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CRIMINOLOGY AND THE LAW OF GUILT*

JOHN S. STRAHORN, JR.†

INTRODUCTION

In the substantive criminal law which determines the criminality of human conduct there are, among others, two important theoretical problems. The one is that of the relevance of extra-legal materials, particularly criminological materials, in the law of guilt.¹ The other is that of the utility and validity of the so-called "general principles" of substantive criminal law.² Tersely expressed these problems are: To what extent may there be developed a "functional approach" to criminal law; and to what extent, under the guise of "general principles", can a decision about one specific crime be useful in settling the law for another specific crime?³

The writer believes both that extra-legal materials have significance in the criminal law and that general principles are valid and

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¹ See Coates, *Criminal Law and Criminology* (1929) 7 N. C. L. REV. 150. Professor Coates inquired into whether criminological materials should be conveyed to law students by (1) an elective pre-legal course, (2) a required pre-legal course, (3) a parallel law school course, or (4) by integration into the conventional law school course in criminal law. He concluded in favor of (4). He stopped short, however, of proposing a technique for doing this. This paper of his was originally prepared for an address before the Round Table on Wrongs of the Association of American Law Schools at its December, 1928, meeting, which was then considering the problem which formed the subject matter of Professor Coates' paper.

² The conflict in viewpoint as to the proper scope of the law school course in criminal law formed the subject of informal discussion by the Round Table on Wrongs of the Association of American Law Schools at its December, 1932, meeting. Three viewpoints were apparent, (1) that the emphasis should be on procedure in the course, (2) that the emphasis should be on the specific crimes, and (3) that the emphasis should be on the general principles of criminal law.

³ See, as reflecting the view denying the validity of "general principles", the following articles; Arnold, *Criminal Attempts, the Rise and Fall of an Abstraction* (1930) 40 YALE L. J. 53; Tulin, *The Role of Penalties in the Criminal Law* (1928) 37 YALE L. J. 1048. In the same vein, but more with reference to pedagogical problems, see Baker, *The Organization of a Course of Study in Criminal Law* (1932) 22 J. CRIM. L. & CRIMIN. 833. See also a review by Professor Baker of Dean Harno's casebook on Criminal Law and Procedure (1934) 28 ILL. L. REV. 856, which also treats of the three ways of teaching a course in criminal law. Two of the newer casebooks on Criminal Law, those of Dean Harno and the third edition by Professor Mikell, purport to emphasize the "specific crimes" approach. That of Professor Waite frankly adheres to the "general principles" plan. Professor Waite thus expresses his viewpoint in some mimeographed material collateral to the casebook which is furnished by the publishers: "The particular detailed requirements of specific crimes are not covered, as such, in this book. In my opinion any student fit to be graduated from a law school can work out those details for himself whenever there is need. They vary markedly in different states, and while it is not always clearly determinable whether breaking and entering of a warehouse constitutes 'burglary' in some particular state, or whether embezzlement by a banker's clerk, as distinct from the cashier, constitutes 'larceny', that difficulty is simply one of ascertainment and application of existing law."

useful.⁴ He further feels that the two problems are related ones, and that a consideration of the relevance of extra-legal materials in criminal law will serve to prove that there exist valid general principles of guilt-finding.

It is proposed to make a joint inquiry into the problems by attempting a critical re-examination of the so-called general principles in an effort to discover whether they have been or can be so worded as to be of value in deciding novel problems of human guilt under the law. If they have been or can be shaped into such a coherent whole as to furnish an organon for the application of criminal prohibitions to novel situations it would seem that they are valid. In making such inquiry it is proposed to illuminate the treatment with a consideration of the relevant doctrines of criminology concerning the ethics of punishment.⁵ This is done because it is believed that these conflicting human demands concerning the crime problem have influenced decision and legislation in the past and may do so in the future.

The question is this: Are there elements of criminality in the abstract, examples of which can readily be perceived in all instances of specific named crimes? If such recurring elements can be observed in decided cases interpreting past criminal prohibitions, then the general principles based on these elements can be applied to future novel applications of stated crimes, old and new.

In beginning the inquiry, it is proposed to assume, if only tentatively for purposes of discussion, a definition of crime in the abstract. In the present sense of human guilt *vel non* we shall define a crime as a *stated socially damaging occurrence legally caused by a person in a manner indicating that he is possessed of an anti-social tendency*. This definition, so it is believed, comprehends the three elements of criminality as found in the Anglo-American law, which are here considered to be (1) a certain social damage, *i.e.*, the criminal result or the *corpus delicti*, (2) the defendant's creation of this damage, sometimes called the act,⁶ but better named the causation or socially dangerous conduct, and (3) the offender's anti-social tendency or likelihood of recidivism or *mens rea* or so-called criminal intent. Traditionally the law has demanded that, for guilt, there be a concurrence of these three elements in a particular case. If any one be missing, there is no guilt. All of the various criminal defenses are manifestations of the specific absence of some one or more of these elements of criminality, frequently the *mens rea*.⁷ An objective of the present article

⁴ The present writer has previously expressed his sentiments concerning more specific problems of the integration of extra-legal materials into the criminal law and of the validity of general principles in the following two articles: *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. OF PA. L. REV. 962; and *Probation, Parole and Legal Rules of Guilt* (1935) 26 J. CRIM. L. & CRIMIN. 168.

⁵ Both the casebooks of Professor Waite and of Dean Harno have introductory chapters of readings on the purpose of punishment. No further attempt is made in these books, however, formally to develop the course in terms of any analysis based on these considerations.

⁶ See Cook, *Act, Intention and Motive in the Criminal Law* (1917) 26 YALE L. J. 645, 647, analyzing the elements of criminality into (1) the act, (2) the concomitant circumstances, (3) the consequences, and (4) the state of mind.

⁷ Except for the consent and condonation defenses, all of the general principles of criminal law usually denoted "defenses" fall under the heading of the *mens rea* element.

will be to inquire into their elemental nature in the order of the three abstract elements.

The relevant criminological theory, in the present limited sense of the crystallized human attitudes concerning the ethics and desirability of punishment, can be grouped under three heads, herein called the vengeance theory, the deterrence theory, and the recidivism theory. The *vengeance*⁸ theory includes numerous subsidiary attitudes toward criminal justice, all of which emphasize only what has already happened. Thus the attitude toward the criminal may be to call for vengeance upon him, either for its own sake, or to restore the aesthetic balance, or as a way of making reparation, or to appease the lynch instinct either of the victim, his friends, and relatives, or of the populace, or to appease the gods, or as a way of expiation for the offender. No matter what the subsidiary object may be believed to be, the application of societal treatment is purely retroactive. The determining factor is whether that event which calls for action to achieve such ends has already happened. The occurred result of the offender's activity is important here and furnishes the measure of societal treatment. The activity itself and its potentialities are in the background, as is the personality of the offender. The legal requirement of the *corpus delicti* gives effect to this theory.

The *deterrence* theory, on the other hand, looks to the future and to other potential criminals and takes action for a past occurrence on the theory that doing so will prevent the creation of future social damage by others by frightening them out of doing the same causative thing. The attitude is that the present offender must be dealt with abstractly as an advertisement to future offenders of the unpleasant consequences of crime. Subsidiary aspects of this are the beliefs that criminal punishment serves either to give the criminal's fellow citizens a vicarious feeling of goodness, or to reaffirm the moral code. The guiding principle of all these is that societal action must be taken whenever there has occurred such activity, the doing of which, by anyone, will lead to social damage. The emphasis should be on the typical causative activity most in need of deterrence. What the offender does and its potentialities rather than the result he has actually achieved is the important thing here. The legal requirement of *causation* gives effect to this theory.

While the deterrence theory looks to the future and treats the instant criminal in terms of other human beings, the *recidivism* theory, also interested in the future, looks to the future conduct of the defendant himself. This latter theory, to the extent manifested in our law of guilt, is that the defendant demonstrates by his crime an anti-social tendency which, if he be allowed to remain at large and unchanged,

⁸The word "vengeance" has been chosen as the best, although by no means a perfect, word to express the idea of state punishment determined solely by the quality or quantity of social damage actually created by the offender's act and regardless of his personality and of the objective danger from such conduct. This word, better than any other, such as retribution, seems to express the idea of measuring the amount of state action calculated to restore the aesthetic balance, make reparation, satisfy the victim, his friends, relatives, the populace and the gods, or provide sufficient atonement from the offender.

will function again so that he will cause future social damage. In order to prevent this future damage, society must deal with him. The object may be to render him less likely to cause future damage than if no action be taken. This may be accomplished by punishment administered to him so that his memory of it will cause him to refrain; or by non-penal, but positive steps for improving his personality so as to reform him; or by the mere removal of him from his environment which may, in a negative way, work his reformation. But in a slightly different attitude the objective may be not so much to improve him as to render social damage from him temporarily or permanently impossible by segregating or despatching him.⁹ Whatever may be the subsidiary objects of this recidivistic approach, the common demoniator of them all is the application of societal treatment according to the present likelihood of future social damage from the instant defendant, in an endeavor to prevent that future damage. Thus the rule should be to apply treatment to those who are likely to repeat, to acquit those whose likelihood is too slight to be important, and to scale the length and nature of the treatment in terms of the relative likelihood of recidivism. This theory is not interested in what the defendant's conduct has caused nor has been, except, incidentally, as these may be indicative of that with which it is directly concerned, *viz.*, what social damage this offender himself will cause in the future. The legal requirement of the *mens rea* or *criminal intent* gives effect to this theory.

This classification of stated theories of the ethics of punishment or of human demands concerning punishment has been adopted for two reasons.¹⁰ Not only does it fit closest to the orthodox classification of the legalistic elements of criminality and best adapts itself to an attempt at integration of legal and extra-legal materials, but it also seems in its own right a valid trichotomy based on the common denominators of the various individual theories howsoever they have, thanks to the versatility of the English and other languages, been

⁹ The present analysis of criminological theory concerning the purposes of state punishment is more concerned with the need for some societal treatment for crime, and how much, whatever its internal nature, than with the problem of the internal nature of, or motive for, that treatment. From the standpoint of the present approach the nature of societal treatment may be considered as a constant and the variables will be, respectively, the demand for vengeance because of the instant social damage, the need for deterrence of the instant socially dangerous conduct, and the likelihood of recidivism of the instant human offender. On this difference between the quantity and quality of societal treatment consider the following: "Inasmuch as punishment appears neither to deter nor to reform unless it is applied to the actual offender I shall tentatively consider retribution as the most fundamental element of the morality of state action in punishment. From the point of view of theory deterrence appears to be a by-product of, and therefore incidental to, more fundamental aspects of punishment; while reformation is essentially a criterion of successful state action. Neither is in any sense an ethical justification of punishment." De Boer, *On the Nature of State Action in Punishment* (1932) 42 *MONIST* 605, 607.

¹⁰ This classification is not offered as a novel one. The writer chooses to use it as the one best adapted for integrating legal and criminological knowledge. See Glueck, *Principles of a Rational Penal Code* (1928) 41 *HARV. L. REV.* 453, 456-462, offering the following classification: (1) retributive-expiative theory; (2) punishment as a deterrent; (3) punishment as a preventive. See also De Boer, *supra*, note 9, at 605, 606: "The traditional theories of the ethical basis of punishment are three in number, *viz.*, the deterrent, the reformatory, and the retributive. Lately there has been added a fourth, which stresses the factor of education; but I do not see that it differs essentially from the reformatory theory."

worded by the endless writers who have engaged in expressing them.¹¹ The classification is in terms of the varying but common emphasis of the various theories.

The vengeance theories emphasize past occurrences only and have no concern for the future or for the potentiality either of the type of causative conduct or of the defendant personally. In the deterrence theories, which look to the future objectively, the occurred social damage is of interest only insofar as it may help indicate the potentialities of the particular type of causative conduct when engaged in by men generally. In the recidivism theories, which look to the future subjectively, the objective potentiality of the conduct is relevant only to the extent to which it gives a start to the subjective investigation of the defendant's personal dangerousness or likelihood of recidivism by allowing a tentative assumption that he will repeat whatever type conduct he has once engaged in. Whether the sub-motive be to reform, educate, frighten, segregate, or despatch the offender, the common question of recidivism is whether he needs any or all of these types of treatment. This is a matter of his presently manifested anti-social tendency.¹²

The criminal law does not squarely adhere to any one of these basic theories to the exclusion of the others¹³ although one might venture an opinion that originally the greatest emphasis was on vengeance, and that later in time deterrence became predominant, and that today there is a shift towards recidivism. As a result the criminal law has become an eclectic mixture of all three types of theory. It refuses to convict an offender unless there concur certain factors recognizing in turn each of these three theories.¹⁴ There is no guilt unless there coincide in the stated manner: (1) something for which vengeance is demanded, which is the *corpus delicti*, (2) the defendant's connection with it by virtue of some course of conduct which it is thought desirable to deter on the part of other persons, *i.e.*, the defendant's causation, and (3) a likelihood of recidivism or

¹¹ The writer does not plan to cite authorities for the phrasing of the various sub-theories of the ethics of punishment. There are so many different phrasings of any one theory that an attempt at completeness of citation would be too voluminous. The writer has drawn on various sources for his information as to the phrasing of these sub-theories by criminological writers. Particularly has OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* (1913) proven useful. The complete files of the *Journal of Criminal Law and Criminology* have furnished numerous types of phraseology as have the various articles and books cited throughout the present article for other purposes. EWING, *THE MORALITY OF PUNISHMENT* (1929) is a recent treatment in book form of the various theories.

¹² One occasionally sees the name "prevention" used as descriptive of one class of theory concerning the ethics of punishment. As so used this comprehends what the present writer has here subdivided into deterrence and recidivism.

¹³ Glueck, *supra*, note 10, at 455: "Too often in the past has the basic principle of penal codes been implied, rather than expressed and defended, with the result that our penal statutes are full of confusions and inconsistencies, containing statutory and case-law accretions of many epochs and philosophies". See also MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* (1933) 371 *et seq.*: "The existing Anglo-American criminal law is a texture of inconsistencies and confusions which have resulted from inconsistent conceptions of the ends it should serve and from the unsystematic and haphazard nature of its development."

¹⁴ See BOLITHO, *MURDER FOR PROFIT* (1926) 55, where the author, in treating of the trial of Burke, Hare *et al.*, said: "This is the narrative to which Lords-Justices had now, by deputation of ancient law, to fit an end, in which must carefully be dosed public revenge, social utility, and the glorification of the moral system."

an anti-social tendency on the part of the defendant, *viz.*, the criminal intent. If there be lacking any one of these as stated in the definition of the instant crime, there is not guilt thereof.

Not only must there exist some manifestation of all of these factors, but they must concur. They must arise out of a single course of conduct. The *mens rea* must be deduced from the manner of the causation of the social damage. As the traditional phrase puts it, "act and intent must concur."¹⁵ This requirement of the presence and concurrence of the three separable elements of crime, each justifying punishment by one of the three general types of human demand concerning the crime problem, is merely a specific application of what the writer considers a fundamental principle of jurisprudence, *i.e.*, that the desideratum of the judicial process is public satisfaction with judicial decision. The state is reluctant to take the serious step involved in punishment unless in doing so it will satisfy the greatest possible number of people.¹⁶ Some of the public want vengeance, others believe in deterrence, still others, and perhaps the most intelligent, emphasize recidivism.¹⁷ By requiring factors indicating some vestige of each as many as possible of the populace are satisfied.¹⁸

Where there is an extraordinary justification for punishment in the name of one alone of these theories, the law occasionally favors it by requiring for conviction slighter evidence than otherwise in support of the other type elements. Thus, under this "sliding scale", we will see that when the demand for vengeance is high less is required than otherwise in the way of proof of the deterrence and recidivism elements, and vice versa.

The requirement of concurrence gives a tri-dimensional perspective to a criminal case and to the incident problem of public satisfaction with the result. This parallel between the elements of criminality and the conflicting views of the ethics of punishment is merely one of the greatest emphasis. Although one cannot chop up the whole criminal law into neat compartments, yet it is the writer's thesis that these three elements of guilt have as their function the emphasizing of these three types of human demand respectively; that the *corpus delicti* requirement emphasizes the demand for vengeance, the rules of causation emphasize the need for deterrence, and the *mens rea* requirement

¹⁵ As an example of the "concurrence" doctrine, witness the rule that there can be no criminality by ratification of the criminal act of another. The criminality, if it exists at all vicariously, exists at the very moment of the principal's act.

¹⁶ See Blanc, *A Preliminary Analysis for the Formulation of a Philosophy of Criminal Law* (1928) 2 ST. JOHN'S L. REV. 177, 179.

¹⁷ HOLMES, *THE COMMON LAW* (1881) 42: ". . . we should naturally expect that the most important purposes of punishment would be co-extensive with the whole field of its application. It remains to be discovered whether such a general purpose exists, and if so what it is. Different theories still divide opinion on the subject.

"It has been thought that the purpose of punishment is to reform the criminal; that it is to deter the criminal and others from committing similar crimes; and that it is retribution."

¹⁸ Sayre, *Criminal Responsibility for the Acts of Another* (1930) 43 HARV. L. REV. 689, 720: "Out of this eternal conflict between the social interest in the general security and the individual interest of the particular defendant has come the compromise of law — the legal requirement of *mens rea* as a necessary element of criminality, the legal defenses of infancy and insanity, the nice distinctions and balanced considerations which make up the substantive law."

and the defenses concerned therewith emphasize the likelihood of recidivism. It remains to be seen whether the specific rules based on these elements of criminality have functioned in the spirit of emphasizing these viewpoints. The writer purports not so much to philosophize as to what ought to be nor to show the defect of what is, as to describe, in terms suitable to the integration of legal and criminological principles, what the criminal law is actually trying to do by its principles of guilt-finding.

VENGEANCE AND THE CORPUS DELICTI

The first requirement for a criminal conviction is to prove the *corpus delicti*, or criminal result or objective crime or impairment of interest or social damage. This requirement, factual proof of which is dramatized in the courtroom usually only in murder cases, is, nevertheless, a theoretical legal element of all crimes. Such problems as whether the prosecutrix consented in a rape case, or the prosecutor in one of larceny; whether the child was born alive in an infanticide case; whether the building was broken into in burglary, or burned in arson;¹⁹ are as much a matter of the *corpus delicti* as whether the bones found in defendant's furnace are human or not.²⁰

The requirement of the *corpus delicti*, as it appears both in the specific details of a given crime, and in the general principles about to be discussed, emphasizes the vengeance theory of criminology. It is the function of rules of this sort to require proof of the existence of the type of social damage which the law has stated previously to be necessary for a conviction. The law looks backwards in this regard.

There must be some occurred event which arouses a demand for societal action regardless of the nature of the conduct creating it or of the personality of the offender. What occurred events will thus arouse a demand for societal action are determined by the law-makers, *i.e.*, the legislatures and courts. The outlines of the occurred events raising a demand for state vengeance must be pre-stated by governmental fiat in statute or decision and these events may or may not "naturally" arouse a demand for vengeance. Certain prohibitions, originally written on the statute books or into the reports by a "natural" demand for vengeance on the perpetrators of such results are interpreted as to their details in such a vein. Other prohibitions, engendered by an "artificial" call for vengeance, and enacted or decided

¹⁹ Another example of the *corpus delicti* requirement is the rule that only such false testimony as is material to the case in which it is given is perjury. Unless the testimony falsely sworn to is material there is no social damage, call for vengeance, or *corpus delicti*. Consider, too, the following borderline problems of criminality, all of which involve the question of the presence of the requisite *corpus delicti*: In common law burglary, was the building entered a dwelling house, was it in the night-time, was there a sufficient "breaking" and "entering"? In rape, was there penetration? In mayhem, was there the injury of a member capable of aiding the victim in fighting? In battery, was there a touching? In robbery, were there force and fear? In larceny, was there an interference with possession, or was the property of a type to be the subject of larceny? In the crime of receiving, were the goods at the time actually stolen goods, and did the defendant actually receive them? In common law arson, was it the burning of a dwelling house?

²⁰ *Commonwealth v. Webster*, 5 Cush. 295 (Mass. 1850), is such a case on the *corpus delicti* in a murder trial.

in the spirit of "indirect social damage" or "public welfare crimes" receive their application in this latter manner. The common denominator of both types is the requirement that there exist a *corpus delicti*, *viz.*, something of the sort contemplated by the statutory or case-law prohibition to raise the demand for societal action administered *quid pro quo*.

This determination of the extent of social damage, both by legislatures in enacting and by courts in interpreting has usually depended on social attitudes toward various types of crimes, with the physical harms incident to murder, battery, and rape at the head of the list and the offenses against property and habitation not far behind. This supposed difference in social damage and call for vengeance is recognized in the difference in penalty for different crimes. For the instant problem, which is that of guilt or innocence of a certain crime, the question is whether there has happened the social damage of the degree which the law has ordained must be present before penalties are inflicted in such a name. If it has not happened there cannot be a conviction for that crime, regardless of the need for deterrence of the type conduct or of the likelihood of future social damage from the instant defendant. Judicial technique in construing the *corpus delicti* aspect of crime crystallized in the days when vengeance was the dominant theory. This technique remains today even though deterrence and recidivism have greater importance than before.

To have legal guilt of crime there must have occurred the requisite social damage or impairment of some interest sought to be protected by the prohibition as worded. We find that certain general principles of criminal law emphasize the vengeance attitude and *corpus delicti* requirement.

First is the relative²¹ criminal attempt. One should point out the functional error of classifying attempts along with solicitations and conspiracies. The latter are punished because they are conduct unusually potentially dangerous and worthy of deterrence even though they do not create occurred social damage consonant with the punishment inflicted. Attempts, on the other hand, are punished because of the social damage actually created and the demand for vengeance actually aroused by the result of the attempt.²² The punishment is scaled in proportion thereto. For attempts, the conduct sought to be deterred is exactly the same whether there results complete crime, criminal attempt, or non-criminal attempt. The likelihood of retri-

²¹ In a previous article, *The Effect of Impossibility on Criminal Attempts* (1930) 78 U. OF PA. L. REV. 962, the present writer has distinguished between "relative" and "direct" criminal attempts. Relative attempts are those punished under the common law principle which by a single legal proposition punished attempts at any and all crimes. Direct attempts, on the other hand, are those crimes actually in the nature of an attempt where the *corpus delicti* is specifically stated in the prohibition so that recourse to interpretation is unnecessary and where the prohibition is limited to attempts of a very specific sort. Examples of direct attempts are perjury, burglary, and treason.

²² The present writer, in the article referred to in the preceding footnote, attempted to apply the analysis herein adopted to a specific problem of guilt-finding, *viz.*, the effect of impossibility. The three most difficult problems of the criminal attempt can all be rationalized in terms of the *corpus delicti* and social damage. These are (1) impossibility, (2) when preparation becomes a criminal attempt, and (3) attempts at minor crimes, and at crimes themselves attempts.

tion, or mens rea, must be as great or even greater for the attempt than for the completed crime. It may be equally great even though there be no criminality under the law. The difference between complete crime, criminal attempt, and non-criminal attempt is purely one of the difference in social damage actually occurred. The problem is only one of the *corpus delicti*.

The *corpus delicti* of the criminal attempt is a partial infringement or impairment of some interest protected by the major prohibition, *i.e.*, a lesser, but discernible, criminal result. Attempted murders are punished only if some human being have his life put in danger or he be put in fear thereof; attempted rapes only if some woman suffer that fright and horror aroused by receiving an offer of sexual violence. Criminal attempts at the various "public welfare crimes", wherein social, rather than individual interests are primarily protected, must involve socially dangerous proximity to success.

Then, to the limited extent they are available, the defenses of consent and condonation must be set off, functionally, from the apparently similar one of entrapment. Consent, as defense to rape, simple assault, larceny, and related crimes²³ involves the consideration that these offences are set up primarily to protect individual interests in physical integrity and property. The consent of the injured party negatives the impairment of the interest protected, so there is no demand for vengeance and, regardless of defendant's committing conduct in need of deterrence, or manifesting a likelihood of recidivism, he goes free because there is no *corpus delicti* as the crime is stated. In other crimes, where the law purports to protect other than personal interests, such as in abortion, carnal abuse, murder, and mayhem, the *corpus delicti* and social demand for vengeance exist and so there is guilt regardless of the consent of the other party. To recognize condonation as a statutory defense is to accept the vengeance theory and that alone.²⁴ Entrapment, on the other hand, involves a different theory, later to be discussed. There is as much social damage and demand for vengeance then as if guilt were held. But the entrapment indicates that the defendant does not possess sufficient mens rea or anti-social tendency and so he goes free because of the absence of *this* element of guilt.

As an incident of the *corpus delicti* and vengeance there are the two problems, of whether the law punishes "mere intent", and of "indirect social damage." The former problem has been, under that name, the subject of much dialectic.²⁵ Under such a name one can-

²³ CLARK AND MARSHALL, *CRIMES* (3rd ed. 1927) §150, lists "rape, perhaps assault, and as a rule, offenses against property", as those for which consent is an effective defense. Why should not also false imprisonment, kidnapping, and abduction be included?

²⁴ In the absence of statute, condonation by or settlement with the injured person is no defense. Minnesota has a statutory provision permitting prosecutions for adultery only at the instigation of the aggrieved spouse. See *State v. Allison*, 175 Minn. 218, 220 N. W. 563 (1928). The bad check laws and occasional laws of the embezzlement type recognize settlements with the injured person as defensive. Occasionally prosecutions for sex offenses are stipulated to be suspended upon the marriage of the parties or the man's offer thereof.

²⁵ See Sayre, *Criminal Attempts* (1928) 41 HARV. L. REV. 821, 821-837, 858. Contrast the ancient crime of "compassing the death of the King". On this see 4 BL. COMM. *76 *et seq.*, and Trial of John Horne Tooke, 25 HOWELL, STATE TRIALS (1818) 1.

not think efficiently about the problem. Translated into objective terms the problem is this: To what extent does the law ever punish in terms of the consummated crime for nothing more than those manifestations of anti-social tendency as would, if accompanied by corpus delicti and causative conduct, normally lead to conviction?

The answer is never. The idea of vengeance has this effect. There is no all-pervading criminal principle whereby one is punished solely because he has manifested a great likelihood of future social damage, or solely because he has committed conduct in need of deterrence, or both. The concurrence principle and the corpus delicti requirement explain this. Occasionally, however, by specific rules, the law gives more than normal emphasis to deterrence and recidivism in situations where the need for deterrence or likelihood of recidivism is unusually great, by pre-stating certain situations to be socially damaging and deserving of more punishment than seems obvious by "natural" vengeance standards alone. But still there must be a pre-stated corpus delicti.

Thus we can observe the cause of deterrence exceptionally served by the crimes of solicitation and conspiracy, by the liquor laws, the narcotic laws, the pure food laws, many regulations of the sex act, and most of the direct omission crimes wherein the omission is itself the corpus delicti, as distinct from those situations where it is the causation of separate social damage. In all these the punishment is assessed with an eye to the ultimate rather than the immediate consequences of the conduct. The emphasis is on conduct in need of deterrence although the matter is immediately stated as the corpus delicti of a specific crime.

Then we find the recidivism theory emphasized by the peculiar crimes of possession of such things as contraband liquor, narcotics, burglar tools, weapons, and counterfeit money and apparatus. The same spirit underlies many of the crimes of specific intent, such as the aggravated assaults where social damage which would, of its own force, call for some vengeance, is punished far more than such demand for vengeance indicates due to a present indication of unusual anti-social tendency. The possessor of burglar tools and concealed weapons is punished severely not because of what he has done and not so much to deter others from that specific conduct, but because he has thereby manifested his own anti-social tendency. Many of the "prima facie" cases of guilt which allow conviction in the name of occurred social damage for what is actually less than normal proof thereof, really punish because of the anti-social tendency shown by the "prima facie" case. The permitted rebutting evidence purports to show a lack of this anti-social tendency.

Should one wish to name this group of crimes one could call them either "indirect social damage" or, following Professor Sayre, "public welfare offenses."²⁶ It would be hard to say for any crime that its rationale was purely in terms of vengeance. One could, of course, attempt to classify all specific crimes as well as general principles in

²⁶ Sayre, *Public Welfare Offenses* (1933) 33 COL. L. REV. 55.

terms of whether the instant *raison d'être* was vengeance, deterrence, or recidivism. To do this would be to set off from the "old-fashioned" or "individual interest" crimes frankly set up to protect individual interests in person, property, and habitation, the "public welfare crimes" of indirect social damage, some of which exist as devices for deterring *conduct* potentially socially dangerous although social damage has not actually occurred, and others of which exist as devices for enabling the apprehension of *persons* who are unusually socially dangerous.

These former crimes are the ones immediately arousing a call for vengeance and which directly involve social damage as here understood. Different attitudes and techniques have to be used in interpreting and applying different crimes of the sorts thus classified according to their varying function.

The importance of the *corpus delicti* dates back to the erstwhile complete sway of the vengeance theory. The attempt and the consent principles display the influence of vengeance the most. The essential problem in each is to investigate whether there is present the *corpus delicti* of the instant crime.

As much as anything else this requirement purports to prevent "frame-ups." These are distasteful to the public. If public satisfaction with judicial decision is a desideratum, then the public will be satisfied with rules which tend to prevent frame-ups. The attempt and consent devices as well as the general requirement that for each crime the specific *corpus delicti* be established, all tend to make frame-ups difficult and so serve a valid end. This, to a degree, makes the vengeance attitude a justifiable one.

Then, the most respectable aspect of the vengeance theory is that some vestige of it is necessary for us to determine just what ultimate social damage it is we wish to avoid so that we may have a starting point for functioning either by the deterrence or the recidivism theories. We must have some way of choosing what conduct needs to be deterred or what human tendencies are anti-social in nature. For, is it possible to work out standards of "prevention", *i.e.*, of deterrence and recidivism, and their calendar of social damage we wish not to occur, without using as a yardstick some conception of what ultimate happenings will, when they do occur, cause a "natural" demand for vengeance on the part of human beings?²⁷

For that matter, getting too far away from vengeance standards, that is, from human demands, tends to make the system break down because of the stubbornness of the human beings who have to run it. Witness the unpopularity of the Baumes Laws,²⁸ the technicalities

²⁷ "The ideal punishment of remorse is thus replaced by an artificial substitute which is supposed to coincide with the degree of resentment felt by the public. There would be nothing objectionable in this if we had reason to believe — which, of course we have not — that public resentment is on the whole a safe index of the degree of depravity pre-supposed by the offense. It must be admitted that relative to a given level of moral insight feelings of resentment and indignation are worthy of cultivation." De Boer, *supra*, note 9, at 618.

²⁸ *I.e.*, the laws providing for increased penalties, even life imprisonment, for recidivists. They take their name from State Senator Baumes of New York, who sponsored the New York version of them. Their unpopularity has been due, no doubt, to their rigid inclusion of various offenses not popularly acceptable as properly within the scope of such provisions.

written into the law by English judges in order to avoid too many hangings,²⁹ and the failure of the Jones "Five and Ten" Law,³⁰ as examples of the failure of criminal principles which give too much emphasis to recidivism or deterrence.

It is unfortunate that vengeance considerations cannot be kept in a proper place. They should not be allowed to influence such matters as the length and nature of societal treatment. As providing a starting point for applying more valid and humane theories, and as underlying the attempt and consent devices, vengeance has more justification. The most recognition that should be given to vengeance and, for that matter, deterrence is to attempt to prevent private vengeance and its incidental disorder, and as well to deter other offenders by the spectacle of the efficient and certain administration of *some* societal treatment for all crime, the quality and quantity of which should be determined by recidivistic considerations alone.

DETERRENCE AND CAUSATION

The basic theory of deterrence is that the objective of criminal punishment should not necessarily be to compensate for occurred criminal results but rather to prevent future similar results by frightening potential offenders away from committing conduct causative of such results. In this vein the emphasis is not on the actual result but on the offender's conduct and its objective potentialities.

Persons may legally cause social damage directly by physical conduct, indirectly by encouraging others, and indirectly by the omission of conduct preventive of such damage. Thus the three problems of deterrence and causation are: first, proximate cause; second, encouragement to crime, including solicitation, conspiracy, and the vicarious guilt of principals and accessories; and, third, the related matters of crimes of omission, master and servant, and corporate criminality. First will come a statement of what the writer considers the general principles of deterrence which show how these legal rules of causation emphasize the deterrence theory.

Causative conduct may be either by way of commission or omission. A general statement for both of these is "course of conduct." The object of deterrence is to prevent future social damage. In doing this society must prevent future courses of conduct creative of social damage. This is attempted by the spectacle of punishment for such past courses of conduct as either already have created social damage or are very likely to do so.³¹ Thus the first principle is that of "likeli-

²⁹ It is generally understood that many of the peculiar technicalities of the Anglo-American criminal law result from judicial utterances of the English judges who were rationalizing their action in refusing to convict persons of crimes which, while minor in nature, were then subject to capital punishment. The only device available for avoiding capital punishment in specific cases was to reverse a conviction, or to apply a technical rule to prevent one.

³⁰ 46 STAT. 1036 (1931), 27 U. S. C. A. §91 (1934), as amended, which provided maximum penalties of five years imprisonment and \$10,000 fine for certain liquor law violations.

³¹ Levitt, *Cause, Legal Cause and Proximate Cause* (1922) 21 MICH. L. REV. 34, 35: "The law takes cognizance only of such acts which the experience of society has shown to be dangerous. Only such acts which have produced hurt or are likely to produce hurt are forbidden by law."

hood." That past causative conduct which is punished in order to discourage imitation must be conduct likely to cause social damage if committed in the future. The potential results are immediately important although actual occurred results aid in determining potentiality. Should type conduct be equivocal and be socially desirable on some occasions, the law solves the dilemma by adding a subjective requirement of *mens rea*. The "likelihood" principle is seen in the general rule for encouragement, the extraordinary rules for conspiracy, the rule of vicarious liability for unplanned crimes, the limitation of omission criminality to relational situations, and the vicarious guilt of employers.

The other general principle is that of "emphasis". Deterrent punishment seeks to frighten future offenders.³² It serves as an advertisement. There must be a dramatic common denominator between the conduct punished and that sought to be deterred. The lesson must be carried home in simple terms that punishment follows bad conduct. But it must also be emphasized that punishment follows only for socially dangerous conduct and for nothing else, and that doing the right or socially desirable thing entails the pleasant consequence of no punishment. Any societal action which suggests that punishment can follow for anything other than socially dangerous conduct violates this principle of deterrence.³³

Thus the state must act carefully to avoid punishing one for a *corpus delicti* which appears as though it might have happened anyhow even had the offender observed societal rules. Occasionally the state may have to go so far as to free an actually socially dangerous individual for fear that punishing him will create this unfortunate appearance and thus violate the principle of emphasis. This is because deterrent punishment, at most, can work only to the extent to which the spectacle of immediate punishment causes the man in the street to react in a societal manner.³⁴ It is equally important to emphasize to him the bad consequences of bad conduct and the good consequences of good conduct. The state claims the right to use the individual unpleasantly for a deterrent effect on his fellow men. Likewise

³² Laylin and Tuttle, *Due Process and Punishments* (1922) 20 MICH. L. REV. 614, 632: "It is submitted that the justification of punishment on the basis of prevention [deterrence?] goes no further than this: Punishment may be imposed for a voluntary act, because it will deter other like voluntary acts; it may be imposed for omission to act when the omitted action is possible and would prevent the evil, because it will stimulate the desired action. But it cannot be imposed because of a mere occurrence, coupled with a static condition which has no causal connection with the occurrence, because it will not prevent either the condition or the occurrence; it cannot be imposed because of a mere occurrence, coupled with an act or omission itself lawful, for the same reason."

³³ Cf. OPPENHEIMER, *op. cit.*, *supra*, note 11, at 235-236, in connection with the importance of appearances in state punishment for deterrent purposes. Oppenheimer in this passage quotes extensively from Bentham.

³⁴ There are two aspects of state punishment for deterrence, (1) the matter of the severity of the punishment and (2) that of the certainty of punishment, howsoever severe. There are those who believe that more deterrence is accomplished by making some societal action certain than merely by providing a theoretical threat of a very severe punishment which does not occur in all cases. On this see BURTT, *LEGAL PSYCHOLOGY* (1931) c. 16. The common law custom of burying a suicide at the cross-roads with a stake through the heart must be understood as an attempt to deter suicides by the fear of ignominious burial in a situation where the ordinary deterrent fear of the death penalty is impossible.

it must be ready to free the individual when a converse but equally telling effect can be achieved or preserved by doing so.

Punishment must thus avoid disgusting the man in the street.³⁵ If it gives him the impression of unpleasant consequences following regardless of conduct, it may induce him to commit crimes for "good measure." This principle of "emphasis" is reflected in the legal propositions of proximate cause, the merger rule, the limitations on vicarious guilt for unplanned crimes, and the "scope of employment" limitation on the vicarious guilt of employers.

Proximate cause

The deterrence policy is to punish conduct which either has caused social damage, or is very likely to do so. This is done in order to prevent future damage from others by preventing conduct likely to be causative. This policy involves, however, the troublesome and metaphysical problem of "cause." The law attempts to avoid the metaphysical complications by the dual requirement of cause in fact or cause sine qua non and proximate cause. These devices attempt to provide rules of thumb which are workable at the hustings.

The normal principles of causation punish only that conduct which actually has created social damage. Conduct which is only likely to create social damage is, exceptionally, punished with deterrence motives under the headings of solicitation, conspiracy, and "indirect social damage." One wonders whether the modern additional and stricter requirement of proximate cause in the normal situations is to be explained in terms of the replacement of vengeance theories by deterrence ones in public consciousness.³⁶

The legal doctrine of proximate cause is, in substance, a rule providing that there shall not be guilt in certain cases even where there is cause in fact. It is substantially a criminal defense serving the policy of deterrence. The writer believes that a consideration of proximate cause in this spirit will serve to demonstrate the validity of the view held by Dean Green and others to the effect that the

³⁵ See Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 ILL. L. REV. 578, 593-594, in which the author rationalizes the requirement of *mens rea* in terms of a device to avoid disgusting the average man. He considers that to punish without a guilty mind would arouse resentment on the part of the punished individual and his cohorts, with the result that these individuals would jump to the conclusion that the thing which was done ought not to be punished under any circumstances. While the present writer does not agree that this is the true rationale of the *mens rea* problem he does find it a valuable treatment of the problem of disgusting the man in the street, which is more relevant on the question of deterrence and causation.

³⁶ 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1898) 470-471: "Guess-work perhaps would have taught us that barbarians will not trace the chain of causation beyond its nearest link, and that, for example, they will not impute one man's death to another unless that other has struck a blow which laid a corpse at his feet. All the evidence, however, points the other way: — I have slain a man if but for some act of mine he might perhaps be yet alive. Very instructive is a formula which was still in use in the England of the 13th century; one who was accused of homicide and was going to battle was expected to swear that he had done nothing whereby the dead man was 'further from life or nearer to death.'" See, to the same effect, 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (2d ed. 1931) 51-52.

principle cannot be refined into any statement more detailed than that of the "substantial factor" test.³⁷

In serving the deterrence theory the proximate cause rule particularly concerns the principle of "emphasis."³⁸ The function of the rule seems to be to exempt from guilt certain persons who have "caused in fact" social damage as a way of emphasizing and advertising that punishment follows only for the creation of stated social damage and for nothing else. The rule seeks primarily to avoid nullifying the normal deterrent effect in cases where there is substantial proximate cause. The writer believes that the proper function of the proximate cause rule is to exempt from punishment in those cases of cause in fact where, should punishment be imposed, the type of fact situation would possibly create in the popular mind an impression that punishment was being inflicted for social damage that might have happened anyhow even had the defendant behaved himself. We hang a murderer to advertise the unpleasant consequences of murder. But where there is raised any doubt as to his conduct being the only cause of the result, we set him free. The reason for this is to advertise to the public that good behavior leads to freedom. We express the test of the doubt by the rule of proximate cause.

It seems that proximate cause means this: In the light of all the facts, particularly the type of the offender's conduct, and the type of result, what was the degree of *apparent likelihood* of this type of social damage occurring anyhow, even had defendant not acted? If there was a high likelihood of its occurring anyhow, then there is no proximate cause, for to punish would give the man in the street an unfortunate impression. If the result was little likely of occurring but for the conduct, then punishment is safe because the man in the street will not be disgusted.³⁹ Is not this the issue we present to the jury

³⁷ GREEN, RATIONALE OF PROXIMATE CAUSE (1927) 137-142; Edgerton, *Legal Cause* (1924) 72 U. OF PA. L. REV. 211, 343; Smith, *Legal Cause in Actions of Tort* (1912) 25 HARV. L. REV. 103, 223, 303. If we accept the function of the defense of no proximate cause as representing a desire to acquit rather than to disgust the man in the street, then we submit to the jury exactly that problem, would conviction disgust you, as average man. This problem cannot be stated in any more refined form than "proximate cause" or "substantial factor".

³⁸ On the function of the proximate cause rule, see McLaughlin, *Proximate Cause* (1925) 39 HARV. L. REV. 149, 194; Edgerton, *supra*, note 37, at 343-347, 355, 356, 359, 361, 363, 364, 367; Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, 636, 640; 1 COOLEY, *TORTS* (4th ed. 1932) §50. These various writers suggest "justice", "discouraging harmful conduct", "speed", and "certainty" as the motives for the proximate cause rule. The former two are close to what the present writer believes to be the true function of the rule.

³⁹ A very important recent case on proximate cause in homicide is *Stephenson v. State*, 305 Ind. 141, 179 N. E. 633 (1932). Defendant abducted and raped a girl and she, while still detained by him, took poison from which she died. The court, by a three to two majority, held this sufficient to predicate a conviction for murder against the defendant. This case is discussed in Note (1933) 31 MICH. L. REV. 659 (an exhaustive treatment of the whole problem of proximate cause in homicide); Note (1932) 81 U. OF PA. L. REV. 189 (including some treatment of the question of whether the rules of causation are the same in crime, tort, and workmen's compensation). It can be suggested that in the *Stephenson* case the court had to stretch the causation device in order to avoid acquitting the defendant for a heinous crime. In view of the fact that the most available evidence against the defendant was the victim's dying declaration, usable only in a homicide case, it was practically impossible to convict him of rape, abduction, or battery. There was no danger that a finding of proximate cause would disgust the average man in the particular case.

when we advise them to measure the situation by the yardstick of "substantial factor" or its equivalent?

The defense of no proximate cause purports to apply the cause in fact requirement on a basis of external appearances and typical situations. Its function is at once to make the requirement of cause sine qua non capable of hasty application at the hustings, and to avoid the socially undesirable external appearance of unjust punishment, viz., of punishment for something very likely to have occurred anyhow despite the defendant's conduct.

Cause in fact is a matter of whether the result actually would have happened but for defendant's conduct. Proximate cause is a matter of whether it would probably so have happened. The extent of the likelihood of other things than the defendant's conduct having created the instant social damage, i.e., the probability of the result having happened anyhow, gives some indication of how dangerous the instant conduct is and how desirable it is of being deterred and should gauge the punishability for deterrence purposes.

Encouragement to crime — solicitation, conspiracy, principals and accessories

One can as well legally "cause" social damage by encouraging another person to do the physical legally causative conduct as by doing it himself. When there is encouragement by one human being to another to commit a crime, whether one-way or mutual encouragement, by words or by conduct, by request or by command, it is recognized that this encouragement goes far to diminish the normal effect of the deterrent fear of punishment on the encouraged person. The result is that he offends the sooner and much social damage occurs which otherwise would not. Since encouragement to crime is as causative as the physical conduct involved in proximate cause, it is as socially dangerous. Thus it must be similarly punished in order to deter others from encouraging and so to prevent future causation of this sort.

The deterrence policy is carried out by the rules of solicitation, conspiracy, and the vicarious guilt of principals and accessories. Future encouragement is sought to be deterred by the punishment of those who have already encouraged. Considerations of relative dangerousness, however, scale the punishment and divide the encouragers into three classes according to the extent to which the encouragement has taken effect. The slightest and least probable punishment is given the least potentially socially dangerous conduct of one-way encouragement or solicitation. It is recognized that such conduct, even though the recipient rejects the encouragement, is slightly socially dangerous because future recipients might not reject it. More punishment is given for the more potentially dangerous conduct of mutual encouragement to crime, or conspiracy. Not only is the punishment usually greater, but the greater potentiality of mutual encouragement is recognized in the rule that it may be a crime to *conspire* to do some-

thing which, when actually done by an individual alone, is no crime. Experience has shown that mutual encouragement results in organization which in turn creates much social damage otherwise non-existent.⁴⁰

Finally the maximum punishment for encouragement, that for the very crime encouraged or committed, is given whenever the encouragement has caused the happening of the stated *corpus delicti* of the specific crime encouraged, or some naturally related crime growing out of it. All of the plotters who have encouraged each other in the commission of a specific crime are vicariously guilty through the act of the very perpetrator and may be equally punished.

This vicarious liability is carried even to the extent of guilt for other crimes than the one planned if these other crimes actually and naturally grow out of the one planned. It is believed that there is as much causative conduct in need of deterrence then as there is both in the case of the very crime planned and in the case of physical proximate cause by a single offender. It is believed that the usual type of related unplanned crime naturally growing out of the planned one would never have occurred but for the planning of the encouraged one. There is cause in fact and proximate cause in the cases leading to guilt. The limitation of this sub-rule emphasizes that punishment follows only for causation. A separate crime not naturally growing out of the planned one might have happened anyhow, and so society dares not then punish the encourager for fear of disgusting the man in the street.

So it is with the withdrawal rule. If one, after encouraging another to commit a crime, withdraws from the plot and so notifies his accomplice, he is not vicariously guilty if the accomplice thereafter goes ahead and performs the planned act. In this latter event it is indicated that the perpetrator is committing the crime on his own responsibility and regardless of the encouragement of the withdrawing accomplice. Hence this indicates such a high likelihood of the crime happening anyhow even had the encouragement not occurred that to punish the encourager would violate the principle of emphasis and disgust the average citizen by causing him to feel that punishment might happen regardless of conduct. Of course the withdrawing accomplice can be punished for the *corpus delicti* he has actually created, *viz.*, solicitation and conspiracy. The withdrawal rule thus encourages the socially desirable preventive conduct of doing acts which may block anti-social results.⁴¹

⁴⁰ Witness the experience with "racketeers" during the late Prohibition era. The marketing of illicit beer to meet public demands required large organizations of human beings. Once they were set up and started to running smoothly they tended to reach out into other fields more socially damaging. Once an organization is established it tends to expand its sphere of activity.

⁴¹ The distinction between principals in the first and second degrees and accessories before the fact is, or was, largely a procedural one. The guilt is the same. But even at that, the distinction can be rationalized functionally. The principal in the first degree commits the most causative conduct, the principal in the second degree relatively less, and the accessory before the fact, who is absent, relatively the least.

Crimes of omission, including master and servant, and corporate criminality

Now we deal with another indirect type of causation, that incident to the omission to engage in conduct preventive of social damage. For if the doing of an abnormal thing can be legal causation, so, too, can the non-doing of a normal thing. At this point we are not interested in "direct" omissions where the omission itself is the stated *corpus delicti*.⁴² Rather we deal with "relative" omissions for which the omission is legally causative of separate social damage, in the name of which latter, if at all, it will be punished with deterrence motives in order to encourage others not to omit. The "direct" omission is a matter of "indirect social damage".

Relative omissions bring together, first, the omission of conduct immediately preventive of social damage which will be punished, if at all, in the name of whatever crime the social damage and *mens rea* indicate and, second, the omission of the more remotely preventive conduct of the proper hiring and supervision of employees by employers, punished by the doctrine of vicarious guilt of the employer. These respectively involve duties to act and duties to hinder the criminality of others.

While both do involve the potential danger from organization, yet it is but nominal to group together the guilt of employers and the topic of principal and accessory under the heading of vicarious guilt. Co-conspirators are punished in order to *deter* positive conduct, *i.e.*, encouragement to crime. Employers are punished in order to *encourage* the doing of that which will hinder likely criminality — the hiring and supervision of competent employees.⁴³ The employer situation more closely resembles the typical omission situation than it does the vicarious guilt of accomplices.

This resemblance is both functional and technical. The state will punish in the name of causation of social damage the omission to engage in preventive conduct only when there exists a legal relation which imposes a duty to act. This may be either the relation of custodian to one in custody or the relation between the master and servant.

⁴² Examples of "direct omissions" would include the crime of non-payment of taxes, the crime of non-support of wife or child, the crime of a minister's not returning the marriage license and certificate to the proper authorities, and a bank examiner's failure to make a periodical examination as required by law.

⁴³ On the function of vicarious liability see 1 BENTHAM, COLLECTED WORKS 383: "The obligation imposed upon the master acts as a punishment and diminishes the chance of similar misfortunes. He is interested in knowing their character, and watching over the conduct of them for whom he is answerable. The law makes him an inspector of police, a domestic magistrate, by rendering him liable for their imprudence." See also Laski, *The Basis of Vicarious Liability* (1916) 26 YALE L. J. 105, 110: "The great Pothier ascribed its force to the necessity of making men careful in the selection of their servants; yet it is clear that in the vast majority of cases that have arisen, no such negligence has ever been alleged." Blackstone also considered vicarious liability a matter of public policy inducing masters to be careful in their choice of servants. 1 BL. COMM. *430. See also BATY, VICARIOUS LIABILITY (1916) 148, giving as one reason for vicarious liability, among others, "carefulness and choice" and listing as supporters thereof Pothier, Robertson, Laurent, and Demolombe. See 1 POTHIER, OBLIGATIONS (3rd ed. 1853) 271-272.

The "likelihood" principle of deterrence underlies this. The unusual or extreme likelihood of the social damage happening from the omission only because of the relation indicates liability therein. The unusually great opportunity for the encouraged act to prevent social damage without undue inconvenience in the relational situations is also relevant. The limitation of employer's guilt to "scope of employment" is a matter of the "emphasis" principle.

The punishment of omissions *immediately* preventive of social damage is usually found limited to homicides and batteries in custodial and employment relations. The parent who omits to feed the child who dies of starvation and the switch-tender whose negligence with the switch has fatal results are guilty of criminal homicide. But why is not the expert swimmer who sits idly by and lets a stranger drown equally guilty?⁴⁴ This is because of the likelihood principle. It is peculiarly *more* likely that social damage will ensue if custodians and employees omit *their* normal duties, calculated to save human life, than if the occasional by-stander fails to jump off the sea-wall to save a drowning person. The omission of custodial and employment duties is objectively more potentially socially dangerous. Encouragement of them accomplishes more. The relation makes social damage more likely if the incidental duties are not performed efficiently. But for the relation and the accompanying omission there is relatively little likelihood of the social damage having occurred. To the man in the street it looks like causation. But it is not so obvious to the man in the street that the stranger could have prevented the social damage. To punish the stranger might disgust the average citizen. Custodial and employment cases involve typical factors appealing to the man in the street.

The master and servant situations involve similar principles. There is guilt in the master where he acquiesces, or the crime is of a certain type, or where he is a corporation. This is so because it is believed that these factors specially indicate a greater than usual likelihood that the fact of organization, *i.e.*, relation of master and servant, actually did "cause" the servant to create social damage he would not have created but for the organization and the special factors which are requisite.

It is felt that the master and servant relation alone creates a certain potential social danger.⁴⁵ The servant's loyalty to his master, or feeling that the master will use his influence to get him acquitted, will

⁴⁴ The law encourages persons to perform properly the duties incident to relations voluntarily assumed, but it takes no steps of punishment to encourage persons not in such relations to engage in preventive conduct. Conversely, the system of granting rewards or medals, such as the Carnegie medals, to persons performing heroic acts is set up to encourage such extra-relational acts. Oddly enough, it is said that Carnegie medals are denied to persons performing heroic acts as incidents to normal duties of employment.

⁴⁵ "What then, shall be said of the problem of vicarious criminal liability in the case of petty misdemeanors involving merely regulatory offenses? In such cases there is no question of moral wrongdoing. The objective of the law is not to cure or change the mental processes of the defendant. There is no thought of social treatment or rehabilitation. The law's aim is not reformatory but almost exclusively deterrent, to prevent future repetitions of similar offenses. To hold the master liable if he fails to prevent his servant from committing the prohibited conduct will have a powerful deterrent effect. . . ." Sayre, *supra*, note 18, at 722.

be likely to cause the servant to commit crimes he would never do of his own initiative. There is an implied encouragement to criminality in the relation. But this alone is not enough for vicarious guilt. There must further be acquiescence⁴⁶ by the master, or the crime must be of a type highly likely to be committed by servants, or the master must be a corporation, which is thought highly likely of instilling this anti-social spirit in its employees.⁴⁷ There is sought to be avoided the master's blocking off the normal deterrent effect on the servant of previous punishments of other individuals. Likewise there is sought to be encouraged the master's instilling pro-social ideas in the servant, and better yet, hiring competent ones, and supervising them all. These things are calculated to prevent much social damage which otherwise would arise from the master and servant relation. The threat of vicarious guilt is believed thus to encourage the master to do the preventive things.

But the master is not expected to do the impossible. Vicarious guilt follows only for servant's crimes "within the scope of the employment." This applies the emphasis principle to the particular field. There is no vicarious guilt for servants' crimes which have no relation to the organization the master has set up. To punish for such as these would be to punish for a crime very likely of happening anyhow even had the master done all the things encouraged. Such punishment would disgust the man in the street and violate the principles of deterrence. In order to encourage the master, in the potentially socially dangerous relation of master and servant, to do those things which will subdue the likely social damage incident thereto, the law requires him to do no more than the normally preventive conduct of hiring competent employees, supervising their conduct, and abstaining from contemporaneous acquiescence in their criminality. If they still do those crimes which they might do but for the relation, nothing can be accomplished by punishing the master. To punish would be worse

⁴⁶ *Id.* at 706-707: "A second way of proving causation is through knowledge plus acquiescence . . . if his acquiescence was known to the agent, the defendant thus became a contributing cause. . . ."

⁴⁷ Arguments against corporate criminality are to be found in Francis, *Criminal Responsibility of the Corporation* (1924) 18 ILL. L. REV. 305; Canfield, *Corporate Responsibility for Crime* (1914) 14 COL. L. REV. 469. See Winn, *The Criminal Responsibility of Corporations* (1929) 3 CAMB. L. J. 398, 414-415, where Mr. Winn argues for limiting the criminal liability of corporations to that for the acts of those "human beings who as primary representatives wield the powers of the groups upon which they are predicated." Edgerton, *Corporate Criminal Responsibility* (1927) 36 YALE L. J. 827, 832, cites Attorney General of Rhode Island, in *State v. Eastern Coal Co.*, 29 R. I. 254, 267, 70 Atl. 1, 7 (1908): "The tendency at the present time is to hold corporations responsible, criminally as well as civilly, for all acts committed by their agents, having any relation to the business of the corporation." Laski, *supra*, note 43, at 124: "The dissolution of individual business enterprise into the corporation system has tended to harden the conditions of commercial life. The impersonality of a company employing say five thousand men is perhaps inevitable; but in its methods of operation, it tends to be less careful of human life, more socially wasteful than the individual has been." Hacker, *The Penal Ability and Responsibility of the Corporate Bodies* (1923) 14 J. CRIM. L. & CRIMIN. 91, 97: "On the other hand it is necessary to accept the penal responsibility of the corporate bodies, for only in this way can we punish the real author of many crimes, and we are not obliged to punish in the place of the real criminal his instrument, who is often quite innocent, or who often acts only by pressure, under the influence of his employer, namely, the corporate body, which gives him his daily bread."

than nothing. Punishment might discourage him from trying to do those things which could be capable of diminishing criminality by servants. And, for that matter, in the case of those crimes without the scope of employment, the relation is not causative because for such crimes there is less likelihood of its blocking off the normal deterrent fear of punishment which affects the servant as an individual.

RECIDIVISM AND MENS REA

The third type of theory of the ethics of punishment is the one called herein recidivism. Under such heading the concern is neither with the achieved criminal result nor with the type of conduct which the offender has committed. Rather it is with the personality of the offender, particularly with reference to the prospects of future criminality from him. The legal requirement of criminal intent is correlated to this theory. It furnishes a device by which it is provided that one shall not be punished, even if he has actually caused a stated criminal result, unless further he has thereby manifested sufficient anti-social tendency or likelihood of recidivism.⁴⁸

Herein the law has not been particularly concerned with the penological question of the internal nature of societal treatment, *i.e.*, whether it should seek to frighten, reform, educate, segregate, or despatch the offender.⁴⁹ Rather, in the present recidivistic vein, the law of guilt has assumed the object to be a constant and has dealt more closely with the matter of the necessity and quantity of such treatment. Thus the problem has been to determine whether the instant offender needs to be frightened, reformed, educated, segregated, or despatched, *i.e.*, whether he manifests a likelihood of future criminality. If so, he must be punished. If not, he may go free.

An exclusive application of the recidivism theory of criminology to criminal law and procedure would result in an investigation into the instant defendant's potentialities for future social damage and in no further inquiry. Thus penal treatment would be administered only to those whose personal anti-social tendency was sufficiently dangerous

⁴⁸ To the effect that the legal requirement of *mens rea* is a device for the ascertainment of the personal dangerousness of the offender, see Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 ILL. L. REV. 578, 589: "When the offender does that which is forbidden he indicates that he may be, or might become, a menace to the security of that social organization. . . . Yet, the intent may be an index to the character of the offender. It may show whether the offender will be a continuing menace to society or whether the act was unique and would not be likely to occur again. The treatment given the offender should depend, *inter alia*, upon this likelihood." *Id.* at 594: "The mental state indicates the dangerousness of the offender, or the absence of such dangerousness. The intention to perform the act may mean that the offender may intend to perform such acts again. This intent is an index to future action. Such action the criminal law wishes to prevent. The intent is therefore an index as to what kind of treatment is to be given to the offender. It is an index, but not a final determinant. . . . The intent is an index to the treatment the offender is to receive because it is a possible index to other mental states the existence of which go to make the offender dangerous to society."

⁴⁹ See MICHAEL AND ADLER, *CRIME, LAW, AND SOCIAL SCIENCE* (1933) 361: "The question of what behavior should be made criminal is thus answerable without reference to the question how should offenders be treated. The most important consequence of the independence of these two problems is the elimination from the behavior content of the criminal law of the penal gradation of offenses and the concept of responsibility."

to merit the law's attention. The length and type of this treatment would vary according to the degree of this anti-social tendency or likelihood of recidivism. Each case would then require a very careful and very personal investigation.

But the legal principles of guilt finding do not concern themselves alone with personal dangerousness or anti-social tendency. Consideration of this is but one of the three problems of the legal elements of guilt. Juries do not have the time for such a very careful personal inquiry. To the extent to which it is both possible and desirable to investigate the defendant's likelihood of recidivism in the trial before the jury the law provides a device therefor in the form of the third of the elements, the requirement of criminal intent or *mens rea*. This element is variable between different crimes both in the statement of nominal operative facts and in the degree or sort of anti-social tendency demanded to be proven by these different facts. The former variation is due to differences in the type of conduct in question, which call for varying word-devices, and the latter is due to varying considerations of *corpus delicti*-vengeance and causation-deterrence which call for a varying degree and sort of anti-social tendency as an element of guilt.

The function of the device of *mens rea* is to give effect, as far as may be possible in a jury trial, other demands being considered, to the desire to incarcerate only those who possess a personal anti-social tendency calling for some treatment, and to free those who do not possess a sufficiently serious one.

Other agencies of criminal procedure and other legal principles than those of narrow guilt-finding also purport to function on a basis of the personal anti-social tendency of the defendant. Thus suspended sentence, probation, parole, pardon, indeterminate sentence, judicial discretion as to length of sentence, the Baumes laws,⁵⁰ the juvenile court system, the classification and separate treatment of separate types of convicts all present to us devices which while not concerned solely with guilt or innocence likewise function on the basis of likelihood of recidivism.⁵¹

The obvious awkwardness of the separate handling of the single problem of recidivism would seem to suggest that the whole problem of anti-social tendency should largely be merged into one and that handled otherwise than by the jury, leaving to them only the function of finding the social damage and the defendant's causation thereof.⁵²

⁵⁰ *I.e.*, the laws providing for more severe penalties for recidivists than for first offenders.

⁵¹ The now historical device of benefit of clergy must be considered as another principle functioning in terms of the anti-social tendency of the offender. As this device developed, and before its eventual abolition, it provided to apply as a means for making the punishment less severe for first offenders. The branding on the thumb of those who were granted clergy made it impossible for recidivists to escape the capital punishment for their later felonies. The term "malice aforethought" in murder came into our law by virtue of the test set up in the time of Henry VIII for removing such murders from benefit of clergy. Many other felonies were similarly removed from benefit of clergy. On the topic see KENNY, *OUTLINES OF CRIMINAL LAW* (10th ed. 1920) 124, 480-1.

⁵² Hints of such proposals are to be found in the writings of Professors Levitt and Glueck. See generally, Levitt, *The Origin of the Doctrine of Mens Rea* (1922) 17 *ILL. L. REV.* 117; and Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 *ILL. L. REV.* 578. See also Glueck, *Principles of a Rational Penal Code* (1928) 41 *HARV. L. REV.*

The writer does not plan to go further into this than to say that he approves it on theory. As he is dubious of any early adoption of it, he plans to concern himself immediately with an attempt at understanding what the law is actually trying to do by its present requirement of mens rea as one of the jury-trial elements of guilt-finding.

The legal requirement of criminal intent or mens rea is a matter of the jury's handling a certain portion of the problem of the personal dangerousness of the defendant, *viz.*, those aspects of recidivism as can be discerned from the manner of committing the crime and can be measured by jury-trial rules of guilt. The instant question is how well the various nominal operative facts have performed their function of making likelihood of recidivism an element of legal guilt.

The problem of recidivism in the law of guilt has not only the question of the general considerations involving it, but two specific aspects which must be differentiated. First is that of the extent to which the prosecution must prove operative facts tending to show that the defendant does possess such an anti-social tendency as to justify punishment. Is it sufficient for the prosecution merely to show the causation of the social damage, on the theory that the anti-social tendency is implicit therein, or must it go further and demonstrate the likelihood of recidivism by additional subjective facts? Second, to what extent may the defendant secure acquittal by proving certain criminal defenses the nub of which is to show that actually he does not possess the anti-social tendency apparently proven by the case against him? The respective headings will be general principles, the requirement of mens rea, and the mens rea defenses.

General Principles

A fundamental proposition which cannot be emphasized too much is that there is not *necessarily* involved in any or all of the nominal operative facts in crimes which serve this requirement any actual state of mind or guilty intent on the part of the offender. Fundamentally mens rea or criminal intent is an abstract quality of the offender's personality as shown by the totality of his conduct. His actual state of mind *may* for certain crimes or on certain occasions, serve as an evidential fact of the separate (if conceptual) fact of mens rea. Thus the legal propositions mingle mentalist and behaviorist concepts. This accords with the dictionary definition of intent which is in the alternative (1) a turning of the mind, design or purpose, and, (2) meaning or import. Some operative facts of mens rea are nominally states of mind, to be proven by conduct, while others, nominally in terms of conduct, can be proven by conduct appearing through a state of mind or on its own behalf.

The term mens rea as used herein has several synonyms which will be used interchangeably. All of them serve to express the abstract

453, 475, calling for a separation of the guilt-finding and treatment (sentence imposing) features of criminal procedure, and an expert handling of the latter problem. *Id.* at 476, note 30, refers to the proposal of Governor Smith of New York to the same end in 1927. Apparently Professor Glueck would, however, preserve *mens rea* as an element of guilt finding to be determined by the jury. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925) 486.

quality of the offender's conduct which reflects his personality and potentialities. This quality is required as an element of guilt in pursuance of the recidivism theory. It is sought after by the particular operative facts in the definitions of specific crimes which in general form the subject of this immediate treatment. These synonyms are anti-social tendency, personal dangerousness, likelihood of recidivism, criminal intent, and manifestation of non-deterrability.

The last of these synonyms — manifestation of non-deterrability — calls for some extended discussion which will serve to show the relation between the causation-deterrence and intent-recidivism problems, and at the same time serve to justify the recidivism approach and the requirement of *mens rea* in criminal law. The object of deterrent punishment is to lessen the number of future crimes by using the spectacle of present punishment to frighten potential offenders. A further assumption is that some few members of the human race are not thus frightened. These persons, who are not deterred, are themselves potential offenders. The state of not being deterred by the punishment of others is, *ipso facto*, the state of having the personal anti-social tendency concerned in the recidivism theory. But society must have some objective way of ascertaining who is in this class. It must wait till the members thereof tangibly manifest their non-deterrability and correlative anti-social tendency by the causation of social damage. When this happens, punishment follows, both to frighten other possible offenders and to handle the potential danger from the very individual. The *mens rea* requirement is a device for ascertaining what persons are not deterrable and hence are too dangerous to be at large.

Before analyzing any of the individual problems of the extent to which the prosecution must make proof of the accused's anti-social tendency, or how far he may be allowed to disprove it, it is proposed to make a cursory and comparative statement of certain general assumptions about human conduct which seem to be implicit in various of the specific legal rules.

The most fundamental assumption made by the rules of criminal intent is that one possesses a tendency to do whatever one has already done ("repetition of conduct").⁵³ Further it is assumed that one possesses a greater tendency to do those things which human beings frequently engage in than to do those things which are usually but sporadic ("normality of conduct").⁵⁴ This also involves the assumption that there is a greater human tendency to do that which is for-

⁵³ The statements in parentheses are meant to be brief, descriptive titles concerning the subject matter of the particular assumption made by the rules of criminal intent about human conduct. For the following ones it is planned to give footnote examples of specific rules of criminal intent which seem to be based on the respective principles of conduct. The present one — "repetition of conduct" — seems to be so fundamental to the whole field of criminal intent that no particular example is necessary. In such crimes as rape and sodomy, for instance, the law implies from the bare doing of such acts a tendency to repeat them.

⁵⁴ Thus the intent will the sooner be held implicit in the causative conduct for a violation of the pure food laws than for bigamy. This is because the causative conduct of selling food in the former case is itself so much more likely of being repeated, due to its normality, than is the causative conduct of getting married.

bidden by the law alone than that which is also forbidden by religion, public opinion, and the other agencies of social control.

An important assumption is that if human conduct is a reaction to a definite stimulating factor, the likelihood of recurrence of the conduct depends on the likelihood of recurrence of the factor ("stimulating factor").⁵⁵ Two other assumptions are dependent each on the other. One is that the likelihood of future performance of conduct, however manifested, indicates a greater or lesser anti-social tendency to the extent to which the happening of such conduct entails the probability of resultant social damage ("intrinsic dangerousness").⁵⁶ The other is that a likelihood of future conduct, however manifested, indicates a tendency to cause whatever social damage is naturally and probably consequent to such conduct ("natural and probable consequences").⁵⁷

An important assumption which is implicit in many of the crimes calling for specific intent is that the existence of a desire, plan, or expectation on the part of a human being for a definite result shows that he possesses more of a tendency to commit the conduct thus desired, planned, or expected, than if he did not have the desire, plan, or expectation ("desire, plan, or expectation").⁵⁸

The remaining three assumptions are related. One is that an actor who is aware of his immediate conduct shows more of a tendency to repeat the conduct than if he is not aware ("awareness of conduct").⁵⁹ Likewise, one who is aware of the probability of certain physical consequences from his conduct shows by the doing of the

⁵⁵ Thus one who kills in reaction to the stimulating factor of personal hatred, a frequent stimulus, is deemed to have a greater anti-social tendency — that of a murderer — than is one who reacts similarly to the relatively less frequent stimulus of sight of wife's adultery, which indicates less anti-social tendency — that for manslaughter. Further, one who reacts to the very infrequent stimulus of mistaken belief in necessity for self-defense, which negatives any anti-social tendency of a degree sufficient for societal treatment goes totally free.

⁵⁶ Thus he who while engaged in an act dangerous to life accidentally kills is thought to have more of an anti-social tendency — that of a murderer — than is the one who accidentally kills while engaged in the negligent operation of an automobile and who is thought to have but the lesser tendency requisite for manslaughter. The relative intrinsic dangerousness of the other conduct which furnishes the intent element in murder and manslaughter, respectively, provides the difference between these two crimes in terms of anti-social tendency.

⁵⁷ The rule is frequently stated, in rationalizing cases involving the intent element in homicide, that "one is presumed to intend the natural and probable consequences of his conduct". This merely means that the doing of an act which naturally and probably tends to a given anti-social result sufficiently shows, by virtue of the tendency to repeat the original conduct, a tendency to create the probable and consequential result so as to call for whatever punishment is assessed against those who do have such latter tendencies.

⁵⁸ Thus a man who breaks and enters a house with the "intent to commit a felony therein" is held to have sufficient anti-social tendency for the more serious crime of burglary, whereas without that "intent" he is, at most, but a trespasser. The existence of his "desire, plan, or expectation" to commit a felony, when concurrent with his causing the stated criminal result of housebreaking, shows that his personality is of the more dangerous sort than if he lacked such a mental state.

⁵⁹ Thus it is understood that the sleepwalker who while unaware of what he is then doing kills another person, must go free because his unawareness makes it less likely that his external conduct indicates a settled tendency to do such things with sufficient frequency to make him a dangerous offender. One branch of the insanity defense, perhaps with less functional justification, acquits the one who from mental defect is unable to know the nature and consequences of his act.

conduct more of a tendency to create the consequences than if he is not aware of the probability ("awareness of physical consequences").⁶⁰ Finally there is the matter of "awareness of societal consequences."⁶¹ One who has not yet engaged in criminal conduct is assumed to have less of an anti-social tendency to the extent to which he has refrained because of his awareness (and fear) that punishment might follow. On the other hand, one who has actually engaged in anti-social conduct is assumed to show more of an anti-social tendency to the extent to which he was then aware that such consequences might follow. He has not been deterred by the spectacle of the punishment of others.

These principles are not here asserted necessarily to have any psychological validity. They are here collected merely to make a comparative statement of the divers assumptions which the law-makers seem to have made in working out the specific rules of mens rea. They are human assumptions about the significance of human conduct as indicative of human anti-social tendencies.

The Requirement of Mens Rea

The first principal problem under this heading is whether for a given crime the requisite anti-social tendency or mens rea is sufficiently indicated by the bare fact of the defendant's causation of the social damage or must be proven by the showing of additional subjective operative facts specifically directed at the issue of likelihood of recidivism under the name of criminal intent. For those crimes in the latter class the second problem thus becomes that of the significance of those words and phrases which are inserted in criminal definitions designedly to require extrinsic proof on the issue of the offender's personal dangerousness. What type or degree of anti-social tendency or how much proof thereof is requisite, as the operative facts are worded?

Intrinsic or minimum intent

This first problem of whether the requisite criminal intent is intrinsic to the bare causative conduct could be stated and treated in three different ways. One would be the way in which it will be presently handled, as a matter of the extent to which extrinsic facts must be shown to establish the anti-social tendency requisite for conviction. It is also a matter of the extent to which mistake of fact is permitted as a defense. For in those crimes in which mistake is not allowed the rule is, in effect, that the criminal intent is manifested by the doing

⁶⁰ Many criminal definitions involve the use of such words as "knowingly", "knowledge", etc. Thus one who receives the goods of another with knowledge that they are stolen goods is thought thereby to show more of an anti-social tendency than if he receives them without an awareness of the physical consequence of interfering with the possession of the true owner.

⁶¹ This concept underlies the problems of ignorance of law, infancy, and the insanity defense. As we shall see, general unawareness of societal consequences is not defensive because, still, the offender is thought to show sufficient anti-social tendency for treatment. On the other hand, the fact of unawareness of societal consequences is expressly made the test for the functioning of the infancy and the insanity defenses.

of the causative conduct alone. For most crimes, particularly those where the intent must be shown extrinsically, a reasonable mistaken belief as to the existence of a justifying fact is itself defensive. Finally one could treat the problem as one of the crimes of omission. In those crimes where one "acts at his peril" as to his creation of a socially damaging result he has, in effect, omitted to ascertain the facts the ascertainment of which would have enabled him to avoid criminality. Thus he is punished for his omission by being punished for the "morally" innocent causation.

In certain types of crime the law works guilt without requiring any further proof of criminal intent than is incidental to the doing of the bare causative conduct. For the remainder of crimes the intent element must be specifically demonstrated in the name of certain extrinsic facts which are included in the criminal definition solely to establish the anti-social tendency. In working out general principles applicable to this situation it is proposed to use for examples typical cases of these separate crimes.

Thus it has been held that if a man has intercourse with a girl below the age of consent he is guilty of carnal abuse even though he lacks awareness of her nonage and reasonably believes her above the age.⁶²

Likewise it has been held that if one sells hard cider mistakenly believed not to be fermented he is guilty of violating the liquor law.⁶³ On the other hand the famous case of *Regina v. Tolson*⁶⁴ allowed the defendant, accused of bigamy, to assert in defense her reasonable but mistaken belief that her first husband was dead. What is there about carnal abuse and cider selling that makes it appropriate that one act at his peril as to the creation of that social damage which does not hold for the social damage of bigamy resulting from marrying? The intent is held to be intrinsic to the conduct in the former two cases but not in the latter.

The writer suggests that the determination of the question depends on the following variables. First is the principle of "intrinsic dangerousness" adverted to above. Second is the normality of the causative conduct. Third is a separate question of the equivocality of the particular conduct.

Equivocality has reference to several features of a typical crime. To the extent to which it is impossible to state verbal definitions of

⁶² Perhaps the leading case on this doctrine is *Reg. v. Prince*, 13 Cox. C. C. 138 (1875). This was a case of taking an unmarried female under age out of the custody of her father. The court held it not a valid defense that the defendant reasonably believed her to be above age. While this was not a case of carnal abuse, yet the cases on carnal abuse are in accord on this point in the analogous situation. The court intimated, however, that a mistake as to the fact of the father's consent would have been a valid defense. This is a sound distinction on a recidivistic basis. A mistaken belief as to the father's consent does show less tendency to abduct females. A mistaken belief as to the girl's age does not show any lesser tendency to abduct or carnally know girls.

⁶³ *People v. Hattinger*, 174 Mich. 333, 140 N. W. 648 (1913).

⁶⁴ 23 Q. B. D. 168 (1889). The writer is not unaware that the *Tolson* case is in the numerical minority on the point and that probably the majority of courts would reject the defense of mistaken belief of the spouse's death. The writer feels, however, that the doctrine of the *Tolson* case represents the better view and for this reason, and because it affords an excellent example of a case for applying the recidivism analysis, it is used herein.

the causative conduct which will cover only situations agreed to be socially damaging, the conduct can be said to be equivocal: Hence it is necessary to add subjective elements of criminal intent to avoid injustice in convicting. Then there may be lack of human agreement that all cases of the same objective social damage deserve the same or any punishment. This doubt, too, can be resolved by further subjective operative facts. Finally there may be lack of human agreement that social damage always follows from the initial conduct. This doubt, too, is resolved by further subjective facts. Whenever there is equivocality of the conduct, it cannot be said that it alone demonstrates the requisite intent and the latter must be shown by further facts.

The rule of the *Tolson* case that the intent is not intrinsic to the conduct alone, can be justified by such principles. The causative conduct — getting married — is equivocal, *i.e.*, it is conduct sufficiently desirous of being encouraged generally that it would be socially undesirable to have one act at his peril in engaging in it. Then, even when done by the average person, it does not intrinsically involve a high likelihood of social damage. Very few marriages are bigamous. Finally, it is conduct rarely repeated by the same individual. Under the “normality of conduct” principle there is less likelihood of its being repeated than is more normal conduct.

On the other hand, in the carnal abuse case the conduct is not equivocal. There is nothing desirable of being encouraged in extra-marital relations. Then, too, there is more intrinsic dangerousness in the conduct itself. There is more likelihood that extra-marital connection with a girl of the borderline age will involve carnal abuse than there is that a marriage will be a bigamous one. Finally, the average seducer repeats the act of extra-marital intercourse far more frequently than does any bigamist repeat the marriage ceremony, (“normality of conduct”). On a relative basis one can differentiate between the bigamy and carnal abuse situations. All in all, doing the bare causative conduct of seducing a girl shows more likelihood of future carnal abuse of too-young girls than does one marriage show a tendency to future bigamy. Hence, by this rule the *mens rea* is not intrinsic in bigamy.

The cider case demands more analysis. Selling cider is an equivocal occupation, desirable of being encouraged in some events. This alone would seem to call for extrinsic proof of intent. But it is outweighed by considerations along the other two lines. Cider is very likely to get hard (“intrinsic dangerousness”). There is even more probability of cider being hard cider than of extra-marital intercourse being with a too-young girl. And it is conduct much more likely of being repeated by individuals generally (“normality of conduct”). These latter considerations serve to demonstrate that there is implicit in the act of selling cider a high probability of future sales of hard cider by this person.

Professor Sayre considers that the determining factors are to be found in the severity of the penalty and whether the crime is a “public

welfare offense."⁶⁵ He considers that public welfare crimes, or police regulations, entailing small penalties, are those wherein the intent is intrinsic whereas for crimes which are morally wrong and have severe penalties, there can be no punishment without a guilty mind.

The writer does not agree with this distinction, although the difference may be only one of terminology. Rape and sodomy are hardly "public welfare offenses" and the punishment is severe, yet they are crimes of intrinsic intent. The severity of the penalty is but one of the items in the broader issue of equivocality. The more severe the penalty, the less likely it will be that all can agree that given conduct deserves punishment and the more necessary it is to appease the squeamish ones by requiring additional proof that the offender deserves punishment, *i.e.*, further subjective proof of criminal intent.

The ultimate test is whether the causative conduct in the given crime itself shows such a high likelihood of repetition of such conduct as to indicate that sufficient anti-social tendency is thereby demonstrated. This the writer believes is to be found in terms of the equivocality of the conduct, its normality, and its potential dangerousness. Conduct which is less equivocal, more normal and more dangerous is likely to be sufficient in and of itself, while conduct more equivocal, less normal and less dangerous probably should entail additional operative facts before the intent is held to be established.

The physical conduct of parking by a fire plug, human conduct considered, shows more likelihood of future traffic violations than does the physical conduct of picking up a friend's watch show a future tendency to steal. The concept of the former's being a public welfare offense, punished by the law alone, while stealing is a moral offense or true crime, forbidden by law, church, and public opinion, *helps* in deciding which conduct alone shows the most dangerousness. But the writer feels that correct analysis of the situation should go deeper than a mere classification into true crimes and public welfare offenses.

Extrinsically proven intent

We have seen that for some crimes, those of intrinsic intent, the requisite anti-social tendency is held to be indicated by the bare doing of the causative conduct. Now we deal with those which are not in this class but for which the likelihood of recidivism must be evidenced by proof of other operative facts expressly added to criminal definitions in order to require subjective proof of the *mens rea* issue. We have already dealt with the reasons for requiring these additional operative facts. Our present problem will be to analyze them as such. But we shall find that the same principles which rationalize the law's separation of crimes into those of intrinsic and extrinsic intent are also valuable in dividing the latter into groups according to the extent of the requirement of extrinsically proven intent. For we shall see that certain of these extrinsically required facts are really but nominal, doing little more than to allow the defense of mistake of fact, if any.

⁶⁵ Sayre, *Public Welfare Offenses* (1933) 33 COL. L. REV. 55.

Others do require definite extrinsic proof of the mens rea element, but vary in the extent of the proof, the degree of anti-social tendency, or the sort of tendency.

In these crimes of extrinsic intent not only does the law apply the recidivism theory by acquitting for lack of this extrinsically demanded proof, even where there is causation of a corpus delicti, but frequently, for one and the same causation and corpus delicti, the punishment is scaled according to the extent of the mens rea. The classic example of this, which will be the first topic, is the gradation of criminal homicide into degrees according to the extent of the offender's likelihood of recidivism.

In homicide we see that constant causation and corpus delicti factors may, according to the intent, run the whole gamut of criminality from complete acquittal to the extreme of capital punishment.⁶⁶ Homicide is never a crime of intrinsic intent, although to be sure, one form of the lowest degree — manslaughter by the negligent omission of custodial or employment duties — involves at most a nominal operative fact of extrinsic intent. But largely it is considered that the typical causative conduct for homicide does not by itself and in all cases show sufficient anti-social tendency to justify punishment. And this is so despite the act that the extreme social damage involved in homicide allows for punishment on the slightest showing of anti-social tendency — and that slighter than is allowed for most other crimes of *extrinsic intent*. But still it must be demonstrated extrinsically. This is because the typical causative conduct is equivocal, *i.e.*, death may result from conduct desirable of being encouraged on certain occasions — driving automobiles, hunting, or target practice.

These considerations outweigh the fact that death frequently results from such activity when engaged in by the average person. Then, the extreme punishment given for some homicides further shows the equivocality and demands the firmest proof of mens rea before it be imposed.

Thus the extreme punishment for first degree murder is given only for the highest manifestations of likelihood of recidivism. It is thought that one who premeditates or kills accidentally in the course of the execution of the most serious crimes shows this high anti-social tendency and a higher one than he who merely kills intentionally on the spur of the moment or kills accidentally while engaging in the middle group of other crimes. The latter person is punished only for second degree murder. The person who kills intentionally, but under the stimulus of a legally recognized provoking factor, which

⁶⁶ Professor Glueck describes the gradation of criminal homicide, along with the setting up of degrees of other crimes as crude individualizations of treatment. Glueck, *Principles of a Rational Penal Code* (1928) 41 HARV. L. REV. 453, 465. See also MICHAEL AND ADLER, *CRIME, LAW, AND SOCIAL SCIENCE* (1933) 358-9. The latter writers consider the gradation of murder and larceny as matters of retribution. The present writer cannot agree with this in the case of murder. The distinction between grand and petit larceny is, of course, a matter of retribution or vengeance, as it involves a difference in the occurred criminal result. But the present writer feels that the gradation of criminal homicide involves a constant criminal result with a constant demand for vengeance, with the difference taken in terms of the anti-social tendency of the offender.

occurs but infrequently, or the person who kills accidentally while engaged in a very minor crime, or while negligent, or while omitting custodial or employment duties is thought to show but a minimum of anti-social tendency. But this is sufficient in view of the great social damage he has caused. He is punished for voluntary or involuntary manslaughter as the case may be.

Thus the whole gradation of criminal homicide is seen to be in terms of likelihood of recidivism or anti-social tendency. The purely accidental killing is non-criminal. Intentional killings are divided according to the mentalist concepts of premeditation, malice, and provocation. Non-intentional but criminal killings are graded according to the other conduct factors present at the time of the actual causation. Engaging in the worst crimes is thought to show the most about conduct, the middle class is felt to equal malice without premeditation, and the minor class, along with negligence and omission of duty is thought similar to desired killing on provocation. Some of the nominal operative facts are mentalist in derivation, some frankly behavioristic. All of them are merely ways of measuring the significance of the offender's conduct with a view to ascertaining his personal tendencies and of assessing societal treatment according to the degree of his likelihood of causing future deaths. One cannot understand the words written into these definitions without thinking of the reason for their being there. The writer submits that the reason for their existence and the rationale of their interpretation is a measurement of anti-social tendency.

When one turns to a general consideration of the crimes requiring extrinsic proof of intent, one finds that the same words of criminal intent or the same principles of recidivism are used in various crimes with different meanings or emphasis. Thus the principle of constructive intent which recognizes the proposition that one is presumed to intend the natural and probable consequences of his acts, is followed for second degree murder but not for certain other crimes where, as stated, the extrinsic operative facts of intent are calculated to require proof of a very specific anti-social tendency or a very high degree thereof. Normally the act of doing a certain thing is thought to show a tendency to do that thing and likewise to create whatever consequences normally follow from the doing of that thing. But the degree of tendency to cause the latter consequences is one of a limited extent only and wherever the policy is to require more tendency or more proof thereof, or a tendency of a certain sort, the doctrine of constructive intent will not do.

Thus in *Rex v. Williams*⁸⁷ the act of cutting a woman dressed in silk, for the purpose of wounding her body, was held not to show sufficient "malice" to make the offender guilty of violating the statute against the cutting of garments, even though the prisoner intended to cut through the garments to the body. This decision can be rationalized in the light of the purpose of the statute. It was passed to curb the practice of disgruntled silk-weavers in slashing imported silk gar-

⁸⁷ 2 Leach 597 (1789).

ments. Obviously it was intended to punish only those who cut silk for the sake of cutting silk, i.e., those who had the tendency to cut silk in the future. To be sure, one who shows a tendency to stab women obviously shows some tendency to cut their garments. It, however, is not sufficient to prove the high degree of anti-social tendency which the court felt was called for by the statute in the light of the severe punishment, the equivocality of the conduct of cutting silk, and the evil aimed at.

Likewise one who maliciously threw a stone at another, intending a battery, but missed the victim and broke a window was held in *Regina v. Pembrilton*⁶⁸ not to have violated the malicious mischief statute even though it provided to apply whether the malice should be against the owner of the property or otherwise. The court here too interpreted the intent requirement as demanding proof of a tendency to break window panes as such, which was not shown by an accidental breaking in the course of an act which merely showed a tendency to battery. The degree of the proof of the relevant tendency is higher in these cases than it is in second degree murder, in view of the fact that the resultant social damage is not so serious.

Then, too, these early decisions which gave a trend to judicial interpretation of these various intent requirements are to be explained, as is much of the detail of criminal law, as judicial reactions to extreme punishments provided for minor offenses at the behest of powerful groups. But the problem is still before us. Our war-time espionage laws, the "life for a pint" and the "five and ten" laws present as sordid a chapter in penal law as did the calendar of capital offenses under the first four Georges and the latest William.

Then, for that matter, interpretation of the subjective intent elements has not always been used as a way of contracting the application of criminal prohibitions. The late Professor Tulin has pointed out⁶⁹ how some courts, in states where there is no apt legislative penalty for the crime of reckless driving of an automobile, have applied to reckless driving the penalty for the aggravated assault with intent to kill in order to develop a sufficient punishment. They have ruled that the requisite "intent to kill or murder" can be worked out constructively from the act of extreme recklessness in driving a car. This does not seem a far development from working out criminality as for a battery, but the majority view is otherwise and holds that the aggravated assault requires a specific actual intent to kill or murder. The majority of states, as a rule, do have a sufficient statutory penalty for reckless driving in its own right and so there is no need for twisting the meaning of specific intent. These courts refuse to apply — because they do not have to — the doctrine of constructive intent to the aggravated assault.

The writer feels that it is equally, justifiable for a court either to expand or contract the meaning of a word of extrinsic intent in order

⁶⁸ 12 Cox C. C. 607 (1874).

⁶⁹ Tulin, *The Role of Penalties in Criminal Law* (1928) 37 YALE L. J. 1048.

to meet social needs.⁷⁰ He feels further that this is just what the courts have been doing and that their actions are to be understood in terms of their demanding greater or lesser showings of the element of criminality concerned with likelihood of recidivism. The existence of other penalties in the *Williams* and *Pembliton* cases, *viz.*, for battery and assault respectively, probably motivated the courts in being strict as to the showing of the requisite intents for the crimes actually proceeded under. In view of the fact that so many of the intent words used by legislatures in defining crimes are mentalist in nature, the courts are usually forced to work out their meaning. This, so the writer believes, has been and should be done on a basis of determining the degree, sort, and extent of proof of the anti-social tendency of the offender to create the evil aimed at by the statute.

This difference in the degree, sort, or proof of the likelihood of recidivism can be discerned by comparing certain related crimes. Thus for forgery there is required only an "intent to defraud" while for uttering there must be this plus a knowledge that the instrument is forged. The mere act of writing another's name is not thought indicative of anti-social tendency. But writing it under circumstances calculated to defraud shows the almost nominal "intent to defraud." But to be guilty of circulating an instrument forged by another one must realize that it is forged, *i.e.*, have an awareness of the physical consequences of his conduct. This is because circulating instruments is very equivocal conduct which is normally desirable of being encouraged. It is quite likely that very law-abiding persons will accidentally circulate forged instruments, and so persons are not punished unless they actually do something which does more certainly show the requisite anti-social tendency.

So it is with larceny and receiving. Merely handling the property of another does not show itself any anti-social tendency. But it is very easy to prove the "animus furandi" which, when it accompanies the act of asportation, shows that the actor tends to be a thief. But non-criminal persons may stumble into the handling of the stolen property of another, and so a more specific element must be shown, *i.e.*, knowledge that the goods are stolen. Only this sufficiently shows a tendency to be a "fence" so as to justify punishment for receiving stolen goods. The tendencies to pass counterfeit money or to receive stolen goods are not so easily demonstrated as the tendencies to forge and steal. The law recognizes this by its stricter rules of extrinsic intent. These distinctions probably are on a basis of relative equivocality, *i.e.*, one type of conduct the more clearly shows the requisite tendency than the other.

Then, differences in the nominal and substantial requirements of intent may be explained in terms of differences in the extent of the corpus delicti or social damage involved in the instant crimes. There seems to be a definite sliding scale in the criminal law. For extreme examples of social damage, the law seems willing to convict on but a

⁷⁰ See Sayre, *Mens rea* (1932) 45 HARV. L. REV. 974, 989, 998, 1003-4, 1016, 1021, concerning the extent to which the meaning of criminal intent has varied throughout the ages.

slight showing of likelihood of recidivism, as witness manslaughter. On the other hand, where the occurred social damage is but slight, and especially where the punishment is great in proportion thereto, very high degrees or proof of anti-social tendencies are required.

Thus one cannot be convicted for the slight social damage involved in attempts save on a showing of a specific intent, *i.e.*, desire, for the result involved in the crime attempted. And where for the aggravated assaults the punishment is made even greater than it was at common law for the relative criminal attempt, the intent must even be more specific.

Burglary is another example of a crime where, because of the slight damage of the *corpus delicti*, the proof of intent must be of the highest order. The objective result consists in being on the premises of another. This alone is not enough but, if accompanied by the specific intent to commit a felony thereon, it makes the burglar worthy of societal treatment. The existence of the desire, plan, or expectation of the intended felony is thought to show such a likelihood of recidivism as to justify incarceration despite the creation of but a slight actual *corpus delicti*.

Criminal definitions are full of words calculated to require extrinsic proof of the *mens rea* element. Such "mentalist" words and phrases as malice, knowledge, intent, purpose, wilful, wanton, negligent, felonious, and their derivatives are encountered frequently. Other types are words more realistically descriptive of conduct or surrounding facts. But regardless of the nature of these facts, the conclusion remains that in order to be applied to the run of specific situations they have to be interpreted.

The writer submits that the significance of all these varying operative facts of extrinsic intent is to enable the courts to apply punishment to those who, having caused the requisite social damage, also manifest such an anti-social tendency as is contemplated by the instant prohibition. It is possible to rationalize and understand the judicial rulings of the past on this basis and, so the writer feels, the future application of the intent element of various criminal prohibitions should be made on the same basis.

The Mens Rea Defenses

If the prosecution fails to prove beyond all reasonable doubt any one of the three elements of guilt of any crime, *viz.*, the *corpus delicti*, defendant's causation, and requisite *mens rea*, the defendant is entitled to be acquitted. We have just been discussing the extent to which subjective proof must be made of the third element. We have seen that for some crimes the *mens rea* is sufficiently shown by the causative conduct and need not further be demonstrated. For others, for reasons of policy, additional and special proof directed at the intent element alone is required. Now we deal with a group of criminal defenses which the defendant is allowed to interpose in order to offer even more specific proof on the question of his anti-social tendency

or likelihood of recidivism. The purport of these is to demonstrate that the defendant *actually does not* possess the anti-social tendency *apparently* indicated by the required proof for the prosecution. Where the jury is convinced of the existence of facts raising any one of these relevant defenses the defendant is similarly entitled to an acquittal. This is because it is believed that he does not possess the requisite and anti-social tendency calling for societal treatment in his case. Just as the absence of sufficient proof of the prosecution's case on the mens rea element calls for an acquittal, so does the proof of affirmative facts in defense which reach the same end as the lack of the prosecution's case. Implicit in either is the idea that societal treatment is administered to those who have *caused* criminal *results* only when, further, it is indicated that the offender is possessed of the requisite likelihood of recidivism. If this likelihood is lacking, either because the state cannot show facts apparently indicating it, or if so, because the defendant can offer more specific proof about it, there is no need for frightening, reforming, segregating, or despatching the defendant and he may safely be trusted at large.

The various intent defenses will now be treated in two groups according to the principles of recidivism which seem to be involved in them. One group is concerned with the principle of human conduct that the tendency to create social damage varies according to the likelihood of the recurrence of the stimulating factor which motivates the conduct of the instant individual. The other group is concerned with certain defenses which revolve around the significance of one's awareness of one's conduct, its physical and its societal consequences.

Reaction to a stimulating factor

It was suggested above that one of the general principles of recidivism found occasionally reflected in the mens rea requirement or its defenses was that of "stimulating factor." This is stated to the effect that if it can be discerned that defendant's instant creation of social damage is a definite reaction to a specific stimulating factor, then it can be said that his tendency to repeat the causation of such social damage varies according to the likelihood of the recurrence of the factor. Thus if it be a frequent factor, he possesses a high tendency but if it be a very sporadic one, his likelihood of recidivism is small. Certain of the intent defenses function on this basis and recognize the existence of certain factors and their infrequent recurrence and call for the acquittal of those whose conduct is definitely a reaction to them and nothing more. The theory is that the presence of these very subjective factors outweighs the significance of the proof by the prosecution of the intent requirement to the end that the instant defendant does not possess the requisite anti-social tendency even though the state has proven those facts, which in the case of the average man, do indicate that. The intent defenses which function on this basis are: entrapment, coercion, compulsion, necessity, self-defense, defense of another, defense of property, prevention of crime, prevention of escape,

lawful arrest, domestic and public authority, provocation, and mistake of fact.

We have seen how the consent defense involves the negation of the *corpus delicti*. Entrapment, on the other hand, is a matter of a criminal defense demonstrating a subjective lack of anti-social tendency. It is an excellent example of a non-intent defense. For, as the legal rule is worded when the operative facts for this narrowly interpreted defense are present, it is clearly indicated that the entrapped person does not possess the anti-social tendency apparently indicated by the bare doing of the causative conduct for the instant crime. To be defensive it must be shown that it was very unlikely that the entrapped person would have violated the particular law but for the blandishments of the entrapping officer. These blandishments provide the sporadic stimulating factor. Because of the infrequency of their recurrence it can be postulated that defendant's conduct will be of similar infrequent recurrence and hence he may safely be trusted at large.

So it is with coercion and compulsion and, incidentally, necessity, which, with varying emphasis, are allowed as defenses to non-capital crimes. If one commits the crime only because of the duress, it is believed that he shows a tendency to react only to the sporadic stimulating factor of the duress and so does not show a sufficiently ingrained personal tendency to commit crime to justify treatment by the recidivism theory.

Likewise does the stimulating factor principle justify the group of criminal defenses which include defense of self, another, property, and the exercise of public authority involved in prevention of crime, prevention of escape, and lawful arrest. The specific limitations on the exercise of these privileges also emphasize considerations of recidivism. He who uses only necessary force in defending his person, for instance, does not show sufficient anti-social tendency to be dangerous, but he who uses unnecessary force in such an event does show that tendency and so must be incarcerated. He who creates the need for self-defense, *i.e.*, the aggressor, does show a tendency to kill, and so he is not permitted the defense.

The reduction of second degree murder to manslaughter upon proof of adequate provocation has already been mentioned. To a certain extent it involves a non-intent defense to second degree murder although the result is not absolute acquittal but only conviction of a lesser crime. This proposition also involves the stimulating factor principle. It is believed that one who kills only on the stimulus of provocation, including sight of wife's adultery, sudden assault, unlawful arrest and mutual combat, shows only a tendency to react to that type of factor which, while it recurs frequently enough to indicate some tendency — especially in view of the extreme social damage — yet does not do so frequently enough to make the crime murder.

Likewise the general defense of mistake of fact, already mentioned in connection with intrinsic intent, is a manifestation of the stimulating factor principle. A reasonable mistaken belief in the

existence of a fact which, if true, would be defensive, is itself defensive. It is believed that — in cases of crimes where mistake is allowed, *i.e.*, where the intent is not intrinsic — the mistake which motivates the action is of such infrequent recurrence that it can safely be said that the defendant does not possess a general anti-social tendency but only a tendency to react to a sporadic stimulus. Hence he is acquitted for lack of a sufficient anti-social tendency. If he reacts to an unreasonable mistake, or to a mistaken belief in a non-justifying factor, he shows a tendency to react too often and so is sufficiently dangerous for societal treatment.

Awareness of conduct and of its physical and societal consequences

Certain criminal defenses involve the matter of the extent to which one's awareness of his immediate conduct, or of its physical or societal consequences, indicates a greater or lesser anti-social tendency on his part. The particular problems are intoxication, ignorance of law, infamy, and insanity.

Intoxication actually indicates a lack of awareness of one's immediate conduct. But in law it is never defensive save to crimes involving a specific intent and then only if it actually prevents the existence of the requisite specific intent. The writer submits that the rule and its exception are both sound on a recidivistic basis. One who gets drunk and kills or rapes probably shows a tendency to get drunk and kill or rape again, and that sufficiently for the fairly low level of anti-social tendency involved in those crimes. Where the level of intent required is but low, non-awareness of conduct does not negative likelihood of recidivism. On the other hand, where it is high, as for larceny and for attempt crimes, involving specific intent, the fact of drunkenness probably does negative the very specific tendency, or very aggravated tendency, or high degree of proof demanded so that it is safe to acquit. The drunken person who takes a "no-parking" sign, or who breaks in a window, or who goes too far in a "necking" party, probably does not show the same specific tendency to steal, commit burglary, or rape as would a sober man who did exactly the same physical conduct.⁷¹ Another example of non-awareness of immediate conduct is the sleep-walker. It seems agreed that one is not guilty of a crime committed while asleep. But this is different from the drunken person who murders or rapes. Sleep-walkers have not

⁷¹ Usually the crimes of specific intent require either a knowledge of some facts independent of the present conduct of the offender or a desire or plan to do something other than that which he actually achieves. Thus the crime of receiving requires a knowledge of the independent fact of the stolen quality of the goods. The crime of burglary requires, in addition to actual breaking of a house, a desire or plan for an independent felony within it. The attempt crimes require, in addition to the presence of the corpus delicti of the attempt, a desire or plan for the separate corpus delicti of the major crime. Where the required intent is but a factor of the very conduct which the offender is doing, the fact of drunkenness does not negative sufficient tendency from that conduct. But where the required intent involves an awareness of some fact extrinsic to the conduct, or a desire or plan for some other conduct than that actually engaged in, the fact of drunkenness does negative both the tendency to do those extrinsic things and the requisite mental state which is the nominal operative fact.

been a social problem. The recurrence of social damage from them has not been so evident as it has been from drunken persons. Hence it is safe to assume a lack of anti-social tendency for them, but not for the drunken person.

Ignorance of law, *i.e.*, a non-awareness of societal consequences on the part of a mentally normal adult, is not defensive, although, like intoxication, mistaken application of law may negative a requisite specific intent. On the other hand, we shall see that ignorance of law is the very test for the ensuing defenses of infancy and insanity. We have already suggested that when one does commit a crime, he shows a lesser anti-social tendency if he be ignorant of the societal consequences therefor than if he be aware. But the law postulates that even then he shows sufficient tendency to call for treatment. Hence the rule that ignorance of the law generally is no defense. The exception for specific intent is but analogous to the similar one for intoxication. Where the proof of intent must be very high, then the relative lesser tendency is relevant. The main rule itself is based on the idea that one who has not been deterred by the punishment of others equally indicates an anti-social tendency regardless of whether his not being deterred results from his unawareness of the punishment of others or from his not being influenced thereby when he is aware. In either event he is a dangerous individual to have at large. Whether it is because he was never "vaccinated" by observing previous punishment or his actual "vaccination" did not "take," he is a social problem. If his present anti-social conduct proves the point, deterrence must then seek to work on him individually by bringing to his attention more vividly — by punishing *him* — societal demands about conduct. The exception for specific intent is but another manifestation of the "stimulating factor" principle. Reaction to a mistaken application of law to fact is a reaction to a very sporadic stimulating factor which indicates a very slight anti-social tendency. Reaction to a general ignorance of the main prohibition itself is a reaction to a very frequent stimulus which indicates a high anti-social tendency.

In the infancy defense as it exists at common law⁷² ignorance of law is the very test for applying the defense and rightly so. For where for the mentally normal adult ignorance of law shows an anti-social tendency, *i.e.*, lack of reaction to previous punishment of others, in the case of the infant it merely shows that the infant has not yet learned societal demands about conduct. But it is proper to suppose that he will soon learn. Thus an infant under seven can never be convicted of crime. It is believed impossible that he has learned and yet believed probable that he will. Hence his conduct can never indicate anti-social tendencies. On the other hand, between seven and fourteen, the approximate limits of the basic public school education, the question for the application of the defense is whether the infant has actually learned of societal demands concerning his conduct. The

⁷²The lack of treatment of the Juvenile Court is not meant to convey any impression of the insignificance of that institution which does, of course, function on a basis of the recidivism theory. The scope of the present treatment is limited to a discussion of the legal principles of guilt-finding alone.

presumption is that he has not. The rule is stated that an infant between seven and fourteen is presumed not to know right from wrong and may be convicted only if the prosecution can show that actually he does know right from wrong. Infants in the transition stage are said to indicate anti-social tendencies only when they react anti-socially *after* learning of societal demands. If they have not yet learned, it is believed that their conduct results from the lack of learning which itself will occur so soon that they can safely be trusted at large. If they have learned as much as society can teach them and still react anti-socially, they possess the same tendencies as would be indicated by an adult. Children who have not yet learned will grow out of their immediate tendencies which are, hence, not permanent. Children who have learned, and all adults, will not grow out of such tendencies which are, therefore, permanent enough to demand punishment on a recidivistic basis. On the other hand, the infancy defense does not extend to low mental age of a chronological adult, short of the insanity defense. This is correct. Low mental age merely indicates a permanent inability ever to learn societal demands and hence indicates more, rather than less anti-social tendency. It is but a matter of the insanity defense next to be considered, but not of the infancy defense as such.

The insanity defense, perhaps with far less functional justification, also acquits one who, because of mental defect, is unaware of the societal consequences of his conduct. Thus the *MacNaghten* case⁷³ stated, as one of the types of situation which would acquit one for mental defect, the inability to know right from wrong concerning the act. In the alternative, the same case recognized unawareness of immediate conduct as defensive by its other rule that if from mental defect one was unable to be aware of what he was then doing he should be acquitted. Save for the further rejection of irresistible impulse as a defense, which is the rule in the majority of jurisdictions, it is hard to rationalize the insanity defenses in terms of the recidivism theory although they are usually classified as involving a negation of *mens rea*. The further ramification in the insane delusion test seems to be a substantial expression of the right and wrong test itself in terms nominally similar to the mistake of fact defense, *i.e.*, to the effect that the delusion, like the mistake, must be as to a factor which would be defensive itself if true. It would seem that the right and wrong test is functionally invalid, due to the fact that it is safe to assume that mental disorder indicates more of a likelihood of recurrence of anti-social conduct rather than less. Rather we must rationalize the right and wrong test in terms other than of recidivism. The acquittal of the insane criminal results from a public feeling of sympathy for him. We sympathize with the one who, from mental defect, cannot know right from wrong, and this feeling of sympathy suppresses the normal demand for vengeance and swings the pendulum to the other side, with the result of acquittal. Or it may be a human idea that it is improper to punish one who is unable personally to be deterred by pun-

⁷³ 10 Clark & Fin. 200 (1843).

ishment. Further it may be explained by a human feeling that the punishment of one unable to choose right from wrong may disgust, rather than frighten and deter, his fellow men.

There is not space at present for a detailed functional critique of the insanity defenses nor of the proposals for the reform thereof. Suffice it to say that the present legal tests for acquittal for mental defect do not accord with recidivistic ideas, but rather with ideas of vengeance and deterrence. Ignorance of the law, while a satisfactory enough test for infants, because for them it does indicate a lack of anti-social tendency, is not a satisfactory test for mentally deficient adults who, because of their mental defect, cannot ever learn sufficiently to avoid being offenders in the future. The insanity defense is one spot where a proposition of criminal intent cannot be rationalized in terms of the recidivism approach to the policy of punishment. Rather, considerations of vengeance and deterrence have influenced this alleged matter of criminal intent. Where elsewhere rules of criminal intent take their differences in terms of relative anti-social tendency, here the line is drawn in another manner.

CONCLUSION

For any specific crime, under the law of guilt, there must concur three abstract elements, first, a stated socially damaging occurrence, or criminal result, or *corpus delicti*; second, legally causative conduct engaged in by the accused offender, of a sort which is socially dangerous when committed by any person; and, third, an indication that the offender possesses the requisite anti-social tendency or likelihood of recidivism, *i.e.*, a criminal intent or *mens rea*. All of these must concur to have guilt. The lack of any one of them will prevent a conviction even though there be sufficient proof of the other two. Problems of the substantive criminal law thus resolve themselves into problems of the elements of guilt as they appear in specific crimes. The rationalization of past decisions and the prediction as to future ones should be made in terms of the legal interpretation of these three respective elements of the given type of crime.

These three elements of criminality are correlated to the three separable types of theory concerning the purpose of criminal punishment and represent, respectively, the influence of these varying theories on the legal rules. The vengeance theory expresses a human attitude that criminal punishment should be a *quid pro quo*, compensating for that which has already occurred, and thus emphasizing the criminal result or *corpus delicti*. The deterrence theory consists of a human attitude that criminal punishment should be administered for the purpose of discouraging future causative conduct by punishing present conduct which has been causative or is very likely to be so. The recidivism theory presents a belief that punishment should be assessed as a way of preventing future criminality by the present offender. Thus it should be imposed only if by his conduct he manifests a likelihood of such future criminality. The law follows all three

theories with varying emphasis by its requirement of the concurrence of three elements of criminality the functions of which are to require, respectively, a stated criminal result for which vengeance is demanded, the socially dangerous causative conduct which is in need of deterrence, and some manifestation of the offender's socially dangerous personality which indicates that he is possessed of an anti-social tendency or likelihood of recidivism. All of these human demands concerning the purpose of punishment must be satisfied before a human being can be punished for a given crime.

This classification of the elements of criminality furnishes an apt outline of the whole body of the substantive criminal law. General principles of criminality underlying all specific crimes can thus be classified according to the particular element of criminality involved in their application and according to the correlative theory of criminology which seems to underly them. Specific crimes can be dissected and their particular elements discussed in their proper place in the outline of result, conduct, and intent.

Thus, under the heading of "vengeance and the corpus delicti" we have seen that the attempt device and consent defense involve particularly the question of the presence of the requisite corpus delicti. Unless there is a sufficient criminal result of the kind involved in the crime attempted, there is no criminal attempt even though there be intent and socially dangerous conduct. Likewise consent may be defensive only when it does actually negate the presence of a corpus delicti of the instant crime.

Under the heading of "deterrence and causation" we have seen that there are properly classified the general principles of solicitation, conspiracy, vicarious guilt of accomplices and employers, and crimes of omission. The immediate question in all these is whether there has happened causative conduct, *i.e.*, conduct which ought to be prevented from happening in the future. The objective is to single out such conduct so that the spectacle of the present punishment of it may frighten potential offenders from doing the same thing. The test for the application of punishment to such conduct is whether it is so potentially dangerous as to make it desirable of being discouraged in such a manner.

When we turn to the third topic, *i.e.*, "recidivism and mens rea," we find that the only positive general principle therein is the conceptual requirement of some proof of anti-social tendency in all crimes. But this differs from crime to crime, both in the nominal wording of the intent element, and in the extent and sort of anti-social tendency demanded to be proved. On the other hand, the criminal defenses involving the absence of intent are matters of the general principles underlying all crimes. These criminal defenses — and they represent *all* of the criminal defenses save consent — are matters of the negation of criminal intent, or of the absence of the requisite anti-social tendency or likelihood of recidivism. Many of these defenses give recognition to the principle that if one's conduct is definitely a reaction to a given stimulating factor, the conduct will recur only so often

as the factor does, so that if the latter is but sporadic, so is the former. Other of these defenses recognize that one's lack of awareness of his conduct or of its physical or societal consequences may show that his physical conduct does not indicate sufficient anti-social tendency. The objective of all these defenses is to carry forward the recidivism policy of punishing only those who, in addition to the causation of a criminal result, actually manifest a dangerous personality, *i.e.*, a likelihood of recidivism.

When we look at the details of the specific crimes themselves, we find that it is opportune to dissect them and classify their components under the three headings of result, conduct, and intent. It so happens that, save for homicide and its question of proximate cause, the debatable details of the specific crimes fall only under the two headings of the corpus delicti and the criminal intent.

It leads to clearer thinking about the details of specific crimes to dissect them into their components and to think of the resultant elements as separate entities. Usually, in a given case, the debatable problem involves either the corpus delicti, or the intent, but not both. But should there be debatable problems of both, it is even more important to dissect the two propositions so that thinking about one shall not be confused by irrelevant considerations about the other.

Paradoxical though it may seem, the "general principles" approach to criminal law is really more specific than the "specific crimes" approach. The proper application of the general principles analysis requires more than merely treating of each specific crime by itself as would the specific crimes approach. The general principles approach calls for a finer dissection of each specific type of crime into its components.

When we speak of "general principles" we mean one of two things. One refers to those propositions of the substantive criminal law which apply equally to two or more different specific crimes. In that sense the attempt device, the consent defense, the principles of solicitation, conspiracy, vicarious guilt, crimes of omission, and the whole calendar of mens rea defenses are "general principles." In the other sense general principles are those fundamental considerations of criminology which underlie the component elements of the specific details of the separate specific crimes. Thus underlying the corpus delicti element in all specific crimes is the general principle that there cannot be conviction for any crime save where there has occurred the stated socially damaging occurrence for which public vengeance is demanded. The rationalization of specific decisions about the corpus delicti element of that or other crimes may aid in developing a technique for the prediction of the future solution of unsolved problems of the corpus delicti. Save for the proximate cause problem in homicide, the causation element of the various specific crimes presents no difficult problem. The required element of causation is present in all crimes, but there can rarely be a debatable problem about its application.

It is on the third element, that of mens rea, that the use of the general principles approach in understanding specific crimes comes

best into play. The writer feels that it is impossible to understand the differing and confusing words inserted into criminal definitions on the intent issue without going back to the underlying principles of the whole topic of criminal intent. The general principles of recidivism are worked out in terms of punishing the one who does possess an anti-social tendency or likelihood of recidivism, of freeing the one who does not, and of scaling the punishment in terms of the relative degree of tendency. Thus understood, these principles aid in interpreting the nominal elements written into criminal definitions for the purpose of requiring some proof of intent, and in deciding whether for the given crime there must be proven any specific element of extrinsically proven intent.

It seems to the writer that the "specific crimes" approach of considering each separate crime by itself without respect to its inter-relation to the whole system of criminal law is a mistake. For while it is true, for instance, that a case deciding a point of attempted rape is hardly a precedent on another point of attempted larceny, yet an analysis of why the former case was decided on the basis of the particular element in question may help in developing a technique for predicting the decision on the latter point — so long as the element of guilt happens to be the same. Thus when criminal attempts are rationalized in terms of the extent to which there has happened a requisite *corpus delicti*, the relation between cases of attempted rape and attempted larceny seems more apparent.

The "general principles" approach, properly applied, *i.e.*, the dissection of each crime into its component elements and a consideration of each of the particular elements in terms of the criminological theory underlying it, seems to lead to the better understanding of difficult problems of rationalizing decided cases and predicting the solution of novel situations. A proper consideration of the elements of criminality in terms of their functional nature seems to aid in this process.

To avenge a past offense, to prevent future similar offenses by any person, and to prevent future criminality of any kind by the present offender, the law takes the step of punishment. The various detailed rules of criminal law have as their function the enforcing of these various attitudes toward societal treatment for crime. It is desirable that courts in interpreting the legal details should apply them in terms of the policy immediately sought to be served rather than in terms of legalistic logic or word-definition. The principal argument for the "general principles" approach is that it facilitates the integration of these functional considerations with the legal rules of guilt.