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THE LIMITS OF INTENTION IN THE COMMON LAW*

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I.

In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.[1]

His acts did not o'ertake his bad intent;
And must be buried but as an intent
That perish'd by the way: thoughts are no subjects,
Intents but merely thoughts.[2]

In his inaugural lecture, Professor Thompson said of the concepts *mens rea* and *actus reus*:

> *Actus non facit reum nisi mens sit rea* is one of the great maxims of criminal law. As with most of the Latin tags which are the lawyer's staple diet, it does not help us very much even when it is translated. *Mens rea* has come to mean that kind or degree of mental blameworthiness that is necessary in order to make conduct criminal. The term *actus reus* has come to mean conduct forbidden by law and the term *mens rea* the mental aspect of such conduct. Unfortunately scholars are not yet agreed on the meaning of these terms and as a result there is confusion in the cases. One can with some difficulty draw distinctions between various cases but one cannot deduce from them a consistent doctrine of criminal liability.[3]

Since these words were written in 1965, law commissions have abounded; and writing which is concerned with the meaning, and clarification of the meaning of intention and its elements, has abounded. What one commission affirms, another commission denies. New, however, to the old controversy over the precise meaning of intention, *mens rea,* and *actus reus,* is the legal philosopher. The legal philosopher does not look at the concepts as if he were a lawyer, but with a sense of

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1. United States v. Apfelbaum, 445 U.S. 114, 131 (1980).

2. *Id.* at n.13 (quoting Shakespeare, Measure for Measure, Act V, Scene 1, *reprinted in* G. WILLIAMS, THE CRIMINAL LAW (1961)).

3. D. THOMPSON, CRIMINAL LAW REFORM 4-5 (1965).

detachment. He must see not only the law, and what it means, but also analyze whether its meaning(s) makes sense—that is, whether it is capable of formal justification. This sense of detachment from the legal system allows the philosopher to appreciate that a concept so flexible and broad as intention is not subject to a confined and restricted analysis. Whatever its verbal clothing, intention appears to be a concept which grows and does not diminish in its complexity and intensity. The literature produced by various law commissions throughout the common law world is staggering, and is now so voluminous that a legal philosopher could devote himself full-time to considering and analyzing those publications.[4]

In criminal law, intention functions as the concept whereby human actions, and the reasons for them, are understood in relation to a criminal system. If there is no law, then there can be no punishment; but what if there is law, what then? How are the actions of the accused supposed to be understood in relation to the criminal law? One is very much aware that the criminal law, as it is presently conducted, generally pits the smallness of an individual against the corporate greatness and might of the state. What ought to serve to balance these competing interests?

In any philosophical exploration one attempts to return to the source of the issue under scrutiny. In this exploration of intention the sources have been wide and varied and, at times, rare and difficult to obtain. There seem to be no clear and precise links from one moment of legal history to another. One is required to make educated guesses,

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4. *See, e.g.*, MODEL PENAL CODE (H. Wechsler ed. 1980); GENERAL LAW AND PENAL METHODS REFORM COMMITTEE OF SOUTH AUSTRALIA, FOURTH REPORT: THE SUBSTANTIVE CRIMINAL LAW (July 1977). One may also consult the various papers issued by the Criminal Law Revision Committee and published by Her Majesty's Stationery Office in London, England, for example, CRIMINAL LAW REVISION COMMITTEE, WORKING PAPER ON OFFENCES AGAINST THE PERSON (Aug. 1976); CRIMINAL LAW REVISION COMMITTEE, WORKING PAPER, SECTION 16 OF THE THEFT ACT OF 1968 (Aug. 1974). There are also various Working Papers issued by the Law Commission, for example, THE LAW COMMISSION, WORKING PAPER NO. 63, . . . CONSPIRACIES TO EFFECT A PUBLIC MISCHIEF AND TO COMMIT A CIVIL WRONG (1975); THE LAW COMMISSION, WORKING PAPER NO. 57, CODIFICATION OF THE CRIMINAL LAW, CONSPIRACIES RELATING TO MORALS AND DECENCY (1974); THE LAW COMMISSION, WORKING PAPER NO. 56, CRIMINAL LAW, CONSPIRACY TO DEFRAUD (1974); THE LAW COMMISSION, WORKING PAPER NO. 55, . . . CODIFICATION OF THE CRIMINAL LAW, GENERAL PRINCIPLES, DEFENCES OF GENERAL APPLICATION (1974); THE LAW COMMISSION, WORKING PAPER NO. 50, INCHOATE OFFENCES, CONSPIRACY, ATTEMPT AND INCITEMENT (1973). The Law Commission has also published several reports after deliberation and criticism of their Working Papers, including, THE LAW COMMISSION, REPORT ON FORGERY AND COUNTERFEIT CURRENCY, NO. 55 (1973); THE LAW COMMISSION, REPORT ON THE MENTAL ELEMENT IN CRIME, NO. 89 (1978); THE LAW COMMISSION, REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM, NO. 76 (1976); THE LAW COMMISSION, ATTEMPT, AND IMPOSSIBILITY IN RELATION TO ATTEMPT, CONSPIRACY AND INCITEMENT, NO. 102 (1980). One may also encounter various Home Office papers, for example, REPORT OF THE ADVISORY GROUP OF THE LAW OF RAPE, CMD. 6352, NO.___ (1975).

thoughtful assumptions, and proffer what seem to be reasonable links from one epoch into the next. One reading of the sources suggests that intention is a volitive concept. Its beginnings as "malice aforethought" suggest that the accused had been moved to break the law (a law which was believed to have a moral foundation) because of his own disruption of character and moral disquietude. One did the deed, not thought the deed.

However, the violation of a law which had a moral foundation leads one to ask further questions about both law and morals. Law and morals have distinct spheres. Is it possible that there is a common link between the ability to break a social law, and the ability to break a moral law? From history one will remember how both Bracton and Fleta admitted how both spheres could surround a human act. At times the spheres overlap, and at other times they are separate. Common, however, to each sphere is the ability and capacity of mankind to move within those spheres. This leads into the old and common effort to inquire into the nature of mankind.

Without doubt, it is true that mankind possesses a nature. Whether that nature can be deciphered, decoded, and put into well defined, nonambiguous sets of linguistic propositions has been and is the rub. Historic modes of thought about human nature identified two broad differences: intellect and will. For centuries these broad conceptual differences seemed to take on concrete forms of their own. One's will and intellect seemed to be reified in moral and theological writings, as if each were possessed of its own distinct identity, acting for its own distinct ends. Added to this reification of will and intellect, one further distinction was set forth that something about man's nature put him into both a world of matter (mass and extension) and of spirit (energy and infinitude). Could any more contradictory sets of postulates have been integrated into a growing legal system?

By reading the ancient sources with an imaginative mind, one can discard many of the conceptual impediments which accompanied the early postulates from which common law notions of criminal responsibility evolved. If there is any wisdom in our own age it may be this: the understanding that no single sentence can be generated which will be both a substitute for, and a full explanation of, human nature. At this point a problem of synonymy presents itself. If x can be redefined by y, then both x and y can be redefined by any further term. That redescription, or its possibility, is much like the number line: an infinite number of redescriptions can be generated. If this applies to natural languages, it may be argued that it applies to the objects or characteristics which those natural languages seek to explain. If a relationship is to obtain between this sentence, and this object, that relationship will

be analogical—partly descriptive, partly indescriptive. This is not a paradox which, for the law, creates skepticism; it is a fairly honest depiction of the human condition, the endless movement from ignorance into intellectual light and knowledge. The broad categories which have been seen to describe human nature have been intellect and will. Since the common law could not effect a criminal sanction to control intellect and will *in se,* both had to be expressed in some form of action which was forbidden and which brought the person under the power of the law. Notice "action" need not be solely interpreted as some form of visible movement; were it so, the concept of criminal omission, a duty to act, would be a logical puzzle.

II.

The art of the legal philosopher is the conceptual analysis of concepts *qua* concepts, and of concepts *qua* legal concepts. If the law, then, is a hierarchy of concepts, each with its distinct elements, then the legal philosopher can ask questions about the nature of those concepts, and he can also ask how their application is justified. The broad concepts of will and intellect call for explanation and justification. Because many conceptual and theoretical borrowings have been at work in the shaping of the common law and its criminal sanctions, one must proceed with reserve and caution in analyzing aspects of that great body of accumulated legal wealth. The slapdash statement has no place in such sustained analysis. One is forced by the nature of the subject to move through its monumental past slowly.

Analyzing intention, then, is to analyze a complex relationship. It is to realize and appreciate that one is discussing some view of human nature; and it is to be aware that one is applying concepts, generally conveyed through ordinary language, to aspects of human behavior. The common law has minimized many difficulties. It has not embraced skepticism or pyrrhonism. It assumes that an accused who comes before the court can be found either guilty or not guilty. There seems to have been the consistent, common sense assumption that legal requirements and findings can be set down with certainty in simple declarative sentences; that language can make clear what the law requires and demands. Law, therefore, is a set of propositions which are both knowable and coherent. The parallel assumption for the Western philosopher has been that the world is knowable. While the common law embraces a linguistic realism, it is certainly in harmony with the accepted philosophy of the West, that of philosophical realism.

The common law, common to its Christian and Graeco-Roman heritage, holds an offender responsible for his actions. If an action was simply attributed to an accused, but not originated by the accused, then he did not come into the control of the criminal law (save for

curious statutory anomalies which simply attributed wrongdoing to an accused, whether or not he actually did a wrong).[5] The roots of the criminal sanction rested in transgression; but transgression had to flow from the conduct of the accused.

However, our common law also assumed the older confessorial notions that guilt had to flow from knowledge, and knowledge had to be an expression of the free assent of the penitent. If the accused merely "knew," but did not consent to knowing, then any movement of his senses would have been described as full and complete knowledge; but it was not.[6] Animal motions or sense impressions were never given the same status as knowledge gained in reflection. Once again, one returns to considering human nature, and what is embraced by the concepts and operations of mind and will.

III.

Is there an ideal model for what relationship ought to obtain between the person and the criminal law? From the standpoint of the criminal law, such an ideal relationship might view the law itself to be a vast body of well-defined propositions. The propositions, in theory, would be potentially knowable by any competent knower; therefore, they could be converted by a competent knower into knowledge, and would thus function as reasons for one's legal actions. To know the law would mean to observe the law. Deducible from this model as a corollary would be the further claim that if the law is, in theory, knowable, then not to follow the dictates of the law would mean that one knowingly violated the canons of his legal knowledge. Not to obey the law would be viewed as a rational act. It could almost be converted into a simple machine model: if one follows the law, there exists a law for him to know in order for him to follow it. But if one violates the law, there exists a law for him to follow, but he himself knowingly violates the law. Is our simple model of the criminal law a complete model?

If one is assuming that a machine model, or a simple cognitive model, states the relationship which ought to obtain in the criminal law in a complete way, then the model is seemingly complete. A person is viewed somewhat like how a computer operates. Once the program is inserted, the computer operates. When it operates, according to the language of the program, it may be said to be operating "legally"—if the program is one of legal language. Raised to a higher, but simpler, level of abstraction, action in accord with the criminal sanction could be reduced to one simple vision: a comprehensive legal proposition con-

5. *See* Regina v. Larsonneur, 97 J.P. 206 (1933).

6. *Cf.* Jaggard v. Dickinson, [1980] 3 All E.R. 716 ("belief" induced by intoxication).

verted into knowledge by a knower, and that knowledge converted into action by appropriate conduct. It would be as if one, in law, had converted the criminal sanction into $E=mc^2$. One would, at this level of abstraction, be reducing the criminal sanction into a simple, but comprehensive, proposition which was knowable. Other systems have utilized such a formulation. Christian theologians who posited an all-knowing God assumed that such a being would have perfect knowledge without the need for propositions. Our simple vision of the criminal sanction as a universal proposition, potentially knowable by any person, is hardly as complicated.

It remains to be seen whether this is an adequate model. If an argument is advanced only from the side of the criminal law, and hence from the governing and police powers of the state, it may be thought to be a complete model. Theories of intention which stress only its cognitive aspect dwell exclusively upon the "mental elements" of intention, defining intention as if it were a set of propositions in a programmer's code. These types of theories advance the state's interest in not only control of the subject, but an easy control of the subject. Models of constructive attribution, such as constructive malice, constructive manslaughter, or felony-murder rules, usually are present in such theories.

Justification for the acceptance of such cognitive models may rest in the belief that the criminal law is a construction of, and prerogative of, the state; as such, the state should make laws which it can easily enforce. This leads to the increasing feature of modern criminal law—as well as other areas of the law, especially tort law—that many decisions are justified on the grounds of "policy"; in essence, the willingness of the state to resort to its police powers to effect conduct without appeal to logic.[7]

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7. One may observe the tension which can exist between the logic of the law and the policies of the state in its use of law. An interesting class of cases are those dealing with criminal attempts. One class of cases holds that the object of a criminal attempt must itself be criminal. The reasoning behind these cases is that, normally, one cannot steal one's own watch. See People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906), in which the court noted: "The crucial distinction between the case before us . . . lies not in the possibility or impossibility of the commission of the crime, but in the fact that . . . the act, which it was doubtless the intent of the defendant to commit, would not have been a crime if it had been consummated." *Id.* at 500, 78 N.E. at 169. *Contra* The Queen v. Whitchurch, 24 Q.B.D. 420 (1890). The defendant, though not herself pregnant, was found guilty of attempting to procure an abortion. Lord Coleridge reasoned that if three persons combine to commit a felony, "they are all guilty of conspiracy, although the person on whom the offence was intended to be committed could not, if she stood alone, be guilty of the intended offence." *Id.* at 422.

The literature on attempt and impossibility is rich, and confusing. *See, e.g.*, Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. Rev. 1005 (1967); Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464 (1954). *Cf.* THE LAW COMMISSION, CRIMINAL LAW: ATTEMPT, CONSPIRACY, AND INCITEMENT, No. 102 (1980). "Our conclusion is that the fact that it is impossible to commit the crime aimed at should not preclude a conviction

This justification has an appealing simplicity. If the law is clearly defined, it should be easily enforceable. When legal clarity is in dispute, the state may then enforce strained interpretations by an appeal to policy. The model begins to show signs of strain, however, when one questions both the nature of a legal proposition, and to whom, or what, it is to be applied. Take a very simple case of obvious child neglect. Under the Children and Young Persons Act of 1933, if one is found guilty of willfully neglecting a child in one's custody, one is subject to a fine, or up to two years of imprisonment.[8]

In *Regina v. Sheppard* the House of Lords was called upon to decide this point of law:

> 'What is the proper direction to be given to a jury on a charge of wilful neglect of a child under s. 1 of the Children and Young Persons Act of 1933 as to what constitutes the necessary mens rea of the offence?'[9]

The facts were simple. The parents had a child who was sick. They failed to appreciate the gravity of the child's sickness because they unfortunately were possessed of low intelligence. Their child, an infant boy of sixteen months of age, perished from hypothermia and malnutrition. The trial judge ruled that the offense under the Act was one of strict liability. The test for the defendants' guilt was to be an objective test; namely, an appeal to a reasonable parent test. A reasonable parent was defined as one who would have been able to form a reasonable estimate of the objective seriousness of the infant's plight, and who would have obtained the requisite medical attention and treatment. Utilizing this test, the jury found the defendants guilty. The court of

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for attempt." *Id.* at 53.

8. 23 Geo. 5 ch. 12 § 1

> (1) If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour, and shall be liable—(a) on conviction on indictment, to a fine . . . or alternatively . . . or in addition thereto, to imprisonment for any term not exceeding two years. . . .
>
> (2) For the purposes of this section—(a) a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided . . . .

Id.

It may be noted, from the case which is to be discussed, that the provisions of § 1(1) have been familiar to the common law since 1889. For relevant case law, see Regina v. Senior, [1895-99] All E.R. 511; Regina v. Petch, [1909] 2 Crim. App. 71.

9. [1980] 3 All E.R. 899, 902-d.

appeal affirmed the conviction of the defendants, but noted that there were matters of genuine legal importance to be settled upon appeal by the House of Lords.[10]

The issue in *Sheppard* was the definitional range of the adverb "willfully" as used in the Act. As can be gathered from the learned opinion of the House of Lords, "willfully" is not as simple an adverb as one might think. When a key word functions as a pivot in a legal proposition, upon which balances innocence or liability, one begins to see that a simple cognitive model, which assumes that key words can be (or are) simply used and understood, is to mistake hope for reality. A key word, in relation to a key element of human nature (or a conception of human nature), does not yield up its treasure simply, as *Sheppard* may demonstrate.

Lord Diplock stated that the defendants' real defense was that they did not realize the gravity of their infant's illness. From the very beginning of his opinion he introduced a distinction between "fact"—in the objective sense—and the defendants' appreciation that such a fact was the objective reality of the situation. Granting this division between what one thinks to be the case, and what truly is the case, he proceeded to frame his theory of the case thusly:

> My Lords, the language in which the relevant provisions of the 1933 Act are drafted consists of ordinary words in common use in the English language. If I were to approach the question of their construction untrammelled (as this House is) by authority I should have little hesitation in saying that where the charge is one of *wilfully neglecting* to provide a child with adequate medical aid, which in appropriate cases will include precautionary medical examination, the prosecution must prove (1) that the child did in fact need medical aid at the time at which the parent is charged with having failed to provide it and (2) *either* that the parent was aware at that time that the child's health might be at risk if it were not provided with medical aid *or* that the parent's unawareness of this fact was due to his not caring whether the child's health were at risk or not.[11]

Lord Diplock also noted that the presence of the adverb "willfully" in the Act indicated that the accused was required to possess *mens rea* for

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10. *Cf.* J. ARCHBOLD, PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES 2 (40th ed. 1979).

Although this was an appeal from a conviction arising because of an Act, the common law had known the offense for failing to provide food and medical necessities, and the like, for one under the care of another and unable to take care of oneself. In most common law countries the criminal offenses are enumerated in a code, or sets of acts, and few of the older, purely common law offenses remain. To object that a finding under the act differs from the finding under a common law offense is of no moment.

11. *Sheppard*, [1980] 3 All E.R. at 902-j - 903-a-b (emphasis added).

an offense under the Act, and that *mens rea* meant

> a state of mind on the part of the offender directed to the particular act or failure to act that constitutes the actus reus and warrants the description 'wilful'.[12]

One should note that Lord Diplock viewed *mens rea* as a state of mind which related to a *particular*. That *particular* would be those elements of the offense to which the description *actus reus* would correctly apply. If one wished to "reconvert" his language into an appropriate philosophical turn of mind, one might suggest, when speaking of statutory offenses (or, for that matter, crimes in general), that the offense with which an accused is charged consists of the conformity of the state of mind of the accused to the element of the offense, and the subsequent performance of the offense. How this conformity is brought about is moot, leaving room for the evident disagreements among cognitivists, voluntarists, behaviorists, and determinists.

Lord Diplock advanced one caveat: that the concept of a "reasonable man" was a standard from the civil law, especially from the law of negligence in tort law, and that

> the obtrusion into criminal law of conformity with the notional conduct of the reasonable man as relevant to criminal liability, though not unknown (eg in relation to provocation sufficient to reduce murder to manslaughter), is exceptional, and should not lightly be extended: see *Andrews v Director of Public Prosecutions* [1937] 2 All ER 552 at 556, [1937] AC 576 at 582-[83]. If failure to use the hypothetical powers of observation, ratiocination and foresight of consequences possessed by this admirable but purely notional exemplar is to constitute an ingredient of a criminal offence it must surely form part not of the actus reus but of the mens rea.[13]

Thus, the trial judge's direction that an offense under the Act must be measured against actions of the reasonable parent was erroneous.

> It does not . . . seem to me that the concept of the reasonable parent, what he would observe, what he would understand from what he had observed and what he would do about it, has any part to play in the mens rea of an offence in which the description of the mens rea is contained in the single adverb 'wilfully'.[14]

Given these preconditions, what did it mean for an accused to "willfully" act?

Lord Diplock thought that "willfully" could bear a "narrow mean-

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12. *Id.* at 903-c-d.
13. *Id.* at 903-h-j.
14. *Id.* at 903-j - 904-a.

ing" or a "natural meaning." These two meanings could bear upon the doing of a positive act "willfully." What did this distinction mean?

> In the context of doing to a child a positive act (assault, ill-treat, abandon or expose) that is likely to have specified consequences (to cause him unnecessary suffering or injury to health), 'wilfully,' which must describe the state of mind of the actual doer of the act, may be capable of bearing the narrow meaning that the *wilfulness required extends only to the doing of the physical act itself which in fact results in the consequences described, even though the doer thought that it would not and would not have acted as he did had he foreseen a risk that those consequences might follow.* Although this is a possible meaning of 'wilfully', it is not the natural meaning even in relation to positive acts defined by reference to the consequences to which they are likely to give rise; and, in the context of the section, if this is all the adverb 'wilfully' meant it would be otiose.[15]

Lord Diplock's prose seems to indicate that one sense of doing something "willfully," a positive act, is to do that from which circumstances do flow, but not, as an agent, to entertain the thought of what circumstances may flow. From tort law one may draw an example. In *Garratt v. Dailey*,[16] the Washington Supreme Court was called upon to determine if a minor, nearly six years of age, could be held responsible for battery. It was a problem presented to the court for the first time.

The facts were relatively simple in *Garratt*. An infant had pulled away a chair from where an older person was beginning to sit. The chair absent, the adult fell backwards to the ground and was injured. The question for the court to decide was one of responsibility: could an infant, nearly six years of age, be held responsible for the harm he had caused? The court found that the act of pulling away the chair was a volitional act.[17] Whether the boy's act was intentional, however, led the court to draw upon this early statement about an actor's intention:

> 'It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this section.'[18]

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15. *Id.* at 904-a-c (emphasis added).
16. 46 Wash. 2d 197, 279 P.2d 1091 (1955).
17. *Id.* at ___, 279 P.2d at 1093.
18. *Id.* at ___, 279 P.2d at 1093-94 (quoting RESTATEMENT OF TORTS § 13 comment d (1934)).

One may paraphrase the instant quotation to read: one who willfully acts, but without an intention, either not knowing that x would result, or not intending x to occur, or not foreseeing that x would occur, *performs a willful act, but not a wrongful act.* Lord Diplock, in his characterization of one meaning of "willfully," appears to have interpreted "to will" in the sense of meaning, simply, "to bring about," but *not* "knowingly to bring about intended or foreseeable consequences." We have drawn attention to *Garratt* purely to show that if a minor did not have knowledge of what it was he was doing, or that he lacked the requisite intention for legal wrongfulness, his act was, therefore, a voluntary act *simpliciter.* By removing the predicates, "malicious" and "intentional," one removes both a legal object and the legal category of wrong, and is left with the residue: to have acted willfully. This may yield the odd sentence form of, "he willed . . .," indicating that he did not have an object in mind. Further, because he did not have an object in mind when he willed, he was not at fault. Lord Diplock depicts this sense of willing as a narrow sense, and excludes this sense from his understanding of "willfulness" under the Children and Young Persons Act of 1933.[19]

What kind of willfulness then must exist for an offense under the Act? Lord Diplock held that the *actus reus* of the offense of willful neglect is the failure to provide the prescribed care.[20] He then went on to describe "willful" in this fashion:

> Such a failure as it seems to me could not be properly described as 'wilful' unless the parent *either* (1) had directed his mind to the question whether there was some risk (though it might fall far short of a probability) that the child's health might suffer unless he were examined by a doctor and provided with such curative treatment as the examination might reveal as necessary, and had made a conscious decision, for whatever reason, to refrain from arranging for such medical examination, *or* (2) had so refrained because he did not care whether the child might be in need of medical treatment or not.[21]

The second disjunct invited a finding of recklessness; but what of the first? Can one willfully intend what one does not know? If one does not know of the existence of a risk, and the lack of knowledge is through no fault of one's own (thus excluding that one may be "reckless"), what state of mind must one possess to be found to have "willfully" acted at criminal law? It had been stated that negligence was a civil concept, and that the conditions which governed the use of that concept were

19. *See supra* note 8.
20. *Sheppard,* [1980] 3 All E.R. at 904-d-e.
21. *Id.* (emphasis in original).

not to be imported into the criminal law.[22] At this point, Lord Diplock introduced a further distinction between "neglect" and "negligence":

> The danger of the statement is that it invites confusion between . . . neglect and . . . negligence, which calls for consideration not of what steps should have been taken for that purpose in the light of the facts as they actually were but of what steps would have been appropriate in the light of those facts only which the accused parent either knew at the time of his omission to take them or would have ascertained if he had been as mindful of the welfare of his child as a reasonable parent would have been.[23]

The criticism Lord Diplock makes is that "willfully," as described by Lord Russell,[24] seemed to be explained in terms of positive acts only; acts which Lord Diplock thought would now be described as "voluntary." Lord Diplock then proceeded to make this observation as a criticism of Lord Russell's definition of "willfully":

> Lord Russell CJ's brief explanation of the meaning of 'wilfully' is confined to positive physical acts. In relation to these he equiparates wilful acts with acts that would now be described as 'voluntary.' I do not myself think that this was right even in relation to positive physical acts of which the statutory definition included the characteristic that they were likely to have certain consequences; but its meaning in relation to positive acts is clear. *I find its meaning obscure, however, in relation to a failure to do a physical act where the failure is not deliberate or intentional in the sense that consideration has been given whether or not to do it and a conscious choice made not to do it. To speak of the mind going with the act is inappropriate to omissions,* but the contrast drawn between 'deliberately and intentionally' and 'by inadvertence' is at least susceptible of the meaning that if the accused has not addressed his mind to the question whether or not to do the physical act he is accused of omitting to do his failure to do the act is not to be treated as 'wilful'.[25]

Neglectful conduct is not a novel category, nor is it a novel category that harmful consequences may flow from neglectful conduct. That conduct, as Lord Diplock appreciated, may be subject to civil and/or criminal classifications, but the classifications must not be con-

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22. *Id.* at 904-f.

23. *Id.* at 905-e-f.

24. The statement Lord Diplock was criticizing was made by Lord Russell, C.J., in Regina v. Senior, [1899] 1 Q.B. 283, [1895-99] All E.R. Rep. 511. Lord Russell maintained:

> 'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind . . . .

[1899] 1 Q.B. at 290-91.

25. *Sheppard*, [1980] 3 All E.R. at 905-f-h (emphasis added).

fused. The measure of responsibility in civil law is not that of criminal law.[26] However, it will be apparent to one upon reflection that "neglect" and "harmful conduct" can admit of a number of logical and epistemic qualifications, and in *Sheppard* the goal of the majority was to explore those qualifications.

In the preceding passage, Lord Diplock appears to be arguing that the contrast between "deliberately and intentionally" and "by inadvertence" does not exhaust the ways in which fault or harm may come about. For example, assume that a defendant is under an obligation to a plaintiff (the obligation being defined by statute, just as an Act defines the obligation in *Sheppard*), and if the obligation is not *correctly* discharged, harm may result. Do the polarities, "deliberately and intentionally" and "by inadvertence" exhaust the logical ways in which harm may occur? What of the logical possibility that plaintiff is harmed, but defendant, to the best of his ability, either did not know that such harm could or would come about? In the second edition of his book entitled *Criminal Law,* Glanville Williams stated: "Wilfulness in criminal law implies knowledge of the circumstances that are relevant to the offence."[27]

The possible confusion in the prior passage[28] is that "by inadvertence" could admit of two distinct meanings. On the one hand it may simply mean, "not knowingly"; on the other hand it may mean, "not knowingly" and that the omission was a culpable omission. In each case there is no appeal either to intention or to deliberation. Both are omissions, one of which is a wrongful omission. In one sense fault may be placed on a person because his inadvertence in having omitted to do (or observe, know, anticipate, realize, etc.) something is a wrongful omission. An early example in the texts was the Elizabethan statute compelling church attendance:

> And that from and after the said Feast of the Nativity of Saint *John Baptist* next coming, all and every person and person inhabiting within this Realm or any other the Queens Majesties Dominions, shall diligently and faithfully, having no lawful or reasonable excuse to be absent,

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26. *Id.* at 904-e.

27. G. WILLIAMS, CRIMINAL LAW 142 (2d ed. 1961). In a footnote to this sentence Professor Williams added:

> In civil proceedings for maintenance it has been assumed that there may be a wilful refusal to maintain if the refusal is based upon unreasonable mistake. . . . But [this] point has not been expressly decided, and whatever may be the civil law it is submitted that the reasonableness of the mistake is not in issue in criminal proceedings. . . . [See] *Dept. of Agriculture v. Burke* [1915] 2 I.R. at 140: " 'Wilfully' means 'intentionally,' 'not by inadvertence or mistake.' "

Id. at 142 n.2.

28. *Sheppard,* [1980] 3 All E.R. at 905-f-h.

> endeavour themselves to resort to their Parish Church or Chapel accustomed . . . upon every *Sunday* and other day ordained and used to be kept as holy-days; and then and there to abide orderly and soberly during the time of the Common Prayer . . . there to be used and ministered upon pain of punishment. . . .[29]

One certainly could, by inadvertence, not know that one day of the week was a holy day of obligation. If the inadvertence was supported by a lawful excuse, no penalty would lie under the statute; however, if the inadvertence was not supported by a lawful excuse, one would be subject to penalty. An unwillful and indeliberate omission may either be excused because of nonculpable ignorance, or be punished because of culpable ignorance. This simply reinstates an old position from moral theology on the nature of ignorance in relation to an act.[30]

If, then, the language of the Act required a "willful neglect," and not simply a "neglect" of the well-being of a child, to explain "willfully" involves an agreed upon understanding of a relationship which obtains between acts of a willing nature and acts of an understanding nature. If "to will" is a concept distinct in features from "to know" (or "to deliberate," etc.), then it is possible to consider that if knowledge can be absent when one wills, and if the absence of the knowledge is not a fault, then one cannot at once be innocently willful and wrongly knowledgeable. To be able to willfully neglect, one cannot possess the conditions necessary to satisfy "neglect." "Willfully" then functions solely as an adverb modifying nothing—it modifies no state of knowledge of the agent.

Placing these conditions in logical order led Lord Diplock to conclude that the proper jury instruction concerning the Act would be:

> [T]he jury must be satisfied (1) that the child did in fact need medical aid at the time at which the parent is charged with failing to provide it (the actus reus) and (2) either that the parent was aware at that time that the child's health might be at risk if it was not provided with medi-

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29. Church Attendance Act, 1 Eliz. ch. 2, § 8 *reprinted in* W. CAWLEY, THE LAWS . . . EXPLAINED 26 (1680).

30. An "act" may be that which one does, or that which one refrains from doing—reminiscent of the position adopted by Thomas Aquinas that to refrain from doing something could be viewed as a positive act of the Will, or, in modern language, the positive act which one enunciates when one says "No!" The difficulty may be one of grammatical form characterizing a negative act. When one states "No, I will not do that," it is not a statement about ability. It is a statement about what one will not do, even though one is capable of doing it. A pianist, after giving a recital, may refuse to play an encore. He is not unable to play—the recital demonstrated that he could—he simply does not wish to play further. In some fashion, negative statements must be understandable. They are not simply statements which report perceptive states. However, some negative "statements" may reflect a perceptive state, as when a mule will not move and one can actively perceive that the animal will not move by observing its resistence.

> cal aid or that the parent's unawareness of this fact was due to his not caring whether his child's health was at risk or not (the mens rea).[31]

By answering the general point of law in this way, Lord Diplock felt confident that parents would not be encouraged to neglect their children:

> [I]t would involve the acquittal of those parents only who through ignorance or lack of intelligence are genuinely unaware that their child's health may be at risk if it is not examined by a doctor to see if it needs medical treatment.[32]

Lord Edmund-Davies, of the majority, believed that the long series of cases from *Regina v. Senior*[33] to *Regina v. Lowe*[34] had all made one central mistake when elaborating upon crimes of willful neglect: "By attaching no importance to the mental ingredient of wilfulness, *R v Lowe* and all similar decisions must, in my respectful judgment, be regarded as wrongly decided."[35] And, if it is not appreciated that the adverb "willfully" qualifies "neglect," then the offense would be read as one of strictest liability; wherein one would be guilty of the offense if the harm occurred by inadvertence, without regard for those qualifications which would excuse the inadvertence.[36] As Lord Diplock noted, this would have imported the standards of the civil law for negligence into the criminal law.

Lord Keith put the matter in simpler language on behalf of the majority. He agreed that the Act in question required an offense of willful neglect to include the adequate *mens rea* on the part of the accused. Here is what he said of "willful":

> The primary meaning of 'wilful' is 'deliberate'. So a parent who knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor, is guilty under the subsection [of the Act]. As a matter of general principle, recklessness is to be equiparated with deliberation. A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child's welfare. He too is guilty of an offence. But a parent who has genuinely failed to appreciate that his child needs medical care, through personal inadequacy or stupidity or both, is not guilty.[37]

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31. *Sheppard*, [1980] 3 All E.R. at 906-j - 907-a.
32. *Id.* at 906-g-h.
33. [1899] 1 Q.B. 283, [1895-99] All E.R. Rep. 511.
34. [1973] Q.B. 702, [1973] 1 All E.R. 805.
35. *Sheppard*, [1980] 3 All E.R. at 908-g.
36. *Id.* at 908-b.
37. *Id.* at 914-a-b.

This statement is further reinforced when Lord Keith stated in criticism of *Regina v. Downes*:[38]

> Lord Coleridge CJ said . . . '[b]y wilfully neglecting, I understand an intentional and deliberate abstaining from providing the medical aid, knowing it to be obtainable.' I have difficulty in understanding how the abstention could be intentional and deliberate if the accused did not appreciate that medical aid was needed. It seems clear that the court proceeded wholly on the irrelevance of the accused's motive for not providing medical aid. None of these cases show any trace of an attempt to face up to the proper application of the law to the situation where no question of motive is in issue, but where the accused's failure to provide medical care is due to inability, through stupidity or ignorance, to appreciate the need for it. So in my opinion it is an error to treat anything decided or said in these cases as authoritative in that situation. I consider that the Court of Appeal fell into that error in *R v Lowe* . . . .[39]

It does not require damaging paraphrasing to suggest that the House of Lords, in this opinion of its majority, had returned to older concepts of an act done, or not done owing to ignorance (which state of ignorance is without fault). The opinion also suggested a return to a concept of the Will in which it was assumed that unless the Will was qualified by, or related to, knowledge, one could not be determined to have willfully acted. The majority opinion was careful to rule out intentional states, recklessness, and maliciousness, and to concentrate solely upon this problem: Can one be said to have committed an unlawful act of willful neglect if one could not, at the same time, have "willfully" "neglected" to act? The reasoning of the majority went beyond the concept of "to have a lawful excuse." The reasoning of the majority affirmed the proposition that unless the accused possessed the logical conditions present in the offense he could not have committed the offense in fact. One can then with some ease apply the older theological notion that some forms of ignorance excuse:

> The first sort of ignorance, which is *involuntary, invincible* and *antecedent,* that is, is *the cause of an action,* so that the thing would not be done but by that ignorance, does certainly make the action also itself involuntary, and consequently not criminal. In this sense is that of the law, *Errantis nulla voluntas, nullus consensus.* They that know nothing of it, consent not. This is meant of ignorance that it is involuntary in all regards, that is, such as is neither chosen directly nor indirectly, but is involuntary both in the effect and in the cause. Thus what fools and mad-men and infants doe is not at all imputed to them, because they

38. 1 Q.B.D. 25 (1875), 13 Cox Crim. Cas. 111 (1875).
39. *Sheppard,* [1980] 3 All E.R. at 914-e-f.

> have no understanding to discern good from evil, and therefore their appetite is not deprav'd or malicious which part soever they take.[40]

With some qualifications, Taylor's statement admirably fits *Sheppard*. Since the defendants seemed ignorant of the arts of the medical needs required, they suffered the fate of their child's death: "[H]e who in arts erres willingly, can mend it when he please; but so cannot he that erres ignorantly. Ignorance is the onely disparagement of his art, and malice is the onely disparagement of our manners."[41]

The minority in *Sheppard*, Lord Scarman and Lord Fraser, dissented. Lord Scarman held that the parents' neglect in not providing needed medical care for their child was a fact in the case:

> The parents knew that a doctor was available and would come, if called. They also knew that their child was ill, off his food, and that he was totally rejecting food for the two days before his death. *Failure in such circumstances to obtain any medical aid was clearly a neglect of the child.* The live issue in the appeal is whether the neglect was 'wilful'.[42]

Lord Scarman thought that the instruction of the trial judge was correct. He laid this foundation in support of his dissent:

> In my judgment, the conduct must be intentional. But the word does not impart into the statutory offence the requirement of foresight or recklessness as to the consequences of what was done or not done (as the case may be).[43]

In his survey of the history which led to the first enactment of a statute to protect children from neglect,[44] Lord Scarman believed that the purpose of that statute was to defeat the result in *Regina v. Wagstaffe*,[45] in which the jury acquitted the accused. The facts of *Wagstaffe* are simple, but bear mention. A religious believer, whose child was ill, did not call a physician to examine the child. It would have been against his faith to have done so. Elders of the religious sect were called in to pray for the child, but the child died. At the trial, Willes, J., submitted instructions to the jury for the crime of manslaughter because of neglect. Lord Scarman offered this paraphrase:

> In directing the jury Willes J said that to make out the offence 'gross and culpable negligence' had to be proved; and he left to the jury the defence that these affectionate parents had done what they honestly be-

40. J. TAYLOR, DUCTOR DUBITANTIUM 500 (1660).
41. *Id.* at 499.
42. *Sheppard*, [1980] 3 All E.R. at 915-a (emphasis added).
43. *Id.* at 915-g.
44. Poor Law Amendment Act, 1868, 31 & 32 Vict. 1014, ch. 122.
45. [1868] 10 Cox Crim. Cas. 530.

lieved was best for the child.[46]

One will recall that the majority in *Sheppard* would have taken this kind of instruction to be an appeal to motive. As a result of the acquittal in *Wagstaffe*, the 1868 statute was passed.

Then came the case of *Regina v. Downes*.[47] In *Downes*, a father was indicted in Central Criminal Court for the manslaughter of his son. Once again the prisoner was a member of a religious sect. The reported decision included the following passages:

> The prisoner consulted the witness Hurry as to what was the matter with the child, and as to what should be given to it. They thought it was suffering from teething, and he advised the parents to give it port wine, eggs, arrowroot, and other articles of diet which he thought suitable for a child suffering from such complaint, all of which were supplied accordingly.
>
> . . . .
>
> It was admitted on the part of the prosecution that the child was kindly treated, kept clean, and furnished with sufficient food, and nursed kindly by the mother and the women of the sect.
>
> . . . .
>
> [I] told the jury [i.e., Blackburn, J.] that the law casts on the father, who has the custody of a helpless infant, a duty to provide according to his ability all that is reasonably necessary for the child, including, if the child is so ill as to require it, the advice of persons reasonably believed to have competent medical skill, and that if death ensues from the neglect of this duty it is manslaughter in the father neglecting the duty.[48]

Written instructions and questions were submitted to the jury by Blackburn, J., for the sake of making clear their verdict, and for protecting the status of the prisoner who had appeared without the benefit of counsel. The jury convicted the father, answering the pertinent interrogatories as follows:

> Did the prisoner neglect to procure medical aid for the helpless infant when it was in fact reasonable so to do, and he had the ability?
> —YES.
>
> Was the death caused by that neglect?
> —YES.[49]

If one looks at the language of *Downes* carefully, one will find that it does not *precisely* sustain the minority reasoning in *Sheppard*. First of

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46. *Sheppard*, [1980] 3 All E.R. at 916-f.
47. 1 Q.B.D. 25, 13 Cox Crim. Cas. 111 (1875).
48. *Id.* at 26-28, 13 Cox Crim. Cas. at 112-13.
49. *Id.* at 28, 13 Cox Crim. Cas. at 114.

all, after the judgment of Blackburn, J., one should read the other opinions appended. Mellor, J., stated, "[t]he words of the section 'wilfully neglect' mean intentionally or purposely omit to call in medical aid,"[50] and then he adverted to *Wagstaffe* and *Regina v. Hines*,[51] as a note.[52]

Coleridge, C.J., in *Downes* said that but for the Poor Law Amendment[53] he would have desired further argument in the case, and added: "Perhaps it is enough to say that the opinions of Willes, J., and Pigott, B., are deserving of grave consideration."[54] He said that he understood the statute to require conviction if any parent willfully neglected to provide, *inter alia*, needed medical aid, stating:

> That enactment I understand to mean that if any parent intentionally, *i.e.*, with the knowledge that medical aid is to be obtained, and with a deliberate intention abstains from providing it, he is guilty of an offence. Under that enactment upon these facts the prisoner would clearly have been guilty of the offence created by it. If the death of a person results from the culpable omission of a breach of duty created by the law, the death so caused is the subject of manslaughter. In this case there was a duty imposed by the statute on the prisoner to provide medical aid for his infant child, and there was the deliberate intention not to obey the law—whether proceeding from a good or bad motive is not material.[55]

However, it takes little appreciation to realize that *Sheppard* did not involve "motive," nor did it involve a person who intentionally dis-

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50. 13 Cox Crim. Cas. at 114.

51. [1874] 80 Cent. Crim. Ct. 309.

52. *Regina v. Hines* was an indictment against Hines for unlawfully endangering the life of his child, aged two years, by omitting to provide proper and sufficient medicine. . . . After hearing the evidence . . . Pigott, B., said: 'I am of opinion that there is no case to go to the jury of any crime; I think it is one of those cases in which a parent, instead of being guilty of anything like culpable negligence, has done everything that he believed to be necessary for the good of his child. That he may be one of those who have very perverted views and very superstitious views . . . may be perfectly true; but that there is anything in the nature of a duty neglected, that is, a duty which he believed or knew to be such . . . does not show. On the contrary, he believed his duty to be in the direction in which he acted, and he carried out that duty to the utmost of his ability. He may altogether have mistaken what his duty was; still I believe it was an honest mistake. It may be an ignorant mistake, in all probability it is the result of ignorance and superstition, but certainly there is not a trace of anything like an intentional omission of duty or a culpable omission of duty within the meaning of that expression as used in the criminal law . . . . But I am clearly of opinion that no judge sitting in a Criminal Court, without any direction or enactment of the Legislature, would be justified in saying that a parent who exercised his best judgment, though a perverted one, in dealing with his child by nursing and care instead of calling in a doctor . . . was guilty of criminal negligence.'
13 Cox Crim. Cas. at 114 n.(a).

53. *See supra* note 44 and accompanying text.

54. *Downes*, 13 Cox Crim. Cas. at 115.

55. *Id.*

obeyed the law. Lord Diplock's minute analysis of the case disposed of this tack.

Following directly upon Coleridge, C.J.'s, opinion was that of Bramwell, B., who viewed the statute as one which,

> has imposed a positive and absolute duty on parents, whatever their conscientious or superstitious opinions may be, to provide medical aid for their infant children in their custody. The facts show that the prisoner thought it was irreligious to call in medical aid, but that is no excuse for not obeying the law.[56]

Once again it may be observed that in *Sheppard* the accused did not wish to disobey the law; furthermore, the statute that was applicable in *Sheppard* imposed criminal liability, but not absolute liability for neglect. Lord Diplock showed that the standards of liability from tort law were not, or ought not to be, applicable in the case. Bramwell, B., it may be remarked, had not analyzed the case as much as he had merely affirmed other opinions or made bald assertions of law. The locution, "to impose an absolute duty upon," is more reminiscent of early tort theories.

Regina v. Senior,[57] which the majority in *Sheppard* criticized, was another religious sect case in which the father did not provide needed medical aid for a dying child, knowing the child to be in need of medical care and attention. The father of the child believed that the New Testament[58] forbade seeking physicians to cure the child's illness. The father believed that prayer alone was sufficient to cure physical ills. The parent did not realize that the verse pertained to "moral" illness and not physical illness.

Lord Russell of Killowen, C.J., thought that the father was rightly convicted, and stated that he dissented entirely from the view expressed by Pigott, B., in *Regina v. Hines.*[59] Lord Russell thought the meaning of "willfully neglects" was:

> '[W]ilfully' means done deliberately and not by inadvertence, and 'neglect' the omission to do something for the benefit of the child—in other words, intentional failure to take those steps which the experience of mankind shows to be generally necessary.[60]

He proceeded to sketch two hypothetical situations: What if the child had a broken thighbone and needed an operation? or, What if an infant needed a tracheotomy to prevent its suffocating? If a parent denied

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56. *Id.* at 116.
57. [1899] 1 Q.B. 283, [1895-99] All E.R. Rep. 511.
58. *James* 5:14-15.
59. [1874] 80 Cent. Crim. Ct. 309. *See supra* note 52 and accompanying text.
60. *Senior*, [1895-99] All E.R. Rep. at 514.

medical aid to the child in either situation it would be a clear case of willful neglect on the part of the parent.

Again, the examples do not address the problem in *Sheppard*. *Senior* provided an analysis of "willful neglect" which flowed from one having been aware that medical aid was needed and consciously refusing to provide such medical aid. The facts in *Sheppard* did not show that the parents were aware that medical aid was needed; the parents believed that the child's illness was slight or passing. Thus, Lord Diplock's objection to Lord Russell, C.J.'s analysis of omission was incorrect.[61] Lord Scarman seemed not to appreciate the force of this distinction, preferring to state that if a harm ensued (the death of a child) it must be taken as a neglect, and neglect then must impute a willful neglect.[62] With respect, Lord Scarman's logical analysis was faulty, and did not address itself to the distinction concerning "willful" which Lord Diplock had advanced. It may also be seen that Lord Scarman assumed that a statute could have the force of "policy," and that as a policy it would teach parents how to obey, drawing upon Johnsonian language that penalties sharpen one's wits:

> I do not share the view expressed by my noble and learned friends Lord Edmund-Davies and Lord Keith that parents who though not reckless or indifferent to their child's welfare yet fail through stupidity or immaturity to appreciate the need for medical aid will not be deterred by a criminal sanction. They underrate, with respect, the deterrent power of the law. The existence of a penalty can concentrate and sharpen the minds of men and women. It is for this reason that in some exceptional areas the law accepts strict liability.[63]

Lord Fraser, in a vigorous dissent, also thought that the Act in *Sheppard* imposed strict liability based upon objective evidence. He cautioned,

> [i]f the offence required proof that the particular parents were aware of the probable consequences of neglect, then the difficulty of proof against stupid or feckless parents would certainly be increased and so I fear might the danger to their children. . . . Especially in these times when parental responsibility for children tends to be taken all too lightly, such a sharp change towards relaxation of the law on the subject seems to me appropriate only for the legislature and not for the courts.[64]

What this excursion into linguistic analysis of a central concept—that of "willful neglect"—may reveal is that when legal analysis

61. *Sheppard*, [1980] 3 All E.R. at 905-g.
62. *Id.* at 916-d - 917-b.
63. *Id.* at 918-c.
64. *Id.* at 913-a-c.

pursues the logic of a concept it may show a hitherto unperceived logical ground in the concept. Lord Diplock, by pursuing a model that "willfully," as an adverb, cannot modify an omission when the omission is the result of nonculpable ignorance, revealed a new dimension to the term, "willfully." He drew upon a much older notion that some forms of ignorance can negate both intent and willfulness. He also demonstrated how, if properly understood,[65] the language of *mens rea* is still a proper language in which to frame discussions about omissions and the logic peculiar to omissions. The obviousness of statements about "willful," and their cognates, is not, after all, so obvious at all. And, in another sense, Lord Diplock demonstrated that the reasoning in *Regina v. Hines,* though not mentioned in the body of his speech, was sound.

IV.

One may advert to two recent cases to show that from inadvertence one may not necessarily deduce recklessness: *Regina v. Stone,* and *Regina v. Dobinson,*[66] neither of which were cited in *Sheppard.* Both cases show that sound law is based upon a sound and logical analysis of concepts, not upon the mere foisting of a particular policy upon the members of a polity (because the logic of the law would prevent the policy) to achieve social ends. Reason, we wish to argue, creates equals; policy creates ranks and subordinates.

Somewhat simplified, the facts in *Stone* and *Dobinson* were as follows. A and B lived together. A was a man aged 67, of low intelligence. B was his mistress, aged 43, who was an inadequate and ineffectual person. To this household comes F, sister of A, to live with them. F was a woman in her fifties who was morbidly afraid of gaining weight; thus, F did not eat or take care of herself. The people of the village in which these parties lived knew that F resided with A and B, and the locals worried that F might become ill through self-neglect, and thus urged A and B to care for F. A and B, however, aware of the deteriorating condition of F, failed to attend to her in any materially significant way. F finally died in squalid conditions in the house of A and B.

In dismissing the appeal of the joint appellants, the court of appeals let stand the convictions for manslaughter. In their appeal A and B had contended they had not undertaken a duty to care for F, or, if a duty was found by the court, they contended that they had not been

65. In a searching article, Professor Graham Hughes argues that the language of the law in which the logic of omissions is understood is not compelling, and is often confusing. He feels that *mens rea* is a notion inappropriate to the logic of omissions. Hughes, *Criminal Omissions,* 67 YALE L.J. 590 (1958). The authors disagree with his statement, however helpful we found his research to be. The opinion of Lord Diplock in *Sheppard* is strong proof for our position.

66. [1977] 2 All E.R. 341 (*Stone* and *Dobinson* were heard as one case).

reckless in their discharge of the duty. As to the defendants' first contention the court found the circumstances of the case demonstrated that F had come to them as a helplessly infirm person, and that A and B could have discharged themselves of that duty either by summoning outside social agencies, or by themselves caring for F. The court found that they had assumed the duty of care, and that the model from standard tort law of not having to rescue a drowning swimmer, did not apply. A and B had undertaken some duties with regard to F; furthermore, F was a blood relation of A.

To prove recklessness, the court turned to the words of Lord Atkin in *Andrews v. Public Prosecutions Director*:[67]

> Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case. It is difficult to visualise a case of death caused by 'reckless' driving, in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing, for 'reckless' suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction.[68]

Drawing upon this statement of legal principles, the court of appeals in *Stone* and *Dobinson* then described why such reasoning ought to apply jointly to A and B in the instant case:

> It is clear from that passage that indifference to an obvious risk and appreciation of such risk, coupled with a determination nevertheless to run it, are both examples of recklessness.
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> The duty which a defendant has undertaken is a duty of caring for the health and welfare of the infirm person. What the Crown has to prove is a breach of that duty in such circumstances that the jury feel convinced that the defendant's conduct can properly be described as reckless. That is to say a reckless disregard of danger to the health and welfare of the infirm person. Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it.[69]

It may be remarked, and in no way do we wish to be paradoxical, that all of criminal law concerns omissions; namely, of one omitting to

67. [1937] 2 All E.R. 552.
68. *Id.* at 556-C-E.
69. *Stone and Dobinson*, [1977] 2 All E.R. at 347-f-h.

follow the law. To suggest that there is something inherently unresolvable about the logic of legal discourse which surrounds criminal omissions is to entertain a misperception of the criminal law itself. Certainly, one may have some difficulty in relating a duty, as defined by the criminal law, and the failure of one to carry out that duty. The *Sheppard* case, in Lord Diplock's acute analysis, showed that a duty may lie, but that there may also be conditions or capacities which one must possess in order to be charged with willfully neglecting the duty. One does not somehow mysteriously perform a "negative act." One could rightly wonder what such a locution signified, just as much as Bertrand Russell, decades ago, wondered about negative facts, and was rightly puzzled over them. By violating the law one brings about an omission; namely, he omits to follow the law. In omitting to follow the law he may, in the act of transgressing the law, do so by a further omission. For example, a doctor may omit to administer his skills with proper care, a parent may omit to care for his family, a stockbroker may omit to furnish proper information required by the Securities and Exchange Commission. The instances of omission can be multiplied with ease. With each omission one commits a crime. The problem for the legal analyst is to determine if some classes of omissions are culpable omissions, and this may take careful and rigorous analysis. The category of omissions is not a new category, as moral theologians know so well. The novelty of the category at law may be to state the conditions and requirements for a wrongful omission in clear and understandable legal language; *Sheppard* being a clear example that the task, at times, may be difficult to achieve. It is not, however, unachievable.

Throughout this essay it may have become apparent that legal discourse is different from, but also borrows from, other forms of discourse, such as theology, moral philosophy, and, broadly, philosophy itself. Unless one has case law in front of him to analyze, legal discourse can become vapid, arid, tautologous, and senselessly abstract. The common law especially does not lend itself to empty systematizing. In this way, discourse about the common law is both restricted by the need to draw upon the great wealth of recorded cases, and protected by use of the case law one concentrates upon to examine a particular problem. To extract common principles from this vast body of law requires that one work with that *entire* body of law. Economy of expression is not the mark of common law jurisprudence.

V.

There are broad areas into which we have not ventured, one of which we would like to mention. We have not discussed what may be called "psychochemistry," and the relation that research in such an area would bear to the connections between human action and the

criminal law. We have chosen to remain silent on the area because it is an area not within our competence. In theory, it does not seem impossible that much of human action, as it relates to serious matters of concern, is action which is not intentional. The obverse of "intentional," in this instance, is not "unintentional." The obverse is that human action may be controlled by behavioral states which result from biochemical activities. What may seem to be an intentional action under a legal description is, in fact, an action brought about because of the biochemical nature possessed by the agent.

It becomes especially trying for the law when it says to a person, "Listen here, you knew that you had this condition, why then did you not take the proper precautions, or exercise proper judgment, to prevent harm being caused to another because of your unhealth?" This does not only raise a question about criminal responsibility and mental illness;[70] it also raises a far broader and far more ranging question: What of human actions in general, when considering their relationship to the criminal law in which it is posited that one is not responsible because one cannot be responsible, given his genetic state at the time the offense occurred?

It is at this point that the manner in which one understands the concept of intention will bear upon how one will treat an offender. If, for instance, one believes that there is no problem between "intention" and "free will," but assumes that one can dismiss the latter and stress the former, then one can produce such obvious oddities as: Yes, his act was determined, but he intended to act, nevertheless; ergo, he is legally guilty because, at law, he legally intended. The assumption underlying such a position would be that if one had the requisite intention, one offended. How the requisite intention came about would be precluded from inquiry, just as some deposit banks are concerned only with the money one deposits, not with the origins of that money—a Swiss banking principle. If having a requisite intention means that one can describe a proscribed act with the use of an intentional phrase, and that such an intentional phrase can be attributed to an accused, then the use of such an intentional phrase indicates that an accused is guilty. The

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70. *See* F. WHITLOCK, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS (1963). *See also* Regina v. Lawrence [1981] 2 W.L.R. 524, 1 All E.R. 974; Regina v. Caldwell [1981] 2 W.L.R. 509, 1 All E.R. 961. In *Caldwell*, Lord Diplock described the concept of recklessness as a failure to think. *Id.* at 515-f, 1 All E.R. 966-f. This description was criticized by Glanville Williams:

> But failing to think can be called a state of mind only in the sense that unconsciousness is a state of mind; that is to say, it is an absence of a relevant state of mind. To say that absence of a state of mind is a state of mind is an abuse of language. Not to think about risks is, of course, legal fault if a reasonable man would have thought about them; but that does not make not-thinking a state of mind.

Williams, *Recklessness Redefined*, 40 CAMBRIDGE L.J. 252, 256 (1981).

contrary would also be assumed to be the case; namely, if an intentional phrase could not be used, one would not be guilty. As one recent moral philosopher wrote:

> It is hard to see why a man who does something inexplicably does not really *do* it. Let us suppose that the hardened criminal's action [i.e., of not robbing a poor box] really is inexplicable; we can only say, 'He just turned away', and not why he did so; this does not mean that he did it by accident, or unintentionally, or not of his own free will. . . . In any case, to explain an action is not necessarily to show that it could have been predicted from some fact about the agent's character—that he is weak, greedy, sentimental, and so forth. We may if we like say that an action is never *fully* explained unless it has been shown to be covered by a law which connects it to such a character trait; but then it becomes even more implausible to say that an action must be explicable if we are to admit it as something genuinely *done*. In the ordinary sense we explain the criminal's action if we say, for instance, that a particular thought came into his mind; we do not also have to find a law about the way such thoughts do come into the minds of such men.[71]

It may, indeed, for the sake of theoretical consistency, be most important to explain how thoughts do originate. The model which the common law has accepted for centuries has been a model which was derived from Christian theism in which, because of a particular understanding of what was volition and intellect, responsibility could be imputed to an agent if certain conditions were fulfilled—namely, if the agent could freely will, and if the agent could be shown to have the capacity to know. It has been a very simple but very persuasive model, and the common law embraced it. If, however, only the cognitive aspects of intention are stressed when expounding criminal liability, it is possible that cognition, as a description of human action and as an element of human nature, could be an element of nonvolitional acts. If the consequences of an act are thought to be the measure of an act, there is no contradiction in terms to assert that an agent necessarily reached correct deductions, or that an agent freely reached necessary deductions, if, in each case, the necessary deductions were the correct deductions.

There is a great temptation, if one may personalize the criminal law, for the criminal law to disregard clear statements of personal intent and principles, and to fly to policy and to principles borrowed (unknowingly, often) from tort law to justify convictions. One aim of the criminal sanction is to control behavior, even, at times, when the principles of fairness and justice indicate abatement. In the gray areas of the

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71. P. FOOT, VIRTUES AND VICES 65-66 (1978).

criminal law—what relationship pertains, or ought to pertain, between it and theories of mind—we have witnessed a great hostility on the part of the criminal law to accept less than a cognitive model of human nature and human actions.[72] As Professor Whitlock remarked, the English criminal law, and the common law in general by implication, assume that one is responsible for one's acts notwithstanding, and evidence or theory to the contrary is treated without sympathy.[73]

What we wish to suggest—and we are fully aware that it is a suggestion only, and not a theory or a postulate or an hypothesis—is that it is possible to view human action as, in part, an expression of biochemical activity. Even if one is fond of philosophical dualism, it is admitted that an area of darkness was the material substratum. The hylomorphic theories about what relationship obtained, and how, between matter and form left the area of "matter" dark and unexplainable. Matter, it will be recalled, was explainable only in its relation to form because "form" was the natural object of the human intellect. Matter, however, was the condition for dualistic existence. In language from our own scientific milieu one would speak of one's (possible) genetic predisposition to development. The dative phrase, "to develop," may be taken to indicate not only a phylogenous development of a member of a species, it may also be taken to indicate what may be the causes which cause a member to act as it does.

It must be remembered that the common law grounds its explanations of intentional actions in the agent himself; psychochemical theory may argue that reaching the "agent" stage is not a complete stop; that "agent" is itself a term in need of explanation. Common law discourse uses the term agent as if it were the ground upon which all qualities are to be founded. To have reached agency is to have stopped the explanatory process. To suggest that one could have the concept of an agent, but not at the same time recognize that an agent is responsible because of his status as an agent, is heresy, for the most part, to the common law.[74] It may also be that traditional theories of human action divided actions into those which sprang from within the individual himself, and those which were assigned to the individual as caused from without. In either case, "individual" (or "agent") is the substratum upon which responsible action or volition is based. Psychochemical theories do not accept that "agent" or "individual" is a first principle from

72. *See* Regina v. Spratt, [1980] 2 All E.R. 269; Roberts v. Ramsbottom, [1980] 1 All E.R. 7; Regina v. Walden, [1959] 1 W.L.R. 1008, 3 All E.R. 203; Regina v. Windle, [1952] 2 Q.B. 826.

73. *See* F. WHITLOCK, *supra* note 70, at 54-71.

74. *See* Devlin, *Mental Abnormality and the Criminal Law*, in CHANGING LEGAL OBJECTIVES 71-85 (R. MacDonald ed. 1963).

which other explanations derive.

Our suggestions here only assert that it is not inconsistent with human behavior to search for a newer or different base for human action and behavior other than in the language of traditional, cognitive models which divided behavior into intellect and volition. It is not inconsistent to suggest that human behavior is a mode of action far wider than the traditional linguistic categories which have been used to depict it. To the charge that one could have acted differently than he did, there may rest the reply: But I could not. That reply may be a genuine report of one's human state. It does not, presently, explain why one acted as he did; it reports only that he did act as he did. The disturbing element in such a report is that it reports a form of behavior counter to accepted mentalistic and affective models. It also lets in a notion which has been found repelling to the common law: that one may have been determined to do what he did.

A counter model is not that one may have been determined *to* do what he did, but was determined *in* what he did. The concept of "to" suggests the model of the divine playwright who has first written the play, and every scene of it, and all the actor then does is to fill in the role and the steps. Used in this way, "to" suggests that the object has been knowingly forecast. To argue that biochemical determination may direct an agent *in* what he does, does not give one the divine playwright who has scripted every contingent feature in a finite series. Given a genetic predisposition (and given our ignorance of a language at present to unravel the code of a genetic predisposition) it is not unusual that one would act in this way rather than in that way. Genetic predisposition suggests preferences. There may be a wide range of "choices" that one could make, without in any way involving the objects of a genetic predisposition, just as there may be a wide range of colors which may be seen without appealing to a spectrum outside of that wide range which only a specially disposed eye could see. One is speaking about a range and possibilities, and that there may be sets of possibilities (or the concept of other possibilities) outside of a range.

It may also be suggested that conditions are required in which to exercise both volition and rationality. Criminal defenses, in some ways (but cautiously), admit this. It is not to cause a logical disparity to suggest, in theory, that it is possible to think that unless conditions are present for the proper exercise of rational volition, an accused may be acting, but neither rationally nor of his own volition. How, after all, does one report that he acted rationally, and of his own volition, unless he is able to believe that he has done so? It is truly a Rylean puzzle to consider that one of the conditions of the voluntary is to act at liberty or without restraint, yet not know that one's genetic disposition predis-

poses one to act as one did.[75] A psychochemical analysis of human action does not necessarily turn the agent into a complicated chemical set. What a psychochemical appreciation of human action may indicate is that many conditions, which have been assumed to be the case about human action, and have been unreflectively assumed, are not the case. Who, for instance, would have thought that lithium salts would ever have been a cure for manic depressive disorders? A common and abundant pharmaceutical can help manic depressive patients to attain stability of mood, avoiding, for the most part, the highs and lows of alternating mood swings, and permitting them to function successfully in their business pursuits and in their private lives.

One may rejoin that we have left the realm of theory and have entered the realm of the experimental. It may be the case that our modes of common law criminal trial procedure force a legal system to resolve its tensions and conflicts on a rational model. To suggest that rational or mental behavior can be expressed in terms other than a simple dualism is a phase of intellectual and legal development which the criminal law will have to undergo. That the law takes cognizance of diminished behavior, or that certain common law jurisdictions are rethinking the nature of the insanity defense in light of present discoveries about the function and operation of the brain,[76] may signal that the traditional procedures of the criminal law process are attempting to accommodate the findings of behavioral and neurological science within the ancient advocacy model. The court itself has shown signs of being puzzled by the relationship which the law dictates must obtain between an offender, the crime he committed, and the punishment he must receive if it can be said that one intended an act and it was a prohibited act.[77] Especially when it seems clearly the case from a medical and therapeutic point of view that one's act should be seen in terms of patient and ailment, rather than in terms of offender and crime. On the other hand, the willingness of the criminal sanction to accept an extended form of duress while under stress has met with a chilling coldness and rejection.[78]

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75. *See* G. RYLE, THE CONCEPT OF MIND (1949) (most of the remarks in chapter five of this book could be accommodated to a psychochemical theory of action: namely, of any action one did it could be said, "He did it."). *See also* W. SARGANT, THE MIND POSSESSED (1975).

76. New York State Dep't of Mental Hygiene, The Insanity Defense in New York: A Report to Governor Hugh L. Carey (1978). *See also* Chief Justice's Law Reform Committee, Burden of Proof of Insanity in Criminal Trials (1965) (obtainable from the University of Melbourne Law School, Australia).

77. *See* Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 326 (1966).

78. *See, e.g.*, United States v. Hearst, 412 F. Supp. 893 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1978).

What must develop in the philosophy of law, and in the courts of law, is a willingness to investigate the claims of modern brain research in its relation to what brings about human actions. Such an investigation must not cast psychochemical research into the older forms of materialism, which end with the familiar reply that man is not responsible for his acts because he is determined. Of course, that is a *possible* position, but it is not an exhaustive one. What may be needed is for common law assumptions to work in accord with newer findings about human nature and behavior. There seems to be little contradiction, in theory, that a molecular universe which does not imply a dualism may, at the same time, imply responsible behavior and voluntary behavior. What is the difference between a concept of voluntarism resting on the postulates of dualism, and a concept of dualism resting upon the postulates of molecular behavior? Does the concept of "spiritual" or of "nonmaterial" alter radically the concepts of the "voluntary" or of the "responsible"? Is it not often an unconscious preference on our parts (influenced, no doubt, by grammatical habits unconsciously accepted) that we prefer to say that "The cat jumped onto the chair" but that "Mr. Smith *intended* to sit on that same chair before the cat jumped onto it?" Might not the locution make as much sense if we said of both that each intended, but that the bounds of responsibility for the intention of one is not the same in degree as the bounds of responsibility for the other? Must degrees of responsibility be predicated only of dualism?[79]

VI.

It may be the case that modern trial procedures will have to increasingly permit defenses, or permit pleas of mitigation, based upon psychochemical knowledge and its application to the accused in the case then before the court. Slowly, the models of punishment will have to be altered to models of therapy—and we do not mean "therapy" in the Soviet sense where one is sent to an asylum to be "induced" to think correctly; that is, according to the aims and wishes of the State. It is doubtful if the force of intention will be diminished in its capacity to be a linguistic vehicle by which and through which responsibility is couched for actions that we do. We will, however, need to concentrate more on the origins of one's intention. Intention will have to be viewed more as a conclusion which invites us to examine the reasons for it. Does this mean that one is skating dangerously close to confusing "mo-

79. David Attenborough's research for BBC-TV (1978) did show that gorillas were very "intending" animals as to whom or which creatures they admitted into their family group. They admitted him after knowing him.

tive" with "intention"? We doubt it. One must appreciate that the entire appellate process is an inference from what all of the actors in the process say, or omit to say. It is not outside the bounds of reasonable trial procedure to indicate that one can put questions to a defendant to discover why he acted in the way he did, and to assume that, in some cases, what may have seemed intentional to him was, in fact, unintentional action.[80] It is not an unreasonable submission to a jury to suggest that it, in the course of considering the legal facts of a case, consider if the fact which the prosecution advanced is, indeed, a "fact" which bears only one interpretation. That is, the *fact* that one acted may be subject to a different interpretation if one accepted that it was the case, but, at the same time, one was not responsible for it. The act may have resulted from causes outside one's control. In this way one has asked the jury, or the court when sitting without benefit of jury, to reinterpret a particular fact.

The trial process itself in the criminal law is cumbersome, and one, necessarily, must work within its limits. To seek more favorable and humane interpretations of *mens rea* may require changes in the trial process itself, moving more to the model of a medical tribunal and less to the model of medieval jousting, or trial by combat. The example of *United States v. Hearst*[81] comes to mind as so much of that trial became a legal heavyweight championship fight between the trial attorney for the defendant and the chief psychiatrist expert for the United States. Where theories of action ought to have been presented and evaluated in gentlemanly tranquility, what we have a record of was bitter combat between trial attorneys and medical experts. It takes little insight to appreciate, in a compassionate way, that theories of action which seek to explain human conduct cannot thrive in such an atmosphere. The obvious injustices of the trial, and its harsh verdict, had to be mitigated by Presidential pardon. It also takes little insight to appreciate that complicated theories of action must first be part of a general literature so that the law then can draw upon them. At present the relationship between faculties of law and other university faculties is of slight moment. Jurisprudence, sadly, is a vanishing subject in most common law schools of law; and, because of the nature of the teaching of the professional subject of law, few students can afford to come to it who first have taken a fair amount of philosophy, logic, or the broad sciences of human behavior. Professional law faculties often have turned into rigorous instrumentalists who view the humane theoretical

80. *See* Jaggard v. Dickinson, [1980] 3 All E.R. 716 (a belief induced by intoxication would be a defense to the charge of criminal damage under the Criminal Damage Act of 1971).

81. 412 F. Supp. 893 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1978).

disciplines as luxuries which law schools cannot afford to teach.

We have not tried to cast the subject of intention into a science. An understanding of the "voluntary" in its relation to the law is not to put forth a propaedeutic on the subject of goodness and good actions.[82] What it will do, however, is set down what our legal notions in the common law world may mean, analyze how they may have gone askew, and determine their limitations and abuses in application. For instance, in the multiplication of crimes of strict liability, the prosecution has barely any elements of proof cast upon it, other than to demonstrate that the act itself happened. We have viewed the workings of the criminal sanction to be first and paramount the humane understanding of human action in its relation to the criminal law; not its ability to convict or to control behavior.

82. SCOTTISH COUNCIL ON CRIME, CRIME AND THE PREVENTION OF CRIME 30 (1975) (published by Her Majesty's Stationery Office, London, England).