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TOWARD A RATIONAL DOCTRINE OF CRIMINAL RESPONSIBILITY

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The unmethodical and irrational approach of the Common Lawyer to the question of criminal responsibility has often been remarked by those who have trained under more rigorous systems. The empiric gropings of the Common Lawyer tend to be dismissed as of little value by those who have dedicated their working lives to a disciplined search for basic normative principles in this field of criminal law.[1] Much of the difficulty lies in the peculiarly imprecise terminology with which the Common Law has seen fit to saddle itself and behind which the Common Lawyer finds it convenient to hide on occasion. Nowhere is this unfortunate tendency more pronounced than in the matter of criminal responsibility and perhaps no term is so vague and unsuited to the purposes for which it is used as that curious latinism, *Mens Rea*.[2]

Mens Rea does not possess a respectable pedigree[3] and like so many legal institutions, having been taken out of one context to be set in another, it has never quite settled down to acquire its own very definite orientation. Like the foreign body it is, it has only been tolerated through the system having grown a hard tissue around it. Has the time not come for a little modern surgery upon this malignant growth of four centuries? Among the voluminous literature on the subject, we have over the years been treated to one learned exposition entitled simply "mens rea",[4] another "a rationale of mens rea",[5] while but lately we have been favoured with a most percipient study of "mens rea reconsidered".[6] The present modest offering might well be subtitled "Is mens rea a necessary concept?" It will be argued here that it is not.

As a preliminary it is as well to observe that the word "responsibility" itself is capable of bearing a variety of technical meanings.[7] This fact would, perhaps, not be of so great import were the distinctions in its usage easily perceived. Unfortunately, they are not and the word tends to be used with a lack of discrimination, which is puzzling to jurists whose legal lexicon is both richer and more precise than that of the Common Law.[8] What is here meant by criminal responsibility is a conjunction of legal and factual circumstances by reason of which some person is called upon to answer to a court of competent jurisdiction for that which he has done or failed to do.[9] The problem is basically one of accountability.[10]

[1] See, for example, *Tratado de Derecho Penal*, 5 LUIS JIMÉNEZ DE ASÚA, EDITORIAL LOSADA 56 (Argentina, 1956).

[2] The forthright stricture of a leading American comparative criminal lawyer is worth repeating: "There is probably no criminal law teacher who would contend either that he fully understands our Anglo-American doctrine of mens rea (at least the writer has not found a single satisfactory comment in the English language) or that he can satisfactorily explain to his students the concept of mens rea (which is a recurring problem in all the cases) or indeed that he can tell his students that Anglo-American mens rea is sensibly used to achieve rational, consistent and functional results." Mueller, *The Teaching of Comparative Criminal Law in the Course of Criminal Law*, 11 J. LEGAL ED. 61 (1958). Professor Mueller has himself come a long way since those words were written, but it is doubtful if he would wish even now to change their import.

[3] In the form in which it has come to influence our criminal law one might be pardoned for seeing it as yet another of Sir Edward Coke's doubtful legacies. See Sayre, *Mens Rea*, 45 HARV. L. REV. 988 (1932). Stephen says of this in a footnote on Coke's supposed authority: "I do not know where he quotes it from", 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (1882). See also Dubin *Mens Rea Reconsidered*, 18 STAN. L. REV. 351 (1966).

[4] Sayre, *op. cit. supra* note 3, at 974–1026.

[5] Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939).

[6] Dubin, *op. cit. supra* note 3.

[7] See the penetrating analysis: Hart, *Varieties of Responsibility*, 83 LAW QUART. REV. 346 (1967).

[8] In fairness, one must state that others are guilty of like imprecision. See the numerous examples cited by Jiménez de Asúa, *op. cit. supra* note 1, at pp. 39, 88.

[9] Compare Stephen: "I understand by responsibility nothing more than actual liability to legal punishment", *op. cit. supra* note 3, at p. 96. See also, Silving, *Guilt: A Methodological Study*, 32 REVISTA JURÍDICA DE PUERTO RICO 18 (1963).

[10] See Hart, *op. cit. supra* note 7, at p. 363.

There are clearly some things we can do or omit to do under any legal system without having to give an account of ourselves to anybody. It is evident, then, that any study of this question of responsibility must begin by seeking out that factor by which we might be called to account by the criminal law from those which do not involve us in any such liability to respond for what we have or have not done. At the root of any particular investigation lie two generally unexpressed questions: What was done or omitted?, and why was it done or omitted? The first question always demands an answer for it touches the very content of the criminal law itself: until we know what was done we cannot measure the activity against the matrix of postulates we have pre-determined for the purpose of regulating certain behaviour. It is really the second question which causes us the most trouble in the study of responsibility, for whether it is asked or not, and the manner in which the answers to it are evaluated, is one of the most characteristic features of any particular system of criminal law. If we ask why a particular act was done or why someone omitted to act, it is clear that we expect a response. Moreover, we are not primarily interested in the response for the purpose of establishing motive. Sometimes, however, the Anglo-American criminal law does not even put the question; it is content simply to know that something has been done or not done. It is very important to a study of responsibility to know exactly what it is that determines whether or not this secondary question is asked and it is here that we begin to expose the unmethodical nature of the Common Law.

The Common Lawyer is in the habit of reducing certain types of crime to two basic elements, an overt act or omission, the *actus reus* and an accompanying mental condition, the *mens rea*. The latter has been succinctly and authoritatively described as a "legally blameworthy condition of mind".[11] When we ask why something was done, in the expectation of receiving a legally relevant answer, we enter upon the realm of *mens rea*. We measure that answer against certain conceptualised mental states in order to establish a correspondence with the elements which necessarily make up the other part of the juristic figure. We exclude those intellectual elements which the law considers too remote and we distinguish between the relevant and the irrelevant. Sometimes, we do not do this at all. The infraction of the law is established upon the receipt of the answer to the question: what was done? It is usual to speak in such cases of offenses in which *mens rea* is not an essential element;[12] indeed we could logically categorize these crimes of strict or absolute liability as ones in which *mens rea* is not an element at all. This tends, to the unguarded eye, to give the impression that such crimes contain no intellectual element at all,[13] but this is obviously not the case; one cannot, even in abstract terms, conceive of an act or omission entirely divorced from the state of mind of the human agent with whom it is associated. Yet it would be true to say that the principal, present-day justification for maintaining the body of learning pertaining to the doctrine of *mens rea* is that it serves to distinguish certain crimes by reason of its presence from those in which, as an ingredient, it is not required. If it did this job well, there would be strong reason for retention of the doctrine. In fact, it does it so badly as to give rise to quite unnecessary controversies, such as whether a particular state of mind is or is not *mens rea*[14] and the various presumptions of evidence which require consideration when a written enactment is silent as to the precise state of mind envisaged by the criminal concept, which it seeks to define.[15] The term *mens rea* does not, therefore, cover all mental states accompanying criminal activity nor does it provide, in itself, a means of distinguishing the class of intellectual elements to which it does refer. It is submitted, quite forthrightly, that its only value is the highly unscientific one of preventing the proper analysis and classification of the various mental states which accompany activity that the legal system has chosen to designate as criminal.

The idea that lies behind the concept of *mens rea* is really a very simple one. As moral notions have come to permeate the criminal law, it has seemed improper to condemn what was done without first enquiring why it was done and then paying careful attention to the answer given.[16] This

[11] 10 HALSBURY'S LAWS OF ENGLAND 273 (3d ed.).

[12] *Ibid.* 274.

[13] Stephen seems to imply this, *op. cit. supra* note 3, at p. 95.

[14] See, for example, Professor J. C. Smith's confident assertion: "of course, negligence is not mens rea". Smith, *The Guilty Mind in the Criminal Law*, 76 LAW QUART. REV. at p. 98 (1960).

[15] See HALSBURY, *op. cit. supra* note 12.

[16] Perkins reminds us that "Deeply ingrained in human nature is the tendency to distinguish intended results from accidental happenings" but points out that "the translation of this into normative terms is a

individualization of responsibility is a necessary preliminary to "making the punishment fit the crime".[17] As our notions of criminality become more refined, so has our examination of the state of mind which accompanies that behavior, which it is the policy of the criminal law to prevent. The careful attention paid to this process has long given rise to the belief that there is no one state of mind that can be comprehended under the term *mens rea*, but rather a number of distinct manifestations, having at times little in common with each other beyond association with conduct which the law has designated criminal.[18] This latter is an important point which is not always given the attention it deserves. The criminal law is concerned primarily with conduct and it is always this association of a certain mental state with some behaviour which the law seeks to forbid, which results in that mental element being categorised as "legally blameworthy": the mental element becomes tainted as it were by association. What is it that determines this link of association? The answer is simply those extra-legal factors which may conveniently be termed criminal policy. It is criminal policy which dictates our attitude towards the general question of responsibility[19] and in the matter of *mens rea* that policy has vaguely laid down that the law ought not to condemn an act or omission of a certain type unless the mental state accompanying this activity is of a certain quality. The principle, which really distinguishes those crimes for which *mens rea* is required from those for which it is not, is the relevance of the mental state to the objects of criminal policy. In the case of crimes of strict liability, the mental state associated with the prohibited activity is simply not relevant to the question of responsibility; the law is not concerned to know why, in the narrow *mens rea* sense, something was done; it is only concerned to establish that it has been done. It is this authoritative, non-individualistic policy concept that *mens rea*, with its seemingly legalistic appeal, seems to rebut. If it is absent as a requirement, it seems that an opportunity to reply or respond in legally useful form is absent and this is precisely what the lawyer does not like.[20] Granted then, that as a matter of policy we should wherever possible ask why something was done and evaluate the answers, can we do this without *mens rea*? Most assuredly we can.

In the first place, we must pay a proper and more respectful attention to the role of criminal policy and recognise it for what it is, namely an extra-legal determinant of the substantive and adjectival content of the system. It is a question of policy whether or not we ask why some particular activity took place and thereupon assess the blame according to the answer received. We cannot therefore judge the matter of "the propiety of public welfare laws creating 'strict' criminal liability",[21] for example, by reference to legal criteria. The policy considerations determining responsibility are all essentially pre-legal, but they affect and color not merely the content of the legal concepts to which they give rise, but also their manipulation in practice.[22] Effective discussion of responsibility can, however, proceed only on the basis of a strict separation of the legal and the pre-legal and it is the failure to do this which has bedevilled so much of the Common Law thinking in this field and given rise to the laboriously involved learning on *mens rea*. Behind all our condemnatory vocabulary, guilt, culpability and like words, lies a scarcely recognised notion of a pre-judgment, not of the individual who stands accused of some conduct, but rather of the issue itself in policy terms.[23] When we of the western world say it is

late and sophisticated development". *op. cit. supra* note 5.

[17] See Parker, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071 (1964).

[18] This was Stephen's view (*op. cit. supra* note 3, at p. 95), and this was shared and elaborated on by Sayre (*op. cit. supra* note 3, at p. 1026).

[19] See Stephen, *op. cit. supra* note 3, at p. 98: "General theories as to what ought to be the conditions of criminal responsibility may not be useless, but they must depend on the tastes of those who form them and they cannot, so far as I can see, be said in any distinct sense to be either true or false."

[20] See Dubin, *op. cit. supra* note 3, at p. 344.

[21] Ibid. 324.

[22] Dubin (*ibid.* 369) makes this interesting observation: "Although the substantive-procedural distinction has gained wide currency in virtually every area of law, there has apparently never been any meaningful attempt in legal philosophy to analyse its definitional scope. The reason is probably that the distinction being fundamentally descriptive, represents substantially different ideas in different legal contexts. The core signification in this supposedly hairsplitting distinction nevertheless is its suggestion of a basic analytical differentiation between *the essential subject matter of laws* and *the ancilliary, implementational manner and method of applying and enforcing that subject matter.*"

[23] Compare Silving, *op. cit. supra* note 9, at p. 24: "Whatever may be the nature of blameworthiness, the latter is undoubtedly conceived of as implying a moral value judgment, and perhaps the most crucial issue in defining guilt is what type of morality it is that gives it substance."

wrong to eat people, we have already made a policy decision based upon the cultural and social facts of our existence; we have sat in judgment upon the question and issued a normative precept which secures its concrete expression through the formal machinery of our criminal law. When we speak of responsibility in the sense in which it has been defined here, we are also issuing a concept that has been the subject of a previously debated but differently resolved policy judgment. It is necessary as a pre-requisite to break these policy considerations down to their barest elements. What, in other words, are the factors that enable us to say that such and such a person shall be accountable for certain acts or omissions and how shall we designate these elements for the purpose of erecting a theory of responsibility?

The notion of responsibility may be conveniently reduced to the following elements. Firstly there must be postulated some act or omission which the law forbids; this may be designated the "content factor". Secondly, there must be envisaged some juristic person deemed capable by the law of doing that which is forbidden; this may be termed the "personality factor". Finally, there are those intellectual elements so closely associated with the prohibited activity that they cannot be regarded as having an existence independently of it; these elements, which comprise all those states of mind found in conjunction with the content factor may be called the "mental element".[24] Reduced to these three elements or factors, it is clear that it is only the third which is going to give rise to serious controversy in the matter of criminal policy. Problems of content rarely arise save in a crisis situation where a political entity is in the course of violent change from one prevailing philosophy to another. It is for this reason that the evolution of new delictual concepts is generally rather a slow process even where some new state of affairs supersedes that which had formerly been subject to penal controls deriving from completely different political criteria.[25] As a general question related to responsibility, therefore, we need not concern ourselves here with the content factor. What this shall comprise, in practical terms, in any particular system, will be adequately determined by the ordinary processes of evolution of that system which, while they may not always function with the perfection or rapidity desired by reformers they rarely provoke grave dissatisfaction with their workings.[26] The second and third elements have a strong connection and are often treated as forming a single entity. It is, however, but a singular connection that gives rise to this relationship and although of considerable importance it has seemed better to make the separation. When we ask who shall be accountable for having done or having failed to do something by reference to our content factor, our answer will be given not merely in terms of status but with additional regard to certain mental elements. For the notion of responsibility must imply, necessarily, not merely some human agency which might undertake the physical task of response, but also some directing intelligence capable of instructing that such response be made on its behalf or of undertaking the task itself. We enter into an inconvenient fiction when we extend the use of the term criminal responsibility as it has been used here to inanimate objects, which can have no innate directing intelligence.[27] It is otherwise with those juristic persons to whose artificial being the machinery of the law has attached the means of arriving at the directive element. Thus "company policy" or "the sense of the meeting" are capable of being comprehended under the artificial phenomena of the law as we can understand, for example, in other contexts, the "Will of Congress". The kernel of the problem in regard to the personality factor is this matter of directive intelligence, which permits a response to be made before the law. We face here two situations, one

[24] What is meant here is something much wider than that mind-act relationship to the difficulties of which Dubin adverts (*op. cit. supra* note 3, at p. 360). Mental elements is intended to embrace here even those elements which are now considered as part of the actus reus. See Smith, *op. cit. supra* note 14, at pp. 82–83. Glanville Williams usefully warns: "It is a common error to suppose that crimes are divided into sharply defined classes, some requiring intention as to every element, some recklessness as to every element, some negligence as to every element, and some being wholly strict." WILLIAMS, THE MENTAL ELEMENT IN CRIME, 27 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 203 (1957).

[25] See, for example, the interesting article: Bucholz, *The Development of Economic Criminal Law*, LAW AND LEGISLATION IN THE GERMAN DEMOCRATIC REPUBLIC, No. 1, 17 (1967). It demonstrates the persistence of criminal legislation deriving from the pre-war regime even under the vastly changed conditions to which the new socialist republic was trying to adjust itself.

[26] See 1 MANNHEIM, COMPARATIVE CRIMINOLOGY 22–67 (1965).

[27] "It is hard for us to acquit ancient law of that unreasoning instinct that impels the civilised man to kick or consign to perdition, the chair over which he has stumbled", "The history of English Law", 2 POLLOCK & MAITLAND 274 (2d ed. 1923).

legal, the other factual. The law, by its nature, confers upon certain agrupations or entities certain rights and duties that require its oversight. The question arises as to the extent to which these entities might be called upon to respond, qua entity, before a court of criminal jurisdiction. This is esentially a legal question and its resolution is according to strictly legal and, on that account, artificial criteria.[28] The second situation concerns those human beings whose intelligence is so immature or impaired that, as a matter of fact, they are unable to respond adequately for what they have done. As a purely arbitrary act, the criminal jurisdiction of any regime can attribute blame in respect of disobedience to its dictates; it cannot, however, hold all persons responsible, for some lack, as a matter of fact, of the requisite "respondability". Responsibility, as used here, always implies capacity to respond and the criteria which the law devises as a determinant of that capacity are artificial and often controversial.[29] It is all too easy to become involved in this controversy at the expense of the substance of the question, which is simply the recognition of this capacity factor in the element denominated personality.

If we ask at what age shall a child be called to account for what it has done or failed to do there is clearly a stage at which fact would preclude us from requiring response, as where a two year old child playing with matches razes the family property to the ground. Equally clearly we are elsewhere cast back upon the artificiality of the law. What do you do if the child is eight, or ten, or twelve?[30] There emerges, therefore, a doctrine of factual irresponsibility, of which, by its nature, the law must take account and a legal irresponsibility which arises when the policy of the law deems that a person seemingly capable of responding is relieved from the necessity of doing so. It is with the latter that we are principally concerned as the factors which motivate policy here have a similarity to those which require more extensive examination in connection with the third of our elements of responsibility. In the case of these persons from whom the law cannot, legally or factually, require a response the language of responsibility is inappropriate. We may say, therefore, that they are irresponsible in the sense that, whatever we may attribute to them they cannot be expected to answer back. We may apply to them measures of social control, such as the restrictions imposed by mental health legislation or enactments designed to place infant offenders against the criminal law in the care of public authorities. It is irrelevant, however, to ask that "why?" of the concept of responsibility which is designed to evoke a response in intellectual terms, for the law presumes there to be no guiding intelligence upon which its mechanisms might usefully operate.

When we come to our third factor we are at once confronted with the rival theories of strict or absolute responsibility, which demands an answer regardless of why the prohibited activity took place: responsibility becomes simply a matter of "Did you do it?," and a more enquiring doctrine, which seeks to bring the actor to account not merely by reason of his having done or not done something, but because the mental state which accompanied that activity is considered thereby to be reprehensible.

It is an observable fact that our Anglo-American system of Common Law shows a marked preference for a theory of responsibility which requires that the person accused of having done something contrary to its dispositions be not only given the opportunity of telling why he did what was forbidden, but that his answer be taken into account in deciding whether he is to be condemned or absolved.[31] This preference is expressed in terms of *mens rea* and we find it necessary to consider what it is that is "blameworthy" about this state

[28] As is the case in regard to the criminal responsibility of that quasi-legal person, the English trade union. See also, *The Criminal Liability of the Hundred*", in 1 MAITLAND, COLLECTED PAPERS 230–246 (1911).

[29] See, for example, the interesting test of exception from punitive responsibility by reason of mental incapacity, propounded in Silving, *The Criminal Law of Mental Incapacity*, 53 J. CRIM. L., C. & P. S. 129 (1962).

[30] Stephen says, refering to legal competence, "The age at which a person becomes competent to commit a crime must necessarily be fixed in an arbitrary manner". *Op. cit. supra* note 3, at p. 97. Thus the Ingleby Committee on Children and Young Persons, 1960 (Cmnd. 1191, H.M.S.O.) recommended that the age of responsibility be raised from 8 to 12, but the recommendation was not accepted and subsequent legislation raised the age to 10 years. Children and Young Persons Act, 1963, 10 & 11, Eliz. C. 37.

[31] See Dubin, *op. cit. supra* note 3, at 326–327: "Given certain circumstances, X (the accused) should not be punished for having done Y (the proscribed harm) because punishment is not justified; and in law there would be an applicable exculpatory principle, doctrine or rule. The explicit and implicit use of this basic statement-form in deciding questions of responsibility is evident throughout the literature of excuses. All questions of criminal responsibility arise and may be profitably studied within the compass of this basic statement form and its four subcontexts."

of mind. It seems here a pointless exercise trying to determine precisely why our legal policy should incline towards what might be termed a liberal as opposed to a strict theory of liability; the reasons lie somewhere beneath the tangled skeins of our social, religious and ethical development. It seems more important to note that it is simply a preference, not an invariable postulate and it is necessary to ask what it is that determines at times that a person should be accountable simply for having done something, while at others his responsibility is dependent upon the further factor of why he did it.

It is suggested that the erection of a doctrine of strict lability is the result of an extra-legal policy decision when the psychological repugnance of requiring an answer from one who cannot effectively respond is overcome by the social necessity of attributing blame to the person who can be fairly shown, by the law's machinery, to have done that which was forbidden. There is a good deal of practical common sense underlying our technical theory of responsibility, and this operates not only in the personality sphere, where at times its manifestation is more obvious, but also in the matter of the mental states which can be demonstrated to the law's satisfaction as having accompanied some particular conduct. Thus it is against common sense to require of someone that he account for his having done something when it is manifest that his state of mind, at the time of doing that of which he stands accused, is such that he cannot give an answer that is of any value for the law's immediate purpose, which is simply to condemn or absolve. In terms of responsibility, as distinct from culpability, which involves the attribution of blame, we ought only to be concerned to know why somebody did something if we can effectively take his answer into account. To hold a man responsible when he cannot effectively answer is to ignore his answer altogether and to treat the matter, constructively, as one of strict liability. At times our system is forced into this awkward choice because it treats of the mental element not merely in terms of responsibility, but also, at one and the same time as a factor in the attribution of blame and thus, proceeding rapidly a stage further, in the assessment of punishment. Concerning ourselves solely with the mental element in relation to responsibility, we may conclude that this should always be taken into account whenever it is going to weigh in the balance of condemnation or absolution of the offender. At times, criminal policy dictates that it be ignored, overriding all other considerations; the mental element in crime simply becomes irrelevant. At others we are clearly at a loss to condemn or absolve without taking this factor into account. The problem, as ever, is due to the grey area in between. Yet it is in this terrain that the crucial issues of responsibility must finally be resolved.

Perhaps the best starting point is the criminal law of excuses. A person is not held liable to answer for what he has done or failed to do if it can be shown that his behavior can be excused according to one or more of the reasons admitted by law.[32] With the exception of those reasons, which have to do with the personality factor, these exculpatory circumstances all concern states of mind which are considered to have some bearing upon whether the offender ought or not to answer for what has been done or omitted. If the person to whom some transgression is imputed can show that he acted through ignorance, mistake, accident, or by reason of a coercion that overbore his will, this is a vital factor in assessing whether he should be absolved or condemned. It is, therefore, not merely a factor in assessing blame, but a preliminary to determining responsibility. The extent to which we admit or deny the influence of these exculpatory circumstances is a measure of criminal policy in relation to the mental element in crime. More than any other field, it is here that we need a strong dose of rationalisation for it is easily demonstrated that our policy is not always consistent, nor in conformity with the principle of its liberal inclinations.[33] Much of the inconsistency is due to the persistence of discussing

[32] This is at least as old as Bracton who states "we must consider with what mind (animus) or what intent (voluntate) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment" De Legibus (Twiss Edn. 1879) 1016, cited by Sayre, *op. cit. supra* note 3, at p. 985.

[33] "Anglo-American criminal law has never developed a sound theory of excuses. A study of the historical development of the criminal law of excuses has persuaded me that a primary reason for this shortcoming is the traditional failure to impose any limitations upon the invocation of the criminal sanction except those that proceed from the purpose-of-punishment. As a result, instead of formulating an independently significant body of excuses designed specifically to protect the liberty of the individual we have been largely content to splice our concepts of responsibility on to our concepts of harm." Dubin, *op. cit. supra* note 3, at p. 346.

these issues in terms of *mens rea*.[34] Our Common Law learning has been built up empirically through the cases and the emergence and definition of these exculpatory circumstances have been a lengthy and unscientific process. The unexpressed major premise that has played so great a part in shaping these concepts is the judges' notion at any particular time of what is the relevant criminal policy in relation to the matter in hand. At times, what is apparently a clear imperative cannot be followed because it is against common sense or would lead to an unjust result.[35] So we have the creation of exceptions which erode the seeming firmness of a general principle and the beginnings of irrationality in the whole structure through this ad hoc rulemaking process. The first step in rationalisation must be to bring order to these scattered and sometimes defective principles, where necessary ridding ourselves of those which however entrenched and hallowed with the years, do not accord well with the general tenor of modern criminal law. This can and must be done. There has hitherto been the tendency to regard some of the data which must necessarily be considered as unmanageable in scientific terms. This is a notion born of idleness and we have but lately been shown the striking results that can be obtained by the application of modern methods of thinking to facts and situations which formerly would have been the subject of vague and often erroneous speculation.[36]

A rational theory of responsibility can only be constructed by having simultaneous regard to a sound doctrine of disposal.[37] We make people responsible for infractions of the criminal law with the express purpose of dealing with them so that they are corrected in their error, punished as appropriate, and prevented where possible from repetition of that which the law has forbidden. These purposes, as well as the wider one of intimidating like-minded offenders, are intimately linked with the principles of establishing responsibility. It is contrary to common sense to require an answer from one incapable of giving it, if the object of this exercise is to attribute blame that he might be disposed of according to the corrective regimen of the system. More than anything else, it is this lack of correspondence between the principles of responsibility and those of disposal which causes disquiet with the doctrine of strict liability.[38] The conflict is really one of criminal policy. What the law cannot regulate it must utterly prohibit,[39] and amid the complexity of our modern society the regulatory apparatus of the criminal law would be enfeebled by the constant necessity of asking reasons to which it cannot hope to attach sensible answers in terms of responsibility. The choice is between effectiveness of punishment, through the suppression of crime by absolute prohibition and the creation thereby of social discontent through the correction or punishment of those who by adherence to this doctrine of responsibility are denied the opportunity of exculpation which they might have had were their reasons for having so acted taken into account. No reconciliation of these conflicting principles is possible, only a balance between them determined by the tolerances in society, which, in themselves, are constantly shifting.[40] The theory of responsibility must always therefore, be seen in relation to the general aims of the law and must above all retain its intimate harmony with the doctrine of disposal, regardless of the shifts and stresses to which it might be subjected in the process. There is an unfortunate tendency to consider responsibility and disposal as matters quite apart and unrelated to each other and this has communicated itself to the codifiers. The lawyer and lawmaker are in danger of abandoning the field of disposal to the social scientists instead of playing their proper role in policy determination. This trend should be reversed and the lessons of history in regard to the intimate

[34] As is the case with ignorance and mistake of law and fact. See, for example, Keedy, *Ignorance and Mistake in the Common Law*, 22 HARV. L. REV. 75 (1908). Such thinking can at times lead to curious conclusions. See Bolgár, *The Present Function of the Maxim "Ignorantia Juris Neminem Excusat"*, 52 Iowa L. REV. at p. 633 (1967): "In connection with the role of intent in the motivation of acts that violate penal laws, a final word should be said about a curious exception to the presumption of knowledge, or, in other words, to the defense of ignorance of law. This is the doctrine of mens rea."

[35] Such is the case in relation to the English exception to the rule that ignorance of the law is no defence, where the accused proves that the statutory instrument which he is charged with contravening had not been issued by H.M.S.O. at the date of the alleged contravention. See 10 HALSBURY, at p. 284 and the cases cited at note *g*.

[36] See the illuminating article: Conard, *The Quantitative Analysis of Justice*, 20 J. Legal Ed. 1, 20.

[37] "There is need for discussions of the mental element in crime to be more closely related to moral issues and the theories of punishment". Cross, *The Mental Element in Crime*, 83 LAW QUAR. REV. at p 226.

[38] WILLIAMS, *op. cit. supra* note 24 at p. 204, 207.

[39] 2 POLLOCK & MAITLAND, at p. 574.

[40] As witness the English attitudes to responsibility in regard to road traffic offences and bigamy.

link between responsibility and punishment should be more closely heeded.

The basic principle of a rational doctrine of responsibility may be stated as follows: a person shall be obliged to account for that which he has done or failed to do as required by the criminal law, when his conduct is accompanied by a legally relevant state of mind. A state of mind shall be legally relevant when the system requires that it be taken into account for the purposes of attributing blame and assessing the consequences of that attribution. The criterion of relevance is exclusively the product of a policy decision based on the choice each system must make, in its own age, between the conflicting principles to which reference has been made. The system should require a state of mind accompanying criminal conduct to be taken into account whenever the result of so doing is calculated to create social harmony in the matter of responsibility and to reduce the tension produced by ignoring the felt injustice in disregarding the intellectual element pertinent to the criminal concept. This is another way of saying that the legal system should always favor taking into account the intellectual factor unless its needs for unquestioning obedience to its precepts are so pressing that these can clearly and acceptably override the social phenomena which incline against making a person responsible without giving him the opportunity of showing, by reason of his state of mind, that he ought to be relieved of answering for what he is shown to have done. It would follow that a state of mind is legally relevant when it is material to consider its relationship with the prohibited conduct for the purpose of realising the objectives of the criminal law and the preservation of the essential harmony of the order. Thus, the states of mind of the mentally incapacitated and the child of tender years are legally irrelevant and their practical association with prohibited conduct is not a factor in determining responsibility. Similarly other states of mind found in fact in association with forbidden behavior are legally irrelevant, because they do not fall to be taken into account that the objectives of the law be effectively realised. It follows, too, that while the concept of the legally relevant state of mind is a general one, there is no single condition fulfilling such a description, but rather a number of different categories each of which is relevant or not according to the circumstances and associations in which it is found.[41] Thus, where the criminal law requires that in association with particular conduct there shall exist an intent directed to the realisation of the specific act prohibited by the law, the existence in conjunction with it, of a state of mind directed to the realization of some other prohibited activity which has not in fact been realized is legally irrelevant to the question of responsibility.[42]

The determination in every case of what is or is not legally relevant is a policy decision and the choice between such legally relevant states of mind as intention and inadvertence is as artificial and arbitrary as that governing the establishment of personality factors, where these do not exclusively rest upon factual exigencies. In every case, however, the rational nature of the policy choice can be preserved by strict adherence to the essential harmony of the penal system. It is not necessary to base a doctrine of criminal responsibility upon uncertain grounds of morality when it can rest more securely upon the hard and observable facts of social life.

Having established the guiding principle of responsibility it becomes much simpler to classify the states of mind accompanying criminal conduct. While their classification is outside the modest limits set for this article, it may usefully be advanced that many of the problems, which are simply the product of our confusing doctrine of *mens rea*, would disappear were they viewed in the light of a single harmonious principle which extends from responsibility to disposal. Thus we classify offenses in order of seriousness by reference to certain policy objectives; it is not, for example, the abhorrent nature of the crime that distinguishes murder from manslaughter, nor has it been from the outset. If correction, or punishment are to have any practical, as distinct from symbolic, significance, it is clear that we must classify that for which we intend to hold transgressors responsible by reference to realistic factors. At the simplest level, we must, therefore, distinguish between one who sets out purposely to break the criminal law and one who, while achieving this result, has done so through inadvertence. In each

[41] This accords both with Sayre's postulated "mentes reae" and the modern legislative tendency of attaching designated mental states to types of conduct which the law seeks to prohibit or control.

[42] As with the well known English case R. v. Pembliton (1874) L.R. 2 C.C.R. 119. See also the case of R. v. Prince (1875) L.R. 2 C.C.R. 154 and the comments of Professor J. C. Smith, *op. cit. supra* note 14. Belief as to the girl's age is irrelevant in these crimes."

case the policy of the law is to prevent the infraction and to retain intact its provisions against further encroachment. It is in relation to the latter that the question of precise definition of the actor's mental state is material, because it is at this point that the policy of the law starts to direct itself to the safeguarding of the future. A person should answer for what he has done partly to repair the breach he has thus made in the law and partly to close the gap against future transgressors. In this matter of the classification of states of mind, for the purpose of creating criminal concepts, we have a choice between the frank recognition of the artificiality of the law and adherence to a scheme of criminal responsibility based upon an attempt to establish responsibility according to the facts. There does not seem to be a compromise choice. In the first case we must accept that the law may deem a person's mental state to be of a different order from what it actually was, thus holding him responsible for a consequence that in fact he had not intended. This we do whenever we make inadvertence in any of its degrees a blameworthy mental element in the establishment of responsibility. Our only means of redressing the seeming unfairness of this is to reduce the gravity of the offence, in terms of disposal, as we do in the case, for example, of murder and manslaughter.[43] The only alternative would be to limit responsibility to intended consequences in every case, a result which would be disastrous for the policy of the criminal law. We see, therefore, that the doctrine of responsibility plays a vital role in the classification of crime and thus in the selection and formation of what has been called the content factor. If we do not accept this we are driven back upon fictions, which seek to mitigate, through legal means, that severity of the law which our extra-legal policy ought to have regulated preliminarily with greater accuracy.[44] A rational doctrine of responsibility must eschew these fictions and by so doing will assist materially not only in the more accurate elaboration of types of criminal conduct, thereby encouraging the necessary element of certainty in the criminal law, but also in bringing into sharper focus the objectives of the criminal law that these might be the more readily intelligible to the lay public. Obedience to the law's precepts, which is after all the ultimate objective, will thus be more easily attained.

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[43] Fitzgerald reminds us that "The offence of murder n English law is by no means the same in all respects as the corresponding offence in other legal systems". Fitzgerald, *Crime, Sin and Negligence*, 79 Law Auar. Rev. 354 (1963). It is well to recall that murder originally bore a very special meaning in English law that clearly revealed the policy considerations underlying it.

[44] For an excellent illustration of the problem see Silving, *Toward a Rational System of Criminal Law*, 32 Revista Juridica de la Universidad de Puerto Rico 134 (1963).