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The Ethical Foundation of Criminal Liability

Emilio S. Binavince

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Cover Page Footnote

The research for this article was in part carried out during my term as Research Fellow of the Alexander-von-Humbolt-Stiftung at the Rechtsphilosophisches Seminar, University of Bonn, Germany in 1962-1963. I must express my appreciation to the Stiftung for sponsoring this and other works in Germany, and to Professor Hans Welzel, Director of the Rechtsphilosophisches Seminar for his friendly assistance on my work on comparative criminal law. * Assistant Professor of Law, Catholic University of Puerto Rico.

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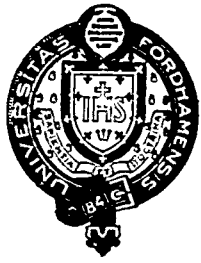

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PROFESSOR MANUEL R. GARCÍA-MORA

MANUEL R. GARCÍA-MORA

1921 - 1965

It is with great respect and sadness that we dedicate this issue of the FORDHAM LAW REVIEW to Professor Manuel R. García-Mora: teacher, author, scholar and friend.

In Memoriam

The untimely demise of Professor Manuel García-Mora was a disheartening loss to his family, his friends, members of his profession, and to everyone at Fordham Law School. Although he was a member of the faculty for only a few short years, his cheerfulness quickly and firmly endeared him to the student body. Through his teaching his students learned—for this we are indebted to him; through his teaching he also learned—for this we admired him.

Much of his time both in and out of the classroom was devoted to the fields of international and comparative law. His books and many contributions to law reviews are an invaluable contribution to those areas of jurisprudence.

He was a man who felt strongly and sincerely about fundamental concepts, constantly searching for truth and justice and peace in what he wrote, taught and did.

It is indeed unfortunate that in the academic world, recognition and acclaim are reserved for so few and come so late in life, for they surely would have come to this man.

THE EDITORS

THE ETHICAL FOUNDATION OF CRIMINAL LIABILITY†

*EMILIO S. BINAVINCE**

I. INTRODUCTION

HISTORY has demonstrated the need to articulate an adequate foundation of criminal liability in criminal law reforms. The tragic experience of the German people during the *Third Reich* proved to be a lesson to the criminal law scholars who prepared the new *Draft Penal Code* now before the *Bundestag*. The *Draft Code* is firmly committed to the fundamental principle that liability is based on personal guilt.[1] The code commission believes that: "The concept of guilt is a living concept in a people. Without it there cannot be a life directed to moral value conceptions. Without moral value conceptions, however, human life is not possible."[2] In England and the United States, the considerable extension of the doctrine of strict liability is posing a serious threat to the rational foundation of criminal liability—the same threat that prevailed to reduce penalty in Hitler's Germany into a morally indifferent "security measure," and made millions of innocent people "criminals." Unfortunately, the American Law Institute failed to meet the challenge to articulate and accommodate a definite theoretical orientation in the *Model Penal Code*.[3] In the main, the reason is that the issue involved is not clearly understood and its

† The research for this article was in part carried out during my term as Research Fellow of the Alexander-von-Humboldt-Stiftung at the Rechtsphilosophisches Seminar, University of Bonn, Germany in 1962-1963. I must express my appreciation to the Stiftung for sponsoring this and other works in Germany, and to Professor Hans Welzel, Director of the Rechtsphilosophisches Seminar for his friendly assistance on my work on comparative criminal law.

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1. See Entwurf eines Strafgesetzbuches (StGB) mit Begründung §§ 15, 23, 24 (1962). The Begründung (motive) of the Entwurf says: "The draft is a criminal law based on guilt (Schuldstrafrecht). This means that the penalty, an institution which contains a judgment of moral disvalue towards human conduct and has always been fundamentally so considered, may be imposed only if the actor could be blamed for his act. To punish without such reproach of blame would distort the idea of penalty and transforms it to a morally colorless measure which could be abused for political purposes." Id. at 96. (Writer's transl.)

2. Ibid. (Writer's transl.)

3. The Institute points out that the "abrogation of such liability may be impolitic . . . ." It believes that "reducing strict liability offenses to the grade of violations," also a criminal behaviour, is the right solution. Model Penal Code § 1.05, comment 3 (Tent. Draft No. 2, 1954). It left to the states the regulation of these offenses. Model Penal Code § 1.04, Reporter's Note 8 (Off. Draft 1962).

implications in the criminal law system sufficiently appreciated. To throw a new light upon this problem, it might be useful to review the historical development of the ethical foundation of criminal liability in the Anglo-American law.

To a great degree, the theoretical foundation of liability in the Anglo-American criminal law is a reflection of the uncertain and fragmentary developments in cultural history. Notwithstanding the classical works of Hale, Hawkins, Coke and Blackstone, the scientific systematization of the criminal law has not received sufficient attention comparable to the efforts in continental Europe.[4] This is in part attributable to the jural method of the common law as a system. The particularistic language of common-law legislation; the judicial attitude to deny a projective value to legislation and its corollary doctrine of restrictive interpretation of laws affecting the common law; the judicial method of reasoning by analogy from prior decisions; the piecemeal judicial law making; the timidity of scholarship, except in recent years, to generalize, organize and systematize the criminal law into a consistent and logical unity—all these have, in one way or another, inhibited the conscious and deliberate construction of a theoretically defensible and adequate criminal law system. To refer to just one example, we may mention the failure to isolate tort from criminal liability on the basis of relevant distinction and classification. Proposed distinctions are not without obscurity, and there is conduct that continues to be classified as tort and crime, such as battery, assault and false imprisonment. This "viscous intermixture," as Winfield calls it,[5] is archaic, and has been maintained in the criminal law by the historical method of ascertaining "the law." As long as archaic elements are suffered in criminal law, no attempt to generalize and isolate crime from tort would be successful.

II. The Ancient Postulate of Liability

It is now common to refer the earliest beginning of criminal law to the principle of vengeance.[6] In Roman law, private vengeance vanished at a very early date.[7] In a culturally primitive society, physical force was the immediate and simplest instrument of redress of what was then narrowly

4. There is truth in the words of Gustav Radbruch that the common law "has stumbled its way to wisdom." Der Geist des englischen Rechts 64-68 (4th ed. 1958).

5. Winfield, The Province of the Law of Tort 190 (1931).

6. See Köhler, Zur Lehre von der Blutrache (1885); 1 Conrad, Deutsche Rechtsgeschichte; ein Lehrbuch 46-52 (2d ed. 1962).

7. See Löffler, Schuldformen des Strafrechts (1895); Mommsen, Römisches Strafrecht 58-64 (1899); von Bar, History of Continental Criminal Law 11 (6 Continental Legal History Series 1916).

defined as wrong.[8] Crime was not considered a challenge against the collective security, but an injury to the private peace of a family or clan. The social unit was primarily organized for the purpose of protection against an essentially external aggression.

This crude social structure formulated vague rules which can hardly be contrasted with the sophisticated system of modern criminal law. It was not until the private and public participation of the individual in society was clearly delineated that the technical discipline of criminal law really became established. Gradually, however, as the consciousness for communal peace and security developed, the private prosecution of wrongs began to move to the background. Vengeance became a serious interference with peace, rather than, as it was in the past, the instrument of peace. Nevertheless, the concept of penalty as understood in rational criminal law was not known. Today penalty is considered a reaction of the state expressing an ethically negative judgment over the conduct and the actor. The "penalty" of the ancient law was an instrument of mystical character often related to religion.[9] Recent studies have shown that until the late middle ages western Europe did not have any rational conception of penalty.[10] The word "penalty" or *"Strafe"* appeared for the first time in the laws of the fourteenth century.[11] To attribute to a sanction an element of "penalty" requires a higher degree of cultural thought in which the creative nature of the human conduct is clearly defined. At this time, however, the creative faculty of the human will had not been recognized; it was not realized that man has the faculty to alienate himself from his natural circumstances and affect the natural order of things. On the contrary, man was considered an indistinct part of the natural universe, behaving like other natural objects, under the determined rule of necessity. Further, the ancient mind had not formulated a satisfactory conception of the causality of nature and the role of human conduct in the daily changes of given natural circumstances. The human conduct is the initial contact in the attempts of man to intervene in the order of the world of causality. This was obscure in their thinking, and they failed to appreciate that man is not absolutely subject to nature, and that within a significant wide sphere of possibilities, causality is a subservient agency that the human creative faculty dominates and utilizes. Again, a knowledge of the causality of the universe is a rational consciousness which is too subtle for an untrained mind to speculate. They lacked, therefore, this essential presupposition from

8. For an exhaustive historical study of different national criminal laws, see Löffler, op. cit. supra note 7.

9. See Weissweiler, Busse (1930).

10. See Achter, Geburt der Strafe (1951).

11. 1 Conrad, op. cit. supra note 6, at 50-52.

which the ethical evaluation of human behaviour could be drawn and the concept of responsibility of the actor could be determined.

Before the Norman conquest, the Anglo-Saxon law can be found at this stage of development. However, on the eve of the conquest we find that blood feud was being regulated, and the composition system was in practice. The tariffs of *wer*, *wite* and *bot*—compositions to buy the peace of the family and the king—can be found. They were already in the period of some form of diffused transition. Cnut had already a more or less comprehensive catalogue of pleas of the crown as shown by a passage in the *Domesday Book*.[12] It continued in use well into the reigns of the early Norman kings.[13] In the twelfth century, however, this elaborate system suddenly disappeared. There were few crimes broadly defined within the king's mercy; discretionary money penalties took the place of the *wite*, and the *bot* became "damages" assessed by the court.[14]

In this period,[15] liability, civil or criminal, attached to a materialistic or objective hypothesis. There must be an external and material conduct and injury on which liability could be grounded. The primitive mind was utterly incapable of elevating itself from its immediate and perceptible encompassment. It lacked the necessary speculative bent to investigate the relevant and distinctive concepts beyond the material and visible indications of a wrong. A wrong must be represented by an actual corporeal injury. For instance, in the individual crimes the penalty imposed was measured according to the value of the object damaged or injured. In theft the gravity of the offense is determined by the value of the property stolen; in battery, the penalty was made dependent upon the part of the body injured.

The presence of a guilty mind was not a condition of liability during the Germanic era.[16] This was tersely expressed in the rhythmic preface of

12. 2 Holdsworth, A History of English Law 43-47 (3d ed., rewritten 1927) [hereinafter cited as Holdsworth]; 2 Pollock & Maitland, History of English Law 451-54 (2d ed. 1927) [hereinafter cited as Pollock & Maitland].

13. 2 Holdsworth 47-50; 2 Pollock & Maitland 460-62.

14. 2 Pollock & Maitland 458-59.

15. To give the length of each period is to invite criticism. After all, the history of ideas, unlike the occurrence of events, has an element of continuity that cannot be arbitrarily encompassed in a defined span of time. Flexibility must be assumed, and it is prudent to refrain, aside from indicating broad guides, from giving the length of each period here discussed.

16. This is the weight of authority. In Germany, this view is supported by Brunner, Schwerin-Thieme, Planitz, Schröder-Kunssberg, Eberhard Schmidt and others; the opposite view is represented by Amira, von Bar, Binding and Kaufmann. For a review, see Kaufmann, Die Erfolgshaftung 11-16 (1958). Maitland, Holdsworth and Wigmore follow Brunner closely, whereas Holmes, Plucknett and Winfield represent the contrary view.

the *Sachsenspiegel*[17] in Saxony. This work of Eike von Repkow reflects also the thinking in England when it was written in the early years of the thirteenth century. The lines, "The deed kills the man," and "One cannot see a wrongful resolution, unless the deed is with it," indicate the objective character of the hypothesis of liability.[18] The Germanic law, however, seems to distinguish some typified circumstances which would already indicate that some type of conduct is not criminal, or at least, less blameworthy. In these cases, apparently the actor has no guilty mind, or when not totally wanting, at least deserving of mitigation. But in these special cases in which absolution or mitigation is recognized, the actor must make an open oath that he did not initiate any circumstance connected with the injury.[19] If one has apparently contributed in any conceivable manner to the death of another, he must take the open oath to a formula which was still in use until the thirteenth century, that is, that he had done nothing in which the dead man "was nearer to death or further from life."[20] Conduct which was not an offense could be made the ground of an appeal of homicide if it could be shown that the conduct conduced, however indirectly, to the death of the deceased.[21] We see also that the ancient law has a strong reproach against offenses done with secrecy (*Meinwerke*). A murder was considered a secret killing, and since the right of feud cannot be easily pursued, it was heavily penalized. So also was theft more severely penalized than robbery, a position which is exactly opposite the approach of modern law which makes a distinction based on the absence or presence of violence.

We can see the operation of this principle concretely if we investigate the early doctrines on some of the familiar defenses in modern criminal law. Under the old law accidental injury[22] and injury done under coercion or self-defense[23] were equally sources of liability as an intentional and blameworthy harmdoing.[24] Brunner, a leading German legal historian, says: "The early law knows no such thing as accident, but it seeks always after something to make answerable, and determines it, by a scarcely ap-

For a short discussion, see Plucknett, A Concise History of the Common Law 463-65 (5th ed. 1956).

17. For a short account of the history of this famous legal literature see 1 Conrad, op. cit. supra note 6, at 351-52. In Germany, this is equivalent to Glanville's work.

18. Sachsenspiegel, Reimvorrede 27 (Eckhardt ed. 1955-1956). (Writer's transl.)

19. Planitz, Germanische Rechtsgeschichte 37 (1944).

20. 2 Holdsworth 52; 2 Pollock & Maitland 470.

21. Ibid.

22. Brunner, Über absichtslose Missethat im altdeutschen Strafrechte (1890); 1 Brunner, Deutsche Rechtsgeschichte 211-20 (2d ed. 1928); 2 id. at 704; Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L. Rev. 315, 319-25 (1894).

23. 1 Brunner, Deutsche Rechtsgeschichte 223 (2d ed. 1928).

24. Brunner, Über absichtslose Missethat im altdeutschen Strafrechte 2-3 (1890).

preciable causal nexus, from the condition of the harmful result."[25] The Anglo-Saxon story of Beowulf provides an illustration of accidental injury. Haedcyn, the second son of King Hredel, was accidentally killed by his brother when the slayer's arrow did not hit its intended mark. The slayer was held and killed to expiate the accidental death. The king so deeply mourned the death of his two sons that he took his own life.[26] As late as 1214 we can still feel the force of this Anglo-Saxon rule. In a case before the king's court, one Roger of Stanton happened to kill a girl by misadventure while throwing a stone. "And it is testified that this was not by felony. And this was shown to the king, and the king moved by pity pardoned him the death."[27]

A famous Nordic legend will suggest to us the doctrine of coercion in the early law. The mistletoe twig was the only thing not sworn not to harm the god Baldur. The jealous Loki gave the mistletoe to the blind god Hodur, and, guiding his hands, threw the twig at Baldur from which he died. The Germanic conception of liability makes the blind god Hodur liable of a grave offense which was avenged by the brother of the deceased.[28]

The doctrine of self-defense under the old law seems to show that self-defense is not as self-evident as is generally assumed. If we look at the old doctrines, we will find to our surprise that the "natural tendency of all living beings to self-preservation" is not axiomatic, as it is represented. The old law does not exculpate a defendant because of self-defense; he and his family were held liable to answer in a feud.[29] Bracton relates a case where the defendant answers, even in defense of himself against a burglar in his own house.[30] Two interesting cases were also decided in the early part of the eleventh century which compel us to conclude that self-defense was not wholly established until some later time. Robert of Herthale was reported to have been arrested for having slain one Roger in self-defense. Roger, it was shown, had also slain five men in the fit of madness. It was directed that Robert be committed to the sheriff and the king was consulted about the matter.[31] In the other case, a carter was assaulted by a robber, Howel, and his band in an attempt to rob him. The carter killed Howel and defended himself against the others. It was ruled: "Whereas it is testified that Howel was a robber, let the carter go quit thereof. And

25. 2 Brunner, Deutsche Rechtsgeschichte 707 (2d ed. 1928). (Writer's transl.)
26. See Brunner, op. cit. supra note 24, at 2-3.
27. 1 Selden Society, Select Pleas of the Crown No. 114 (1887).
28. See 1 Conrad, op. cit. supra note 6, at 49.
29. See 1 Brunner, Deutsche Rechtsgeschichte 223 (2d ed. 1928).
30. 1 Bracton, De Legibus et Consuetudinibus Angliae 446 (Twiss ed. 1879).
31. 1 Selden Society, Select Pleas of the Crown No. 70 (1887).

note that he is in the parts of Jerusalem, but let him come back safely, quit of that death."[32]

When it dawned upon the ancient law that the approach to accident and self-defense was harsh, some light of rationalism began to enter the system of criminal law. The king generally mitigated this harshness by using his prerogative to pardon the defendant, as the foregoing cases have demonstrated. But it is important to notice that justification was not as yet recognized; hence, the defendant needs a pardon. In 1278, the Statute of Gloucester[33] directed the judges that if one kills another in self-defense or by misadventure, he shall be held liable, but the judges shall inform the king, so that the king may pardon him if he wills.[34]

The lack of enlightened orientation to evaluate the subjective elements of conduct may also be noted in the doctrines concerning the liability of the insane and infants. Modern law recognizes insanity as a defense in crime but not in tort.[35] However, in ancient law, in which criminal and civil liabilities were not distinguishable, the state of the law was different. Insanity does not entitle a man to be acquitted, at least not in murder. Insanity merely enables him to obtain a special verdict that he committed the offense while insane, and the king may extend his pardon.[36] The modern law holds a child liable in tort,[37] and an age of immunity in criminal law has been fixed at seven.[38] Here the development was quite different from insanity. In the Germanic tradition, until a male child becomes a weapon-bearing member of the community, he does not have the capacity to possess rights nor assume liabilities. At a time when peace was precariously

32. Id. at No. 145.

33. 6 Edw. 1, c. 2 (1278).

34. See 3 Stephen, The History of the Criminal Law of England 36-37 (1883).

35. McGuire v. Almy, 297 Mass. 323, 8 N.E.2d 760 (1937).

36. See 2 Stephen, op. cit. supra note 34, at 151.

37. Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955).

38. Clay v. State, 143 Fla. 204, 196 So. 462 (1940); Triplett v. State, 169 Miss. 306, 152 So. 881 (1934); Queen v. Smith, [1845] 1 Cox Crim. Cas. 260; 4 Blackstone, Commentaries **22-24; 1 Hale, Pleas of the Crown 26 (1st Am. ed. 1847). Currently, we are inclined to classify infants into several categories of responsibility. The age of immunity varies in different jurisdictions usually from seven to eight years. See generally Woodbridge, Physical and Mental Infancy in the Criminal Law, 87 U. Pa. L. Rev. 426 (1939). In England the age of immunity was raised from seven, as in the common law, to eight. See Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, § 50. Next is the rebuttable criminal incapacity between the ages of eight to fourteen years. Miles v. State, 99 Miss. 165, 54 So. 946 (1911). Above fourteen, the defense of infancy is usually no longer available. Children and Young Persons Act, supra at § 107; Woodbridge, supra at 438. In some jurisdictions, a boy below the age of fourteen cannot be found guilty of rape or other sexual offenses because of the conclusive presumption of physical immaturity. Tex. Pen. Code art. 1188 (1961); 4 Blackstone, Commentaries *212. Compare Cal. Pen. Code § 262.

achieved by arms, complete participation in the political and legal rights and duties in the community was conditioned upon the capacity to bear arms. Until the child attains this status, the father answered for and made claims on behalf of the child like the master for his slave.[39] The acquisition of this status is marked by a solemn ceremony, the *Wehrhaftmachung*, in which the male child is given a weapon.[40] The ceremony customarily, though not always, took place at the age of twelve. Accordingly, during the Anglo-Norman era the infant initially acquires liability at the age of twelve,[41] and the cases have ruled that a child cannot be guilty of a crime until it reaches this age.[42] Later, however, the law became severe, and, apparently as a borrowing from Roman law, the tendency was to limit the age of immunity to seven.[43] A boy who killed another in defense of his brother argued that he was below twelve years of age. Nevertheless, he was committed to prison, and Judge Spigurnel said: "If he had done the deed before his age of seven years, he should not suffer judgment; but if . . . he had done any other deed not causing the loss of life or limb, and against the peace, he should not answer, because before that age he is not of the peace."[44] It was thereafter firmly established in the common law that beyond the age of seven, the infant is *doli capax*.[45]

The development of the tort liability of a child departed from this pat-

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39. Wigmore, supra note 22, at 447. Wigmore points out that the same notion of legal liability could be seen in one of the two forms of the writ of pardon for infants in the Registrum Brevium where the infant was discharged, but must come up again and answer if any one raises the question after he has arrived "ad legitimam aetatem." Id. at 447 n.2.

40. See 1 Conrad, op. cit. supra note 6, at 13-14.

41. Wigmore, supra note 22, at 447.

42. In a case, a boy placed a mark inside the house to shoot his arrow. In shooting, the arrow accidentally went outside and killed a woman. A Justice said: "Since he is not of the age of twelve years, he is not a felon, but good and loyal." Y.B. 30-31 Edw. 1, 529 (Rolls ed.) quoted in Wigmore, supra note 22, at 447 n.3; see also Kenny, Outlines of Criminal Law 73 (Turner ed. 1952).

43. Wigmore, supra note 22, at 447 n.4; see also 1 Hale, op. cit. supra note 38, at 20-23.

44. Y.B. 30 Edw. 1, 510-12 (1302) (Rolls ed.) quoted in Wigmore, supra note 22, at 447 n.4.

45. In Wooldale's Case (1218-1219), 56 Selden Society 415, pl. 1134 (1937), a seven year old boy was held liable for murder but the death penalty was pardoned him for the King's sake. In 1338, a girl of thirteen years was found guilty of treason for killing her mistress. She was burnt. It was argued in this case that by the old law no one under age was hanged, or has ever suffered judgment of life or limb. Spigurnel, J., however, found a case where a child of ten was hanged for killing his companion. It was said that because the infant concealed the body of his companion after killing him, he knows the distinction between evil and good. Y.B. 12 Edw. 3, 627 (1338) (Rolls ed.) quoted in Wigmore, supra note 22, at 447 n.5. See also 4 Blackstone, Commentaries *23; 1 Hale, op. cit. supra note 38, at 26.

tern.[46] When the idea of compensation was gaining ascendance over the penal idea in tort, the rule was that infants, like the insane, were liable for damages they may have caused. About 1611, the courts started arguing a distinction between tort and criminal liability in that in tort, unlike in crime, the "intent" to cause damage was immaterial.[47]

The doctrines of inchoate offenses, such as criminal attempt, solicitation and conspiracy, in criminal law present to us another interesting area of comparison between modern and ancient criminal law. As it shall appear, we will find that these recognized doctrines are not as modern as one would believe. These offenses are not self-contained or adequate wrongs because they do not connote any material injury in themselves. As relational and derivative offenses, their disvalue-quality requires an investigation and evaluation of the mental orientation of the actor. There is no attempt, solicitation or conspiracy, as such; one must always attempt, solicit or conspire the commission of a specially defined offense such as murder, robbery or treason. In order to establish the significance of a particular conduct as attempt, solicitation or conspiracy, it is necessary to ascertain the relevance of the subjective orientation of the actor towards the execution of these material offenses. It is not enough that a conduct existed, and that a concrete consequence is wanting. The mental nexus between the conduct and the unrealized consequence must be definitely established. For this reason, a sharper consciousness of the concept of "harm" as something incorporeal or inanimate is necessary to realize that inchoate offenses deserve punishment. This was, however, unknown to the ancient law, and accordingly what we consider now as criminal attempt, solicitation and conspiracy were not sources of liability.[48] Indeed, an attempt to commit a crime was not clearly established as an offense at common law until 1801.[49] But even at the establishment of the doctrine of attempts, the corporeality of the concept of "harm" still held back for a time the recognition of the doctrine of impossible attempt. The conviction of the prisoner in *Regina v. M'Pherson*[50] was quashed because of the factual

46. A case in 1457 has always been given as the first case holding an infant liable in trespass. See Wigmore, supra note 22, at 447-48 n.7. The child who caused the loss of one eye of the plaintiff was four years old. Wigmore believes that the court in this case was still laboring under the penal idea in trespass, and that there was an inclination by the court to exempt the child. Wigmore argues that the reason given for refusing to discharge the child due to incapacity of discretion does not amount to a refusal to discharge on the ground of immateriality of intention. Id. at 448.

47. Ibid.

48. 1 Brunner, Deutsche Rechtsgeschichte 213 (2d ed. 1928); His, Das Strafrecht der Friesen im Mittelalter 76-80 (1901).

49. King v. Higgins, 2 East 5, 102 Eng. Rep. 269 (K.B. 1801).

50. Dears. & B. 197, 169 Eng. Rep. 975 (Ct. Crim. App. 1857).

impossibility to complete the attempt to steal the article specified in the indictment. This caution was strongly entertained in homicide. The famous Baron Bramwell skeptically said:

> The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first plausible; but supposing a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?[51]

The ancient criminal law, however, knows some typified conducts as offenses that are defined under modern criminal law as attempts. For example, we can find during the Franken times a catalogue of independent delictual attempts. However, it must be noted that the ancient law considered only the realization of external circumstances, not the direction of the will of the actor.[52] Thus, the ancient law considers as punishable conduct: the giving of poison, the drawing of a sword, or dipping of another in water, which are the modern equivalent of attempted homicide, or assault and battery; the entry into the land of another, a modern equivalent of attempted burglary; the getting on the bed of a third person, a rough equivalent of attempted rape or adultery.[53] In all these cases casuism is the determinative element; the ancient law does not care to examine why one has drawn a sword, or entered the land of another, or was on the bed of a third person. The moment such circumstances are present, there existed a completed offense.

The concept of conduct was also viewed by the old law with sharp materialism. It only imposes liability when the offender has pursued an active and perceptible bodily behaviour; but when one has made a positive bodily movement, he acts at his own peril.[54] This seems still to be the rule at the time of Hale: "[I]t cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God . . . ."[55] The movement of the mouth in speech seems too negligible to be considered a conduct. For example, the common law has held until the middle of the nineteenth cen-

51. Regina v. Collins, 9 Cox Crim. Cas. 497, 498, 169 Eng. Rep. 1477 (Ct. Crim. App. 1864). He voted to quash the conviction. Pollock, C.B., in Regina v. Gaylor, Dears. & B. 288, 292, 7 Cox Cr. Cas. 253, 255, 169 Eng. Rep. 1011, 1012 (Ct. Crim. App. 1857), pointedly said: "If I, believing that there is a person in an adjoining room, when in fact there is no one there, fire a pistol through the doorway with the intention of killing him, I have committed no act cognizable by the criminal law, although, morally, I am just as guilty as if I had shot the man." See also 2 Stephen, op. cit. supra note 34, at 225. Cf. Regina v. Brown, 24 Q.B.D. 357 (1889).

52. 1 Conrad, op. cit. supra note 6, at 173.

53. Ibid.

54. 2 Holdsworth 51.

55. 1 Hale, op. cit. supra note 38, at 429. He was speaking of witchcraft.

tury that a person who causes the death of another by fright or shock is not guilty of homicide.[56] It was not until Stephen had supported the contrary view that this objectivity was gradually abandoned.[57]

The continuity of this idea seems still to be noticeable in the doctrine of omission. In continental Europe, it is now firmly recognized that a failure to render assistance to persons in emergency, when such aid or assistance could be rendered without danger to the actor, is a crime.[58] In the common law, there has been a persistent refusal to recognize liability in omission, either in tort or criminal law.[59] The proposal of Bentham[60] and his American disciple, Edward Livingston,[61] to create liability based on omission was rejected in preference to the established rule as supported by Lord Macaulay[62] and Stephen.[63] When the courts feel that punishment should be imposed, especially in manslaughter, liability is justified with a harking argument upon negligence based on some "legal duty" which was omitted.[64] This doctrine of the old law might also explain the late acceptance of "possession" as a conduct.

It might appear to some observers that there was an attempt in the laws of Alfred to create distinctions based on some mental attitudes. It was decreed that, "If a man have a spear over his shoulder, and any man stakes himself upon it, that he pay the wer without the wite . . . ; if he be accused of wilfulness in the deed let him clear himself according to the wite; and with that let the wite abate . . . ."[65] Holdsworth says that no such

56. Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850); Regina v. Murton, [1862] 3 F. & F. 492, 176 Eng. Rep. 221; 1 Hale, op. cit. supra note 38, at 428.

57. "Suppose a man kills a sick person intentionally by making a loud noise which wakes him when sleep gives him a chance of life; or suppose knowing that a man has aneurism of the heart, his heir rushes into his room, and roars in his ear 'Your wife is dead!' intending to kill and killing him, why are not these acts murder? They are no more 'secret things belonging to God' than the operation of arsenic . . . . If it was, and it was intended to have that effect, why should it not be murder?" Stephen, Digest of Criminal Law 210 n.9 (9th ed. 1950).

58. See e.g., German Penal Code § 330(c) (1871).

59. People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907); The Queen v. Instan, [1893] 1 Q.B. 450.

60. Bentham, An Introduction to the Principles of Morals and Legislation 323 (1879).

61. The Draft Penal Code of Livingston proposed to penalize omission, but the Draft Code was not adopted. See 2 Livingston, Complete Work on Criminal Jurisprudence 126-27 (1873).

62. See Macaulay, Notes on the Indian Penal Code, in Lord Macaulay's Works 413 (Trevelyan ed. 1873).

63. 3 Stephen, op. cit. supra note 34, at 10.

64. See Hall, General Principles of Criminal Law 193-94 (2d ed. 1960); Kenny, Outline of Criminal Law 16-17 (Turner ed. 1958).

65. 2 Holdsworth 51 n.8.

conclusion can really be drawn because it was not the ethical element in conduct that was the foundation of liability but the external conduct itself causing the injury.[66] This conclusion becomes doubly tenable if we remember that modern criminal law theory does not consider the objective presence of conduct alone as exclusively determinative in crime. Some definitive qualification in terms of objective and subjective circumstances must be adopted as references of evaluation. It must therefore be insisted that the ancient law was not able to evaluate subjective elements. Its conception of value was obviously material and referable only to the immediate senses of the empirical world. There are, of course, a number of behaviours in which the ancient mind could perceive the immediate presence of injury in conduct alone. For example, cowardice, especially in war, was punishable in the Germanic law. We must remember, however, that in ancient society bravery was not only a virtue; the obligation to go to war was more immediate and necessary. But cowardice in this context does not necessarily connote an ethical evaluation. It would have been difficult for the ancient mind to know that the refusal to fight in war might be based on some justifiable reason or conscientious rejection of killing another. Indeed, as late as the end of the middle ages, we find Chief Justice Brian saying: "The thought of man shall not be tried, for the devil himself knoweth not the thought of man."[67] These words, as Maitland rightly described, "might well be the motto for the early history of criminal law."[68]

This objectivity, however, which we have found in the ancient criminal law is also prevalent in other branches of the Anglo-American law. Many well-known doctrines and principles in the modern law of property, succession, contracts and others reflect this curious materialism. They show the strong continuity in the conceptions of the common-law system. With the "romanization" of the continental legal systems, the Anglo-American law is probably the most faithful heir of the Germanic tradition.

The rational significance of feud and the composition system in ancient criminal law discloses the early theory of responsibility. The power to punish in ancient society was in the clan or kinship. The head of the family possessed a penal authority, but only within his family, and it was derived from his paternal power.[69] If an outsider committed a wrong against a member of the kinship, the feud—a private war between the clan of the offender and the offended—was the result. The feud was a legally recognized form of revenge. Damages done in pursuance of a feud were not wrongs, and if the feud was successful, it restored the dignity of the offen-

66. Id. at 52-53.

67. Y.B. Pasch. 7 Edw. 4, f. 2, pl. 2 (1468).

68. 2 Pollock & Maitland 475.

69. 1 Conrad, Deutsche Rechtsgeschichte; ein Lehrbuck 46-49 (2d ed. 1962).

ded clan. For this reason, to let the wrongdoer go free and accept a composition in expiation was not a favored practice. In homicide, the revenge need not fall upon the wrongdoer himself; it was possible to seek out anyone in the kinship. In the early Norwegian practice, we find the relatives of the deceased making the best man of the offender's clan answer for the wrong.[70] When the composition system became popular, the wrong was atoned with compensation. However, it remained the obligation of the kinship to buy out the private war.

The liability is therefore assumed by the group. The imposition of liability presupposes responsibility of the group for the conduct that caused the wrong. The pervading maxim behind the feud or composition system is the theory of collective or joint responsibility of the kinship. Not the offender alone, but the clan answers for his wrong. To the ancient mind, conduct was not an individual determination, it was a result of group resolution. Hence, it was not possible to formulate a theory of responsibility based on the moral and personal accountability of the actor. This theory of responsibility was, of course, consistent with the position of the individual in society at the time. The Germanic law has not sharply recognized the individual personality. The legal position of the individual was determined by his membership in a clan; individual rights and duties were wholly derivative; they were referable to the kinship. Any one who stands outside the clan, for instance a foreigner, had neither rights nor protection.[71]

III. The Search for Subjective Postulates

During the reign of Henry I, we notice a formless struggle to sustain liability on something more substantial than the physical appearances of injury or conduct. The cultural stage of the people was beginning to open the unknown regions of significant subjective concepts not easily and immediately derivable from the materialistic evidences of an undesirable consequence. To be sure, the rational foundations of criminal liability were found only after a number of difficult experiments.[72] The development was not conscious and deliberate, nor marked with clear definition of determinants and variables; to borrow the words of Maitland, it was primarily a process of "blundering their way to wisdom."

The ancient law made the first successful attempt when it found a sharp contrast between absolute liability and intentional realization of harm. To the medieval eye, absolute liability for all visible injuries dawned as an unsatisfactory and harsh archaism. On the other hand, to impose liability

70. Id. at 47.
71. Id. at 31-35.
72. 2 Pollock & Maitland 475.

only for harms intentionally realized seemed to them extremely revolutionary, if not limited. That this contrast would be stumbled upon in the medieval ages is explained by the theoretical structure of intention. In criminal law theory, intention admits a more reasonably definite and easily formulated theoretical articulation than other mental states. The impact of its qualities is unequivocal from the material elements of wrong. The elucidation of intention, however, was not conscious, and often we find it vague and confused. Still, liability was not grounded on intention alone. However, we can understand this hesitation of the ancient law if we note that even modern Anglo-American criminal law does not refer its scheme of criminal liability exclusively to intention. Negligent offenses and a number of variations of the old doctrine of *versari in re illicita* illustrate liability for unintended harms in modern law. Further, the ancient doomsmen did not possess the elaborate machinery of punishment available to the courts today. As Maitland pointed out, either "the doomsmen of old days must exact the *wer* or let the slayer go quit."[73] It would have appeared to his obscure feeling for logic fallacious to impose a diminished *wer* in cases of mitigated forms of culpability.[74] Nevertheless, this period saw the emergence of a new justification for holding a man liable for his wrong. Mental elements were examined to create a possible ethical basis of liability. At this time, for instance, the *Leges Henrici* introduced to Enlish law the maxim that puzzles modern criminal law scholars: "*reum non facit nisi mens rea.*"[75]

The forces that stimulated the exploration of a new basis of liability were numerous. There was a remarkable rise of the royal justice in the king's peace, which resulted in the serious and more or less systematic consideration of offenses. This was accompanied by the gradual development of a more solid and precise organization of the political machinery. Besides profits to the crown due to corruption of blood and forfeiture of property when a felony is committed, the crown found it really necessary to intervene for the preservation of the king's peace. The coercive sanction of criminal law was perceived as an appropriate instrument of effective regulation of the affairs of the kingdom. The number of unemendable offenses was appreciably increased.[76]

The attention directed to the investigation of the mind and the ethical implications of these elements in crime, however, is especially attributable

73. Ibid.

74. Ibid.

75. 2 Pollock & Maitland 476; See Lévitt, The Origin of the Doctrine of Mens Rea, 17 Ill. L. Rev. 117 (1922).

76. 2 Pollock & Maitland 460-62; 2 Holdsworth 47-50.

to the influence of the Christian church.[77] We see that the Christian church, even before the Norman conquest, had been urging that the objective rules of liability which formed the Anglo-Saxon law of crime and tort ought to be modified in accordance with the subtler conception of moral culpability.[78] The church's conception of sin seems to have provided the foundation of this novel experiment on liability. The point of departure of the Christian religion was the existence of a creative element in the human mind. Sin evaluates the purposive functioning of this element; it is therefore a moral concept definable in reference to the activity of the relevant mental state. The sanctions following sin assume a personal moral responsibility over the human conduct. These were embodied in the ecclesiastical laws and poenitentiaries of the church, and the legal minds from Henry I's reign found them ready sources of guidance in the development of criminal law. In some cases, the medieval mind was inclined to exaggerate, and the view seems to be that crime is nothing different from sin. They were so closely drawn to the church, says Holdsworth, that to save the actor's soul, not to prevent any blood feud was their primary concern.[79]

In this period we notice also a remarkable change in the theory of responsibility. It seems inevitable since the theory of responsibility is but a corollary of the ethical basis of liability. We have seen that the collective and joint responsibility of kinship was the fundamental maxim of the principle of vengeance. Now, however, we find the individual demanding a recognition of his personality separate from the group. Man, in other words, was becoming an individual. Again, the dogma of the Christian church led the way for the individualization of personality. Christianity is based on the distinct individuality of man as a basic assumption of responsibility. Salvation according to the Christian dogma is personal; each actor, detached from his family or kin, stands accountable for his conduct. The significance of this idea is the establishment of an individualistic basis of responsibility in crime. The principle of vengeance was irreconcilably opposed to this trend of development; gradually, it became obsolete. Responsibility shifted from kinship to the individual, from group liability to personal liability.[80]

The forceful current of the stream of novel conceptions also washed away many of the harsh archaisms of the ancient law. The lunatic and the infant were already free from criminal liability in the laws of Henry I,

77. See 2 Holdsworth 53; 2 Pollock & Maitland 476; Lévitt, supra note 75.

78. Plucknett, The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey, 3 U. Toronto L.J. 24, 43 (1939).

79. 2 Holdsworth 53.

80. "The sense of individualism in Christianity was opposed to the solidarity and joint responsibility of the kindred." Seebohm, Tribal Custom in Anglo-Saxon Law 384-85 (1911).

though it does not follow that the persons responsible for their custody will entirely escape.[81] But indicative of the experimental stage of this period, the man who has killed another by misadventure or in self-defense is still liable to pay the *wer*. The archaism of this rule seems to have disturbed the thoughts of the author of the *Leges Henrici*.[82] When such an occasion arises it has been noticed that the king's pardon generally intercedes.

Outside England, we find a new force developing at Bologna—the revived Roman law that extinguished forever the national identity of the legal systems of most countries in continental Europe. It was not unknown to England; its influences are still found in many institutions of English law, but was not able to prevail upon the existing common law. The revived Roman law was edging its way into English law during the twelfth and thirteenth centuries. The conduits of this "reception" were legal minds, like Glanville and Bracton, and the Christian church. They began to contrast, as Glanville did, civil and criminal cases, to speak of *dolus* and *culpa*, and to find stress on the psychical elements in crime.[83] Bracton's *De Legibus* brought to England the Roman law principles restated in Azo's *Summa*[84] and Bernardus Papiensis's *Summa Decretalium*.[85] Important in the theory of liability is Bracton's borrowing from Bernard. We must, however, warn that his is not strictly Roman. Bracton's discussion on homicide was transplanted from the doctrines worked out by the great canonist, one of which is the fundamental doctrine adopted by judges in the development of the troublesome constructive malice rule of modern criminal law. It is certain that Roman law has always insisted on the sharp separation of *dolus* and *culpa*. But this absolute reliance upon the assumption of blameworthiness or guilt was obscured by the developments in the middle ages. The church contributed its share to the confusion in formulating the doctrine of *versari in re illicita*.[86] Löffler has convincingly demonstrated that this doctrine was articulated for the first time in Bernard's

81. 2 Holdsworth 53.

82. Leges Regis Henrici Primi § 84, in Thorpe, Ancient Laws and Institutes of England (1840). "Every outlaw is brother to another; and he who answers a fool according to his folly is like unto him." Quoted in 2 Holdsworth 54.

83. 2 Pollock & Maitland 477.

84. See Select Passages From the Works of Maitland, Bracton and Azo (Maitland ed. 1895); Güterbock, Henricus de Bracton (1860); 2 Holdsworth 236-37; Woodbine, The Roman Element in Bracton, 31 Yale L.J. 782 (1922).

85. 2 Pollock & Maitland 477; Mannheim, Mens Rea in German and English Criminal Law, 18 J. Comp. Leg. & Int'l L. 78 (3d ser. 1936).

86. For details, see Löffler, Schuldformen des Strafrechts 136-42 (1895); von Bar, Gesetz und Schuld im Strafrecht 277 (1907); Mezger, Strafrecht, ein Lehrbuch 262 (1949).

Summa which appeared between 1191 and 1198.[87] The idea of this doctrine is that liability does not only extend to the classical guilt in the forms of *dolus* and *culpa* of Roman law, but that liability may be found for consequences which are accidentally realized as a consequence of a prohibited conduct. This notion was related to the principle of the church in cases of religious irregularity that the unworthy should be excluded from the exercise of ecclesiastical functions.[88] The ethical standard of the church was high; it demanded absolute moral innocence so that responsibility over the injury should not be traced to any wrongful conduct of the actor. If a man accidentally causes death because of a prohibited act, however remote from the death, the actor is liable for the death. *"Versanti in re illicita imputantur omnia quae sequuntur ex delicto."* From Bracton, English law found this doctrine useful to impose liability upon persons not totally free from contributing causal elements in the realization of the injury. It was so useful that it is now so firmly established a principle in the common law that attempts to abolish it have seen great difficulties.[89]

87. Löffler, Schuldformen des Strafrechts 138-42 (1895). Norval Morris says this principle is derived from Roman law, but he cites no authority. Morris, The Felon's Murder Responsibility for the Lethal Acts of Others, 105 U. Pa. L. Rev. 50, 58 n.43 (1956). No evidence supports this assertion. Morris must have been misled by the Latin form of this principle.

88. Mezger, Strafrecht; ein Lehrbuch 262 n.18 (1949).

89. The English Homicide Act of 1957, 5 & 6 Eliz. 2, c. II, §§ 1, 2, might convince others to abolish the felony-murder rule. The purpose of the Homicide Act to abolish the constructive-malice rule, however, has been, to a great degree, frustrated by the House of Lords in construing § 1 of the act. Director of Public Prosecutions v. Smith, [1960] 3 All E.R. 161. Section 1 requires "malice aforethought (express or implied)" in murder. The defendant in this case, while driving a car loaded with stolen goods, was stopped by the deceased, a constable. The deceased noticed the goods, and asked the defendant to draw into his near side. Defendant, in an attempt to escape from the constable, accelerated his car along the street. The deceased, however, hung on the car. Smith attempted to shake him off, and after a distance, the deceased was thrown off the car, and was run over by another car coming from the opposite direction. The defendant was charged of capital murder. The Lords, through the Lord Chancellor, Viscount Kilmuir, admitted there was no "express malice," but conviction for murder was sustained on the basis of "implied malice." The Lords argued that malice could be found by using the test provided by Holmes. Holmes believes that intention is an objective concept and means foresight of the consequence ascertained from the viewpoint of a "reasonable man." Holmes, The Common Law 53-54 (1949). In this case "a reasonable man" could have foreseen the consequence of a grievous bodily harm upon the deceased when he was shaken off the car, though Smith himself could not have foreseen it.

The area of malice as understood by Holmes and the House of Lords is more limited than the area of constructive malice. However, the effect of Smith is to restore the constructive-malice rule in a signficant area where ordinarily negligence has been found. For criticism of Smith, see Binavince, The Theory of Negligent Offenses in Anglo-American Criminal Law, 38 Phil. L.J. 428, 469-72 (1963); Parker, The True Meaning of D.P.P. v. Smith?, 59 L.

In the succeeding centuries, however, the influence of Roman and canon law ebbed sharply. After the thirteenth century, they ceased to exercise appreciable influence on the development of English law.[90] The work of Bracton, after various peaks, waned in popularity in about 1350, not to be rediscovered again until 1569.[91] But we do not need to go into the reasons that made the common law able to resist the incursions of Roman law. We need only mention that as a result of this development, the English lawyers were thrown back upon themselves to work out doctrines and principles of criminal law. Their work became also especially difficult because responsive concepts appeared necessary to accommodate the complexities of a rapidly developing society.[92]

During the reign of Edward I, however, some general and rational principles of criminal law were already authoritatively established. It was recognized that personal accountability is an essential presupposition of criminal liability. For example, age was considered an element of personal responsibility, and a child of tender age who committed a crime was granted the benefit of excuse.[93] We have seen that later a child under seven cannot be guilty of a felony, but we find in the *Register of Writs* that at an earlier time a pardon was granted to a child under the age of seven.[94] It was also laid down that insanity at the commission of the offense is a valid defense.[95] During the reign of Edward III the external circumstances that affect the freedom of determination of the actor's conduct were recognized as a basis for further distinctions. If the actor is denied the freedom of determination, he is sometimes granted the benefit of excuse. Thus, one committing offenses under duress in time of war or rebellion was exculpated.[96] We can also find in the *Year Books* of the regnal years of Edward IV and Henry VII that a person can establish self-defense or misadventure to escape liability for a felony, although he might be liable to a civil action of trespass.[97]

Soc. Gasette 149 (1962); Travers & Morris, Imputed Intent in Murder or Smith v. Smyth, 35 Austl. L.J. 154 (1961); Williams, Constructive Malice Revived, 23 Modern L. Rev. 605 (1960).

Through the influence of natural law in the codifications in Europe, the principle of guilt as a basis of liability was firmly established and in no time the doctrine of versari in re illicita which spread during the middle ages was gradually abandoned.

90. 2 Holdsworth 359, 452; 3 Holdsworth 371.

91. Plucknett, A Concise History of the Common Law 263 (5th ed. 1956).

92. 3 Holdsworth 371.

93. 1 Hale, Pleas of the Crown 20-29 (1st Am. ed. 1847).

94. 2 Holdsworth 358 n.8; 3 Holdsworth 372.

95. 3 Holdsworth 372.

96. 1 Hale, op. cit. supra note 93, at 49.

97. 3 Holdsworth 313.

IV. The Emergence of Ethical *Mens Rea*

The trend of the preceding period was leading to a higher sophistication in the analysis of crime, and the evaluation of subjective attitudes was the point of departure. The repudiation by society of an offense was becoming identified with the concept of punishment; a crime was more or less regarded as an embodiment of a challenge to the values accommodated by a more or less integrated society. The disvalue element of a crime was moving gradually from the visible causation of a material harm or the execution of an outward behaviour into the ethical significance of the conduct. Investigations of the psychological operations of the mind and its limitation were unconsciously attempted. The more obvious limitations upon free responsibility such as youth, insanity, coercion upon the wife by the husband and like defenses were recognized.[98]

An obvious defiance of social values is embodied in the "intent" to realize an undesirable consequence. We found that this concept is relatively easy to ascertain because of its active and positive relation with the harm. Whereas a sharp contrast between absolute liability and liability founded on intentional realization of harm was attempted in the earlier period, the construction given now was that the essence of offenses is the "intent with which the act was done." The judges were even inclined to be absurd, and they usually went far in considering the "intent" for the deed. They punished the "intent" though the act was uncompleted.[99] This doctrine was, of course, radical and even dangerous, but it had a strong appeal at a time when legislation to punish attempt was still in the future.[100] However, they were not too eager to abandon their old doctrines to which they had become sentimentally attached. This principle was limited, therefore, to treason; in all other cases, a completed conduct was required. Coke in his discourses on treason shows that compassing and imagining the king's death was penalized, and he refers to the two cases abstracted by Fitzherbert.[101] As a negative reaction to the dangers implied in this rule at the rise of greater tolerance in the realm of thought, English law adopted strict probative requirements in the prosecution of treason.

This modest innovation, however, the moment it became accepted, provided a foothold for wider extension of the doctrine; it focused the important role of intention in the determination of a felony. In 1466, for in-

98. 3 Holdsworth 373.

99. See 2 Stephen, The History of the Criminal Law of England 222 n.1 (1883) (quoting Fitzherbert, Corone 383 (15 Edw. II 1322)); see also cases cited in 3 Holdsworth 373 n.4.

100. 3 Holdsworth 372-73.

101. Coke, Third Institute 5 (1797); 3 Holdsworth 373. These cases are reproduced in 2 Stephen, op. cit. supra note 99, at 222 n.1.

stance, a case[102] of trespass arose where the defendant asked for absolution from liability because the damage alleged came about against his will. Defendant owned an adjoining land with a thorn hedge. In cutting the thorns, some fell upon the plaintiff's land against his will (*ipso invito*). He entered upon plaintiff's land to take them, and trespass was charged. Some interesting exchanges of counsel were recorded.

Catesby, for the defendant, argued:

> And, sir, I put a case that I am cutting my trees, and the boughs fall upon a man and kill him; in this case I shall not be attainted as of felony, for my cutting was lawful, and the falling upon the man was against my will, and no more here, *etc.*

To this Fairfax, for the plaintiff, answered:

> It seems to me just the other way; and I say that there is a diversity between an act resulting in a felony and one resulting in trespass, for in the case put by Catesby there was no felony, for felony is of malice prepense, and when it was against his will, it was not *animo felonico*, *etc.*; but if one is cutting trees, and the boughs fall on a man and wound him, in this case he shall have an action of trespass, *etc.*; and, also, sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito*, it is no felony, as has been said, *etc.*; but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was lawful, *etc.*, and the wrong which the other received was against his will, *etc.* and so here, *etc.*[103]

Some forty years later, we find, in the *Year Books*, Judge Rede using in a trespass case[104] the arguments of Fairfax. He affirms that in trespass "the intent cannot be construed; but in felony it shall be." Pursuing analogies, he referred to a man who shoots at butts and kills a man, or of a tiler on a house killing a man unwittingly with a stone. In both cases, Rede believes, it is not felony. However, he was careful to add that "when a man shoots at the butts and wounds a man, though it is against his will, he shall be called a trespasser against his intent."[105] Criminal wrong is being gradually isolated from civil wrong, and "intention" was the criterion adopted.[106] Sir Thomas Raymond, almost repeating the thoughts of Littleton, indicates to us the rationale of this rule: "In all civil acts the law

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102. Y.B. Mich. 6 Edw. 4, f. 7, pl. 17 (1466).

103. Sayre, Mens Rea, 45 Harv. L. Rev. 974, 990 (1932). Judgment was for the plaintiff. Ibid. See also Holmes, op. cit. supra note 89, at 85-87.

104. Y.B. Trin. 21 Hen. 8, f. 27, pl. 5 (1506).

105. Ibid. See discussion of this case and other later shooting cases in Holmes, op. cit. supra note 89, at 87-88.

106. For larceny, see the famous Carrier's Case, Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5 (1473); for mayhem, Y.B. Hil. 13 Hen. 7, f. 14, pl. 5 (1498), translated in Sayre, Cases on Criminal Law 925, 265 respectively (1927); see also Sayre, supra note 103, at 990-91.

doth not so much regard the intent of the actor, as the loss and damage of the party suffering."[107]

After these statements in the *Year Book* generalizing "evil intent" as the distinctive element of felony, to support it became commonplace in criminal law. It was accepted and has found little refinement in the legal treatises of Staunford,[108] Coke,[109] Hale[110] and Hawkins.[111] By the second half of the seventeenth century, it was already universally accepted in England that this so-called "evil intent" was a necessary element of an offense.[112]

The position of negligence, however, was wholly different. As a mental attitude, it does not possess positive evidences of its nature; the untrained mind would not find the objective elements of a crime useful in the articulation of some general propositions. A conception of some standard of care must be found, and this is primarily an approximation of an ideal behaviour in a particular situation. To construct this ideal and abstract concept requires a sensitive perception and evaluation of the attendant circumstances; for example, the personal qualifications of the actor, the time and place of the occurrence, and the like. Hence, the standard of care, and necessarily negligence, as an omission of the standard of care, are determined by factual variables, and thus limited to the attendant circumstances of a particular conduct. For this reason, a strong barrier stood in the way to generalize negligence. The English lawyers and judges at this time were unsure, and there was a considerable hesitation to consider any attitude short of "intent" as sufficient to qualify a conduct an offense.

During the Anglo-Saxon era, when no defensible theory of liability existed, it was really purposeless to distinguish intention and negligence. In either case, and even in misadventure, the liability was the same when a corporeal injury existed; and we saw that no concept of negligence and intention was known. We have seen, however, that Glanville attempted to contrast *dolus* and *culpa*. Apparently, not much of his discussion was useful as a basis for the development of the theory of negligence. After all, his account of the criminal law is contained in few pages, and treats almost exclusively matters of procedure.[113] Passing to the time of Bracton, there was little to see in the treatment of negligent liability, at least, in the royal

107. Bessey v. Olliot & Lambert, T. Raym. 467 (1682), quoted in Holmes, op. cit. supra note 89, at 88.

108. Staunford, Pleas of the Crown 27 (1557).

109. Coke, op. cit. supra note 101, at 45-47, 69, 161.

110. 1 Hale, op. cit. supra note 93, at 425-26, 532.

111. Hawkins, Pleas of the Crown 72 (8th ed. 1824).

112. Sayre, supra note 103, at 993.

113. 2 Stephen, op. cit. supra note 99, at 197.

courts.[114] Even in the lords' courts, except for some references to straying cattle, goring oxen, biting dogs and fire, there is no encouraging evidence of a medieval law of negligence.[115] As Maitland remarks, "Hardly a germ is to be found of any idea which will answer to the Roman *culpa* or become our modern negligence."[116] In torts, not until the nineteenth century is there a principle comparable to the modern tort negligence found in the books.[117] "This may seem a breathless course; but till then the history of negligence is a skein of threads, most of which are fairly distinct, and no matter where we cut the skein we shall get little more than a bundle of frayed ends."[118] In continental Europe, however, the *Sachsenspiegel* seems to indicate that in the thirteenth century some form of doctrine of negligence was already conceived. Although intentional conducts, as in England at this time, were within the coverage of criminal law, the law of the middle ages in the continent distinguishes misadventure and negligence in tortious behaviours (*unerlaubte Handlungen*). The law in Saxony according to the *Sachsenspiegel* was that "one should pay the damage which arose to other persons because of his negligence [*Fahrlässigkeit*], as when the damage come about from fire or well which he failed to fence a knee above the ground, or when he shoots or throws at a man or cattle, when he aims at a bird."[119]

In 1681, the reluctance to hold negligence, however gross, was still entertained. In *Lambert v. Bessey*,[120] a trespass for false imprisonment, the defendant justified on a bad writ. It was, however, held that:

> In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering . . . . And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum, nisi mens sit rea*.[121]

If death results in a conduct by negligence, it was a misadventure or accident in which pardon was of due course, and no criminal liability could arise. To Hale, this theory of criminal liability revolves upon the "consent

114. For a detailed study, see Winfield, The History of Negligence in the Law of Torts, 42 L.Q. Rev. 184 (1926). Winfield points out that of the 256 select civil cases between 1200-1203 in the Selden Society collection, no principle similar to negligence can be found. Id. at 184 n.3.

115. 2 Pollock & Maitland 527-28.

116. Id. at 528.

117. Winfield, supra note 114, at 185.

118. Ibid.

119. Sachsenspiegel, Landrecht 38 (Eckhardt ed. 1955). (Writer's transl.)

120. T. Raym. 421, 83 Eng. Rep. 220 (K.B. 1681). This is abstracted in Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L. Rev. 315, Appendix at 458 (1894). He also abstracted other cases on the same line of thought. Id. at 456-64. See generally 3 Holdsworth 375-79.

121. T. Raym. at 422-23, 83 Eng. Rep. at 221.

of the will" because it is the will which renders human action commendable or culpable.[122] If there is no will to commit an offense, Hale believes, "there can be no transgression, or just reason to incur the penalty."[123] Using the same reasoning, he developed a limitation upon the imposition of the death penalty:

> [I]f the act, that is committed, be simply casual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were punishable with death, is not by the laws of England to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act, and event, to make the offense capital.[124]

Starting from one extreme—liability for all consequences causally realized—the English law leaped to the other extreme—liability for consequences intentionally brought about. Undesirable consequences realized through other states of mind were excluded. A large area of culpable wrongs were therefore excluded from the more effective and swift sanction of penalty. The English law has posited misadventure as the antithesis of intention, but misadventure was too broadly construed. Gradually, however, the legal minds realized that a limitation of "misadventure" must be invented. There were two available techniques to restrict "misadventure": either defining "intention" broadly, so that some of the culpable wrongs within "misadventure" could be qualified as intentionally committed; or develop a concept which, although not completely satisfying the restrictive meaning of intention, must, somehow, entail the consequence of liability arising from a felony. The former technique was no longer possible to follow; common law was well committed to the restrictive doctrine of intention and it was difficult to overthrow all the cases abruptly. The second technique offered more possibilities, and apparently it has the support of Bracton. With it, it was possible to apply the doctrine of *versari in re illicita* and the articulation of a concept of negligence. Coke's thinking has taken the cue. He was sure about his position when he developed the constructive malice doctrine, but he had merely a vague insight of the possibility of articulating negligence. He probably did not clearly see the different implications of the two concepts. He nevertheless contrasted misadventure with intent. "Homicide by misadventure," says Coke, "is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a man's death."[125] If the act is unlawful, Coke will hold the actor liable for murder, the factual absence of intent being irrelevant.[126] Coke did not see

122. 1 Hale, op. cit. supra note 93, at 14-15.

123. Id. at 15.

124. Id. at 38.

125. Coke, op. cit. supra note 101, at 56.

126. Ibid. "If the act, be unlawful, it is murder. As if A, meaning to steale a Deer in the Park of B, shooteth at the Deer, and by the glance of the arrow killeth a boy, that is hid-

that in negligence the central notion is the standard of care deduced from the circumstances of each case. If such circumstances are present which would merely delimit the ideal behaviour, Coke would have immediately found the application of the constructive malice doctrine. In Coke's example, that the man knows that many people came in the street from a sermon, does not indicate anything relevant. This knowledge merely forms the basis of the resolution of his action. We cannot derive a conclusion of any intent or negligence. Coke elaborates the example by supposing the man to have thrown a stone over the wall and someone is killed. We still cannot conclude negligence or intention even with this additional fact. We must find the content of the actor's resolution and the causal potentiality of the actor's conduct. Coke, however, with this additional fact, arrives at a vague and confused but valid insight. Somehow he believes that the content of the actor's resolution is relevant, although his conclusion to hold it murder is harsh. If the man "[intends] only to feare them, or to give them a light hurt" Coke calls it murder, "for he had an ill intent, though that in-

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den in a bush: this is murder, for that the act was unlawfull, although A had no intent to hurt the boy, nor knew not of him. But if B the owner of the Park had shot at his own Deer, and without any ill intent had killed the Boy by the glance of his arrow, this had been Homicide by misadventure, and no felony.

"So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is per infortunium: for it was not unlawfull to shoot at the wilde fowle: but if he had shot at a Cock or Hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull." Stephen says that "a more disorderly mind than Coke's and one less gifted with the power of analysing common words it would be impossible to find." 2 Stephen, op. cit. supra note 99, at 206. However, he also says that this "astonishing doctrine" as it has been modified by Foster who limits the unlawful act amounting to felony "has been repeated so often that I amongst others have not only accepted it, though with regret, but have acted upon it." 3 id. at 57. Stephen doubts the authorities given by Coke, including that of Bracton, who, of course, did not consider it murder as Coke does. Id. at 57-58.

Hobbes criticizes Coke on this point: "Philosopher: This is not so distinguished by any statute, but is the common-law only of Sir Edward Coke. I believe not a word of it. If a boy be robbing an appletree, and falleth thence upon a man that stands under it and breaks his neck, but by the same chance saveth his own life, Sir Edward Coke, it seems, will have him hanged for it, as if he had fallen of prepensed malice. All that can be called crime in this business is but a simple trespass, to the damage perhaps of sixpence or a shilling. I confess the trespass was an offence against the law, but the falling was none, nor was it by the trespass but by the falling that the man was slain; and as he ought to be quit of the killing, so he ought to make restitution for the trespass. But I believe the cause of Sir Edward Coke's mistake was his not well understanding of Bracton, whom he cites in the margin." Hobbes, A Dialogue between a Philosopher and a Student of the Common Laws of England, in 6 The English Works of Thomas Hobbes 87 (Molesworth ed. 1840). (Emphasis omitted.)

tent extended not to death, and though he knew not the party slaine."[127] In his rationale of the forfeiture following a misadventure, he seems to suggest already the actor's legal duty to direct his conduct in a way so that unintended harms will not be realized:

> For the killing of any by misadventure, or by chance, albeit it be not felony, *quia voluntas in delictis, non exitus spectator*; yet he shall forfeit therefore all his goods and chattels, to the intent that men should be wary so to direct their actions, as they tend not to the effusion of man's blood.[128]

The necessity to fashion some form of limitation upon misadventure independent of the constructive malice rule came directly in question in the *Hull* case of 1664.[129] The defendant, indicted for murder, was a worker building with others a house which stood about thirty feet from the highway. He was sent to bring down a piece of timber from the second floor. He shouted, "Stand clear," and threw over the timber which struck and killed a co-worker. This was held misadventure, and ambiguous statements generalizing the standard care in negligent behaviours were made. It was pointed out that because the workman did what was usual for workmen to do, namely, to shout "Stand clear," he cannot be held for a felony. It was also felt that this right and usual conduct is not an absolute concept but a concept definable from the varying circumstances of each situation. It was remarked that although the conduct of the defendant was satisfactory in that particular place, it might be a basis of liability if it were done in London, so that in spite of the warning, the act would have been manslaughter.

Hale apparently picked up the suggestion in this case. In discussing a homicide *per infortunium*, he summarizes the doctrines to which we have already made reference. He mentions the hypothetical situation of a carpenter or mason in a building letting fall a piece of timber or stone, and killing another. He finds a homicide *per infortunium*.[130] He was, however, quick to qualify that if the carpenter or mason "voluntarily let it fall, whereby it kills another, if he gives no due warning to those under, it will be at least manslaughter; *quia debitam diligentiam non adhibuit*."[131]

But it was only in the work of Foster that some form of rational doctrine

127. Coke, op. cit. supra note 101, at 56.

128. Ibid.

129. Kelyng 40, 84 Eng. Rep. 1072 (1664). For comments on this case, see Moreland, Rationale of Criminal Negligence 4 (1944); Hall, General Principles of Criminal Law 122-23 (2d ed. 1960); Davis, The Development of Negligence as a Basis for Liability in Criminal Homicide Cases, 26 Ky. L.J. 209, 216 (1938).

130. 1 Hale, op. cit. supra note 93, at 56.

131. Ibid.

of negligence in criminal liability is achieved in English law.[132] Foster for the first time saw the significance of the standard of care or diligence in the theory of negligence. He definitely characterized the central idea of negligence as the "lack of caution or due care to prevent danger."[133] He did not hastily conclude, as Coke did, that a death becomes murder if the actor knows circumstances which would forewarn him of the possible bringing about of harm. Rather, he attempted to distinguish three situations, all based on different mental attitudes, which are, however, not absolutely without obscurity. He puts up the example of a man driving a cart or carriage who happens to kill another. He urges that murder is committed if the man "saw or had timely notice of the mischief likely to ensue and yet drove on," because here "it was wilfully done."[134] One degree removed from murder because of "wilfullness" is manslaughter due to negligence. This would be the case "If he might have seen the danger, but did not look before him" because the facts show that he acted with "want of circumspection."[135] In other words, the actor failed to observe due care, and this omission of the "due care" is to be imputed to the driver. However, if the accident happened in such circumstances that no want of due care will be imputed to the driver, then Foster thinks "it will be accidental death, and the driver will be excused."[136] Foster, therefore, clearly perceived that the distinction between negligence and misadventure can be found in the actor's relation to the due care.[137] Negligence is simply omission of the due care, whereas accident presupposes observance of the required care. Foster, however, did not elaborate how "due care" should be defined or formulated.

Upon the establishment of negligence as a psychical basis of liability, the mind of man became totally open to conceptual analysis.[138] Intention

132. Foster, Crown Law (2d ed. 1791).

133. Id. at 258.

134. Id. at 263.

135. Ibid.

136. Ibid.

137. Foster made interesting observations on Hull especially the direction that if the conduct in Hull were done in London, it would have been a manslaughter in spite of the warning. Ibid.

138. In Blackstone, Foster's discourses were merely repeated and amplified: "[W]hen a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all . . . ." 4 Blackstone, Commentaries *192.

and negligence are the foundations of liability based on *mens rea* as an ethical concept. It presupposes blameworthiness in the realization of the harmful consequence. The actor is blameworthy because he intentionally or negligently brought about the harmful consequence. In 1891, Lord Justice Bowen boldly swept away the timid abnegation of the earlier courts to investigate the human mind, and found all the self-imposed helplessness to visit the operations of the mind erroneous. In sharp contrast to the words of Chief Justice Brian, three centuries earlier, he said:

> So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud.[139]

V. The Trend Toward Strict Liability

The complexity of the social structure that began to emerge since the Industrial Revolution stimulated a new line of analysis in criminal law and its philosophy. This was a development that found difficult and slow, but voluminous, expression from the second half of the last century. The machine brought with it enigmatic phenomena and processes that obscured the causal relation of human conduct and harm. Whereas in simple society the immediate position of conduct and harm was consistent with the ascertainment of the hypothesis of liability justified on "fault," proof of "fault" became difficult since the coming of the machine. The conduct was suddenly removed further and further from the harm. The area of "guilty knowledge" as a reference of the concept of fault turned nebulous; its boundaries diffused among facts or circumstances that cannot be evaluated otherwise than neutral. The dilemma that compelled the primitive mind to surround itself with myths and symbols was slowly driving the modern mind to invent fictitious doctrines and presumptions to facilitate proof or which would ultimately abolish the requirements of proof.

In another sphere of social history, the individualism that prevailed in criminal law before and during the nineteenth century was challenged seriously by a collectivistic or socialistic philosophy.[140] The earlier premise in the analysis of crime was the security of individual personality; to insulate him from the injustice of the social order was its fundamental purpose. Security was assured while the imposition of penal sanction is conditioned upon personal guilt. On the other hand, a more extensive and effective regulation of social life was felt necessary as a result of the developing social order. The security of social interest was gradually gaining emphasis over the protection of individual freedom. The machinery of criminal

139. Angus v. Clifford, [1891] 2 Ch. 449, 471.

140. See Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 67-70 (1933).

law was reviewed to accommodate the new thought. A criminal law whose fundamental presupposition is personal guilt cannot be appropriate to realize the petty regulations relating to traffic, construction, sanitation, foods, drinks and the like. "What is badly needed," Sayre noted, "is some form of administrative control which will prove quick, objective and comprehensive,"[141] a technique which should be "unrelated to questions of personal guilt."[142] It is urged that to devise this system of criminal law, the only reliable indication of a wrong should be the realization of a harmful conduct or consequence. The psychical foundation of the actor's behaviour is unimportant and should be disregarded.

No doubt this abrupt change of fundamental assumption was influenced by utilitarianism which became popular amongst jurists when analytical jurisprudence was claiming success.[143] Typical along this line of thought is Holmes' theory of objective liability.[144] Holmes teaches that "Public policy sacrifices the individual to the general good . . . and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."[145] Holmes identifies penalty with pain and its only purpose is to give to the actor a new motive for not doing the punishable act. If the actor persists on doing the act, the law has to inflict the pain in order to be believed.[146] Utilitarian ethics adopts a strongly objective premise in the evaluation of human conduct. To postulate it as the foundation of criminal liability leads to the articulation of crime in terms of its external circumstances; the undesirable consequence is the determinative element in the ethical notion of crime. Holmes therefore urges that the law merely treats the individual as a means to an end, and uses him merely as a tool to increase the general welfare at his own expense.[147] The general welfare is defined in terms of the outward order, the absence of an open and observable injury to the material world. The reliable indications of the disturbance of the general welfare are the objective circumstances. To achieve the end of criminal law, all that it demands is external conformity to its commands.

141. Id. at 69.

142. Id. at 67.

143. As Pound noted utilitarianism, although a theory of ethics, is in reality a theory of applied ethics. 1 Pound, Jurisprudence 79 (1959). Austin, the leader of the analytical school, was a zealous disciple of Bentham, the forerunner of the analytical school and leader of utilitarianism. Rudolf von Jhering, the German imperativist, was the founder of social utilitarianism.

144. For discussion of Holmes' theory of objective liability, see Hall, General Principles of Criminal Law 146-58 (2d ed. 1960); Binavince, The Theory of Negligent Offenses in Anglo-American Criminal Law, 38 Phil. L.J. 428, 450-54 (1963).

145. Holmes, The Common Law 48-49 (1949); see also Holmes-Laski Letters 806 (Howe ed. 1953).

146. Holmes, op. cit. supra note 145, at 46.

147. Id. 46-47.

"For the most part," says Holmes, "the purpose of the criminal law is only to induce external conformity to rule. All law is directed to conditions of things manifest to the senses . . . ; its object is . . . an external result."[148] In robbery, for example, the purpose of the law is to put a stop to "actual physical taking and keeping of other men's goods," and in murder, "the actual poisoning, shooting, stabbing and otherwise putting to death of other men."[149] If these harms are not done, the law forbidding them is equally satisfied, whatever the motive. Conversely, if these are done, the law prohibiting them is transgressed regardless of guilt. In Holmes's theory, the element of *mens rea* is totally excluded. Indeed, all references to the mind are abandoned. In the theory of objective liability, the state of mind is "wholly unnecessary, and all reference to the state of his [actor's] consciousness is misleading . . . ."[150]

Further, the traditional concepts of criminal law such as "moral culpability," "mens rea," "fault," "intention" and "free will" were under violent attack when the empirical method of natural science was transplanted in criminal law. Darwin's study of man's origin disclosed that man is a part of the natural universe to be studied, not as a spiritual or elevated being, but as any other natural object. A new field of discipline emerged—the science of criminology—which would undertake to find the causality of criminality. Lombroso applied this method when he maintained that the cause of crime might be traced to the retarded physical development of the human specie; he began measuring the head, the ears and other physical features of man. The *Scuola Positiva* openly proposed the abandonment of the traditional concepts of criminal law. Ferri, for instance, rejected the distinction of civil and criminal law, a distinction which is a corollary of the traditional thought in legal liability.[151] There was also a remarkable activity in the law of tort to limit the doctrine of "no liability without fault," and the doctrine of strict liability was urged to be accommodated.[152]

The courts led in the recognition of the theory of strict liability in criminal law.[153] Before the middle of the nineteenth century, there was still a lack of unequivocal evidence that the courts would not strictly adhere to

148. Id. at 49.

149. Ibid.

150. Id. at 75.

151. See Ferri, Criminal Sociology 413 (1917).

152. See Ehrenzweig, Negligence Without Fault (1951); Hall, General Principles of Criminal Law 331 (2d ed. 1960); McNiece & Thornton, Is the Law of Negligence Obsolete?, 26 St. John's L. Rev. 255 (1952); Takayanagi, Liability Without Fault in the Modern Civil and Common Law (pts. 1-2), 16 Ill. L. Rev. 163, 268 (1921), (pts. 3-4), 17 Ill. L. Rev. 187, 416 (1922-1923).

153. Legislative intervention is relatively recent, and was mainly directed to the ordering of the modern economy.

the rule that even in minor offenses *mens rea* was a necessary element of liability.[154] In 1846, however, *Regina v. Woodrow*[155] signalled the recognition of the doctrine of strict liability in England. A tobacco dealer was charged with having in his possession adulterated tobacco which he purchased as unadulterated. Although he did not know, nor had reason to suspect the tobacco was adulterated, the defendant was held liable. To Chief Baron Pollock, the fact that the defendant knew he was in possession of the tobacco was sufficient. He considers it not necessary that the defendant knows the tobacco to be adulterated.[156] It being remarked that to gain the knowledge of adulteration it was necessary to make a "nice chemical analysis," he retorted that "you must get someone to make that nice chemical analysis."[157] It should be noted that the reasoning was to rebut the defense of absence of guilty knowledge, and the effects of these statements was to make possession alone determinative of liability. Baron Parke admits that the logical consequence of this doctrine "may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received . . . ." However, Baron Parke seized the difficulty of proof of "guilty knowledge" to justify liability in such cases. He argued that "the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so."[158] Some twenty years later, this ruling was reiterated and further elaborated in a nuisance case.[159] An additional argument was advanced to support the doctrine. It was observed that although the nature of the proceedings in which strict liability could be imposed is crim-

154. Sayre, supra note 140, at 56; Harno, Some Significant Developments in Criminal Law and Procedure in the Last Century, 42 J. Crim. L., C. & P.S. 427, 430-31 (1951). A similar problem has been encountered in Germany in the so-called Ordnungsstrafrecht which includes administrative criminal law (Verwaltungsstrafrecht), commercial criminal law (Wirtschaftsstrafrecht), and police regulations. In general, the blameworthiness of conduct is required as an element of the offense. It has been said that these behaviours violate merely the imperative determination of the norm (Bestimmungsnorm) not the evaluation of the norm directed to the consequence (Bewertungsnorm). The German system is actually explaining the absence of a harm though there is guilt and therefore liability. The problem in Anglo-American criminal law is the determination of liability in the absence of guilt. For a discussion of the German position, see Goldschmidt, Das Verwaltungsstrafrecht (1902); Kaufmann, Das Unrechtsbewusstsein 183-96 (1949); E. Schmidt, Probleme des Wirtschaftsstrafrechts, Süddeutsche Juristen Zeitung 225 (1948); Erik Wolf, Die Stellung der Verwaltungsdelikte im Strefrechtssystem, 2 Festgabe für Reinhard von Frank 516 (1930).

155. 15 M. & W. 404, 153 Eng. Rep. 907 (Ex. 1846).

156. Id. at 415, 153 Eng. Rep. at 912.

157. Id. at 413, 153 Eng. Rep. at 911.

158. Id. at 417, 153 Eng. Rep. at 913. Sayre summarizes a number of decisions deviating from this ruling. See Sayre, supra note 140, at 58 n.10.

159. The Queen v. Stephens, [1866] 1 Q.B. 702.

inal, it was only so in form; in substance, however, it is a civil action in which no *mens rea* is required.[160] Other subsequent cases made the doctrine applicable in the construction of statutes regulating foods[161] and traffic.[162] In the United States, Connecticut led in the introduction of the doctrine. Apparently without awareness of the English decision, the court in *Barnes v. State*[163] held that a conviction for the sale of liquor to a common drunkard may be obtained even if the seller did not know that the buyer was a drunkard. The wide acceptance of the doctrine in the United States, however, is attributable to the Massachusetts court. In *Commonwealth v. Farren*,[164] the defendant was convicted under a Massachusetts statute regulating adulterated milk, although he sold the milk without knowing it to be adulterated. The court relied heavily upon the words of the statute to disregard the classical requirements of fault. It argued, along the same line as Baron Parke, that the difficulty of proof of knowledge in this case justifies the conviction. Utilitarian arguments were further used to demonstrate the desirability of holding the defendant "absolutely liable." The interest of the community to be protected from adulterated foods, the court believes, is significant, and to shift the burden of inconvenience to the dealer's shoulder is reasonable.[165] After 1868 the doctrine became well established in other states.[166] From this limited catalogue of offenses, it expanded in the construction of statutes regulating the sale of narcotics, bigamy, adultery, statutory rape, possession or transportation of gambling devices, traffic construction and zoning, and a great miscellany which permits no organized classification.

The Supreme Court has also adopted the theory of strict liability in the construction of federal legislation. The Court believes that the same pressure that compelled the states to adopt legislation without reference to the requirement of guilt has exerted influence upon Congress to adopt legislation, especially in regulating interstate commerce, which must be interpreted to exclude proof of guilt for liability. In passing similiar legislation, Congress must be presumed, according to the Court, to have borrowed the "terms of art" which have been developed by the judicial decisions of the

160. Id. at 708-710 (Mellor, J.).

161. See cases cited in Sayre, supra note 140, at 60 n.18.

162. Id. at 61; see also Edwards, Mens Rea in Statutory Offenses (1955), for an extensive study of the English development.

163. 19 Conn. 397 (1849).

164. 91 Mass. (9 Allen) 489 (1864).

165. See also Commonwealth v. Raymond, 97 Mass. 567 (1867); Commonwealth v. Goodman, 97 Mass. 117 (1867); Commonwealth v. Boynton, 84 Mass. (2 Allen) 160 (1861) (cited by the court in Commonwealth v. Farren, supra note 164).

166. Sayre, supra note 140, at 66.

state courts in interpreting statutes similar to the federal law, together with the "cluster of ideas that were attached to each borrowed word."[167] From Mr. Justice Frankfurter's rationale for the theory of strict liability, utilitarianism seems to be particularly significant in the rapid acceptance of the theory in federal courts:

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.[168]

In this area of criminal law, we may observe that generally the doctrine of *mens rea* was decidedly repudiated, and replaced by the theory of absolute liability.[169] Honest mistake of fact, however reasonable, is not recognized as a defense.[170] However, the interpretation of these statutes has actually proceeded in many, sometimes inconsistent, directions. It has been maintained that each individual offense must be investigated without regard to earlier decisions concerning the same or analogous offense penalized under the same or another statute. Frequently, some courts hold that the legislative prohibition of "doing the act" defined in the statute is "absolute," and the "doing of the act itself" supplies the required *mens rea.* Apparently, the courts are confusing volition as an element of the act isolated from the consequence which it may realize with *mens rea.* This attempt to provide *mens rea* of some kind not related to the harm has been appropriately called nothing but "paying a lipservice" to the principle of *mens rea.*[171] When a voluntary conduct exists, as in *Woodrow*, the courts are quick to say that the *mens rea* requirement is thereby satisfied. In these instances, it seems to be implied that only circumstances which would remove the voluntariness of the conduct, as coercion, necessity and insanity, are available defenses. There are, however, rare cases in which the courts still insist upon the requirement of *mens rea* in the interpretation of these statutes.[172]

Scholars are divided on the issues raised by the theory of strict liability,

167. Morissette v. United States, 342 U.S. 246, 263 (1952).

168. United States v. Dotterweich, 320 U.S. 277, 284-85 (1943).

169. See Stallybrass, The Eclipse of Mens Rea, 52 L.Q. Rev. 60 (1936); Jackson, Absolute Prohibition in Statutory Offences, 6 Cambridge L.J. 83 (1936).

170. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922); Regina v. Tolson, 23 Q.B.D. 168 (1889); Regina v. Prince, [1875] 2 Cr. Cas. Res. 154.

171. Edwards, op. cit. supra note 162, at 244-47.

172. Id. at 248-51.

with the majority rejecting it.[173] The discussion is concentrated on the deterrent effect of punishment in strict liability offenses, an issue which it is not within the purpose of this article to analyze. Two points in this discussion, however, are relevant. First, strict liability, it is said, approximates "civil offense," or "public tort," and as such the penalty is usually fine in minimal amount.[174] The liability, it is argued, is a form of civil liability similar to the liability in public nuisance at common law. If this analogy is granted, no valid generalization and systematization of criminal liability can be formulated, for the position of strict liability confuses the essential difference between criminal and civil sanction—a return to the confusion of the theory of liability of the ancient criminal law. The second argument supports strict liability on the basis of the old distinction between *mala prohibita* and *mala in se*.[175] Blackstone's exposition is often taken as the primary authority. Blackstone distinguishes *mala in se* from *mala prohibita* in that the former are intrinsic wrongs, whereas the latter are simple "disobedience to the supreme power."[176] *Mala prohibita,* the equivalent of strict liability offenses, are offenses without personal guilt. This distinction savors of natural law arguments. The "law of nature" or the "law of conscience" defines *mala in se; mala prohibita,* on the other hand, are declarations of positive law. These statements suggest that criminal law has two distinct sources, and that two ethical postulates, namely, the ethics of conscience and the ethics of positive legislation, are accommodated in the criminal law. The Nuremberg prosecutions notwithstanding, criminal law has only one source; criminal law is only a positive law of crime. To hold otherwise would mean the repudiation of the principle of legality. Within this principle, the common-law criminal law is a positive law, although the conscience of the judges may have been its primary

173. For criticism of the theory see, Hall, General Principles of Criminal Law, ch. X (2d ed. 1960); Williams, Criminal Law 255-61 (2d ed. 1961); Model Penal Code § 2.05, comment 140 (Tent. Draft No. 4, 1955); Sayre, supra note 140, at 55; Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958); Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043 (1958). See the defense of this doctrine by Friedmann, Law in a Changing Society 199 (1959); Wasserstrom, Strict Liability in the Criminal Law, 12 Stan. L. Rev. 73 (1960).

174. See Hall, General Principles of Criminal Law 336-37 (2d ed. 1960); Perkins, Criminal Law 701 (1957); Gausewitz, Criminal Law—Reclassification of Certain Offenses as Civil Instead of Criminal, 12 Wis. L. Rev. 365 (1937); Perkins, The Civil Offense, 100 U. Pa. L. Rev. 832 (1952).

175. Morissette v. United States, 342 U.S. 246 (1952); United States v. Balint, 258 U.S. 250 (1922); The Queen v. Tolson, [1889] 23 Q.B.D. 168; Regina v. Prince, [1875] 2 Cr. Cas. Res. 154; Hall, General Principles of Criminal Law 337-42 (2d ed. 1960); Perkins, Criminal Law 692 (1957).

176. 4 Blackstone, Commentaries **42, 55-58.

inspiration. It is relevant to remark that the failure to comprehend that the common-law criminal law is a positive law and not a "law of conscience" has already misled European criminal-law scholars to claim that the guarantee of the principle of *nulla poena sine lege* does not exist in the common-law criminal law. To insist on the distinction of *mala in se* and *mala prohibita* seems to give credence to this unfounded criticism. The bifurcation of ethics in criminal law is less persuasive. Criminal law embodies the ethical conceptions of the legal order;. a crime is a crime not because it is a wrong to the conscience, but because it is wrong to the legal order. *Mala in se* and *mala prohibita* are, in substance and form, wrongs "to the supreme authority."

VI. Conclusion

The major problem of criminal law theory is the determination of the basic ethical principle in reference to which the fundamental element of crime should be defined. The history of criminal law, like the growth of our moral consciousness, shows two relevant postulates in characterizing crime, either in reference to the external conduct and its material consequence, or the subjective elements that control or direct the conduct. This study reveals the difficult experiments to find a desirable solution, but we have not gone further than moving in a circle. The problem remains real in modern criminal law.

We cannot doubt that the external alterations caused by conduct are essential in our judgment of crime, since it is axiomatic that criminal law is primarily conceived to protect the significant rights of individuals and society. Criminal law is not intended to dictate the purity of our thoughts, but to discourage us from committing a material wrong.[177] The punishment of witchcraft, or the imagining of the king's death as treason reminds us of the tyranny of the days when criminal sanction has visited the inner processes of our thought. Others have further urged the rejection of this principle because to refer the definition of crime exclusively to the innocence of the actor might "encourage ignorance where the law-maker has determined to make men know and obey . . . ."[178] This discomfort is not wholly unjustified. Crime must be something more than a wrong against the conscience, otherwise the purpose of a legal order will be seriously weakened. Imagine, for instance, the shattering effect on the legal order if ignorance of the law were a universal defense, or better still, if a man could

177. Holmes says that the purpose of criminal law "is not to punish sins, but is to prevent certain external results . . . ." Commonwealth v. Kennedy, 170 Mass. 18, 20, 48 N.E. 770 (1897). See also Würtenberger, Die geistige Situation der deutschen Strafrechtswissenschaft 50-51 (2d ed. 1959).

178. Holmes, op. cit. supra note 145, at 48.

defend himself of robbery by alleging that to rob the rich is not in his conscience wrong. On the other hand, we are disturbed by the equally undisputed truth that criminal liability is founded upon personal responsibility for the harm. Responsibility is only real if the basic subjective element of conduct is a fundamental premise of evaluation. We note that to pursue the first principle to its logical extreme would abolish all guarantee of security rooted in the innate feeling of innocence of the individual. Mistake, however honest, would not be a defense. The theory of strict liability and the felony-murder rule convince us that this principle is not desirable.

Max Weber has cogently expressed the issue in this problem in the antithesis of *Gesinnungsethik* (ethics of conscience) and *Verantwortungsethik* (ethics of responsibilty) in law.[179] This issue has been encountered also in moral science,[180] and scholars have searched for a solution from the declaration of the *Ten Commandments* through St. Thomas Aquinas[181] and Kant[182] to Max Scheler[183] and Nicolai Hartmann.[184] It is the same issue that underlies the dispute of criminal law scholars in Germany whether it is the *Erfolgsunwert* (consequence-disvalue) or the *Handlungsunwert* (conduct-disvalue) that is determinative in the *Rechtswidrigkeit* (unlawfulness) of a crime.[185]

Perhaps we have been too busy stressing the independence of these two principles that we are accustomed to making them mutually exclusive.

179. Weber, Politik als Beruf, Gesammelte Schriften 396-450 (1921). The word "Gesinnungsethik" is translated by Kurt Wilk as "ethics of sentiment." Radbruch, Legal Philosophy, in Legal Philosophies of Lask, Radbruch and Dabin 92 (Kurt Wilk transl. 1950). Gerth & Mills translated the words as "ethics of ultimate ends." Max Weber: Essays in Sociology 77-78 (Gerth & Mills transl. 1946). Ryu and Silving in discussing the use of this word by Welzel in Aktuelle Strafrechtsprobleme im Rahmen der finalen Handlungslehre (1956) translated it as "ethics of attitude." Ryu & Silving, Error Juris: A Comparative Study, 24 U. Chi. L. Rev. 421, at 449 n.165 (1957). The word "Gesinnung" is really difficult to translate. The English word "sentiment" has emotional connotation, "attitude" is mainly psychological, while "ultimate ends" is very objective. "Gesinnung" carries a moral significance, and "mind" would have been short expressing this. I have taken "conscience" although books would take "conscience" as the equivalent of "Gewissen."

180. In ethics it is expressed in the form of Gesinnungsethik and Erfolgsethik (ethics of consequence). See Scheler, Der Formalismus in der Ethik und die materiele Wertethik 109-62 (1921).

181. Wittmann, Die Ethik des heiligen Thomas von Aquin (1933).

182. Kant, Grundlegung zur Metaphysik der Sitten (1785).

183. Scheler, op. cit. supra note 180.

184. Hartmann, Ethik (1932).

185. Baumann, Strafrecht, allgemeiner Teil ein Lehrbuch 11 (2d ed. 1961); Maurach, Deutsches Strafrecht, allgemeiner Teil 179-80 (2d ed. 1958); Welzel, Das deutsche Strafrecht, eine systematische Darstellung 1-4, 56-57, 113-20 (7th ed. 1960); Würtenberger, Die geistige Situation der deutschen Strafrechtswissenschaft 50-52 (2d ed. 1959).

We suddenly forget that a synthesis is possible, and indeed necessary. Even Weber remarks that: "In so far as this is true, an ethic of conscience and an ethic of responsibility are not absolute opposites but rather complements, which only in unison constitute a genuine man . . . ."[186] A synthesis is derived by allocating to the two principles their mutually interacting functions in the criminal law system. First, it is necessary to make some observations on the theoretical structure of criminal conduct. Conduct is the material manifestation of a will activity and is basically purposive.[187] No conduct, at least not one which is intelligent and responsible, exists for its own sake. It is an agency of man to intervene in the causal world to realize some resolved objective. It is creative and destructive; it can bring about value or disvalue. The potentiality of conduct to create or destroy is an element that gives to it significance to other persons or to society. It can affect the accommodated values in criminal law, such as life, property, liberty, honor and others. The proposition that conduct has teleological direction toward a causal situation assumes, in turn, a conscious premise. Every conduct is based on what is known. Knowledge is not an end by itself; it is for the purpose of doing.[188] This knowledge is not limited to the appreciation of the circumstances of the place and time of action. It includes the accumulated generalized idea about our world of experience. In fact, the appreciation of the present particular experience would appear meaningless and disconnected if not referred to our reservoir of generalized ideas. For one to poison another, he needs not only to have the sense appreciation of a tablet inside a bottle; he must have also an abstract idea of a poison. A generalized idea is therefore important, and even sufficient to be the basis of a blameworthy conduct. For example, we punish *A* for impossible attempt in trying to poison *B* although he mistakenly gave *B* a vitamin pill.

All these propositions do not, however, justify a conclusion that the essential character of crime is solely determined by the intrinsic quality of the will as Kant preaches.[189] All that they prove is that the subjective element is relevant; we cannot conclude that the subjective element is exclusively significant. But if Kant's teaching should be qualified, neither could we wholly agree with the utilitarians that the harmful

186. Weber, op. cit. supra note 179, at 127.

187. Welzel, op. cit. supra note 185; Welzel, Das neue Bild des Strafrechtssystems 1 (4th ed. 1961).

188. "The primary and pervasive significance of knowledge lies in its guidance of action: knowing is for the sake of doing." Lewis, Analysis of Knowledge and Valuation 3 (1946).

189. Kant, Metaphysische Anfangsgründe der Rechtslehre 197-206 (1797).

consequence is determinative. If conduct cannot be totally isolated from the will, then conduct is not purely a causal or natural phenomenon whose ethical content is only derivable from its external manifestation in the world of experience. Not every consequence-disvalue caused by conduct is attributable to the activity of the will. We know, for example, excusable accidents. Further, the absolute validity of this proposition is definitely weakened by the concededly rational conception to punish attempts, conspiracy and solicitation. On the contrary, punishment may even follow although objectively no material injury but rather benefit results from conduct. Witness our poisoning example. The intended victim may have profited from the vitamin pill. To the skeptical we may illustrate this in the following case: *A* attacks *B* unlawfully. *B*, having previously decided to kill *A* and without knowledge of the unlawful aggression by *A*, kills *A*. In other words, *B*'s conduct was not for the purpose of defense. Although *B* saved his life by committing murder, the benefit of self-defense cannot be recognized.[190] Self-defense can only be recognized if the defendant acted for the purpose of defense.

From this structure of conduct, we must allocate the theoretical function of the harmful consequence and the subjective element in crime. This can be done without difficulty if we remember that man is not only an individual; he is also a social unit.[191] Man's life is guided by two ethical considerations, that of his person and that of society. Society's ethical conception is something peculiar. It is not like Dickens' Christmas Spirits that appear from nowhere. Like all social categories, it is essentially derivative, and the individual's ethical insight is its source.[192] As Herbert Spencer noted, society has no central or natural consciousness.

The legal order is the positive expression of social morality, and criminal law contains a catalogue of the most elementary and fundamental notions of social morality. Every individual, at least theoretically, knows the norms of criminal law; it is his responsibility to know them.

190. This is the prevailing rule in Germany. Maurach, op. cit. supra note 185; H. Mayer, Strafrecht, allgemeiner Teil 204 (1953); Schönke-Schröder, Strafgesetzbuch, Kommentar 328 (10th ed. 1960); 2 von Hippel, Strafrecht 210 (1930); Welzel, op. cit. supra note 185. 235-36 (1949). He changed his position later in accordance with the prevailing view. Mezger, The position of Mezger was originally contrary. Mezger, Strafrecht; ein Lehrbuch Strafrecht, allgemeiner Teil 118 (Juristische Kurzlehrbücher 9th ed. 1960). In the United States a similar view is represented by Cook, Act, Intention and Motive in the Criminal Law, 26 Yale L.J. 645 (1917). Hall takes the contrary view. General Principles of Criminal Law 88 (2d ed. 1960). He claims support from Golden v. Georgia, 25 Ga. 527 (1858).

191. Durkheim remarks: "Far from being simple, our inner life has a sort of double center of gravity. There is, on the one hand, our individuality, and more especially our body which is its foundation; on the other, all which, in us, expresses something other than ourselves." Quoted in Alpert, Emile Durkheim and his Sociology 205 (1939).

192. Lewis, Ground and Nature of Right 83 (1955).

The existence and meaning of a norm of criminal law, like every fact, are knowable. Every individual, so far as it is consistent with his personal capacity to know, must ascertain the conduct commanded or prohibited in criminal law. If he fails to determine the legal significance of his proposed behaviour from all available evidence within his command, he is ignorant but not innocent. Only when the actor is honestly convinced, whether correctly or erroneously, that his behaviour agrees with the norms of the legal order, is his conduct not blameworthy.[193] There is, in other words, a blameworthy ignorance. It must be noted that the actor's responsibility to determine the rightness of his conduct extends not simply to an error in the logical process of knowing; it extends to all possible sources of error.

We should not be concerned with the individual's responsibility to know the norms of the legal order. Firstly, he is not liable for blameless ignorance. Secondly, he has no difficulty in determining the norms of the legal order, especially in criminal law. Invariably the individual's ethical insight—as a source of society's—accommodates a more exhaustive catalogue of right conduct. For this reason, we find it usually safe to rely upon our personal notion of right behaviour.

From what has been discussed, we may conclude that the consequence of conduct is significant in criminal law as the objective point of orientation of the actor in the formulation of a proposed, or the execution of a decided conduct. To the extent that the actor is obliged to know the proscribed or prescribed conduct, the *Verantwortungsethik* is determinative. The subjective element provides the rational basis of responsibility of the actor in behaving in one way and not differently. The *Gesinnungsethik* determines the blameworthiness of an objectively wrong behaviour. The problem of error in which the collision of the two principles is most apparent is resolved by punishing only a blameworthy ignorance. Only a blameworthy ignorance is a responsible ignorance. It is absurd to punish a person for an ignorance or mistake which he, despite honest effort, could not have avoided.

193. "We are all subject to errors of deliberation and conclusion, and the best that any of us can do is what he thinks is right at the time when decision of action is called for. Whoever does that is blameless." Lewis, op. cit. supra note 192, at 51. At another place, he says: "[A]n act is subjectively right if it conforms to the doer's conviction concerning what consequences are likely to follow and their having that character which marks them as justified to bring about." Id. at 56.