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# THE OBSOLESCENCE OF CRIMINAL GUILT

J. J. M. SCANDERETT

## I. *General Considerations*

"We know that the will is free, and there's an end of that."

—Samuel Johnson, 1759.

"We know nothing of the sort, and there's an end of that."

—Arthur Brisbane, 1930.

It has been suggested that the two opinions above express more than a mere individual difference of opinion between two eminent publicists, rather epitomizing, perhaps, a profound change in the attitude of the people of the Western Hemisphere during two centuries, the drift, in short, from free will to determinism. In the field of criminology such an evolution is manifest. There one finds today a particularly sensational illustration of the commonly observed discrepancy between the tradition-caked rules of law and the practical needs of the instant social organization.

That nullification precedes legal housecleaning might be stated as a maxim, although such nullification may often be unconscious, hence appearing in the historical record by inference only, and therefore, of course, often overlooked by the superficial observer. Augustus was monarch in fact, though not in name; the Carolingians ruled for generations as "mayors of the palace"; similarly medieval English lawyers solemnly made use of fictions rather than open revision of the law in order to bridge the gap between the tradition and practical necessity, which, as they have abundantly shown, "knows no law"; and so today, while controversy is waged on the question of capital punishment,<sup>1</sup> the juries evince their disapproval of the death penalty by declining to convict the accused. Finally, and yet more significantly for the purposes of this discussion, the whole fabric of the criminal law as it exists today is as porous as mosquito-netting.<sup>2</sup> The inexorableness of nature, as contrasted with human society's floundering for regularity, or, to use the more

<sup>1</sup> Kavanaugh, Marcus, and Lawes, Lewis A.: Does the Death Penalty Curb Crime? 33 *Current History* 356 (1930).

<sup>2</sup> Wallace, Schuyler C.: Nullification, A Process of Government; 45 *Pol. Sci. Quart.* 347 (1930).

precise language of science, the inevitable modification of the original hypothesis, as shown false by experiment, is thus excellently illustrated. When one reflects that the period of our recorded social experience, in comparison to the age of the world, is but as a postage stamp pasted on top of a high mountain, impatience at this floundering should vanish, perhaps. Paradoxically, however, it seems that those who contemplate the least of the panorama of time are most unhurried of all to substitute another garment for the swaddling clothes of certain of our social institutions.

Scholars have now come to recognize the evolutionary quality of the law, that injustice is not absolute, and, as remarked by Dean Pound<sup>3</sup> and others<sup>4</sup> that the law must adapt itself to the change of ethical standards brought about by changing social patterns. In the words of Dr. Pound:

"While jurists have been arguing the relations of jurisprudence and ethics, others have been urging upon them the relation of jurisprudence and economics, the relation of jurisprudence and politics, and the relation of jurisprudence and sociology. Indeed one could say on each of these subjects much that has been said as to law and morals and could reach much the same result. Jurisprudence, ethics, economics, politics, and sociology are distinct enough at the core, but shade out into each other. When we look at the core or chiefly at the core, the analytical distinctions are sound enough. But we shall not understand even that core, and much less the debatable ground beyond, unless we are prepared to make continual deep incursions from each into each of the others. All the social sciences must be co-workers with jurisprudence. When we set off a bit of social control and define its bounds by analytical criteria and essay to study it by its own light and with its own materials and its own methods exclusively, our results, however logical in appearance, are as arbitrary and as futile for any but theoretical purposes, as the division of the body of the defaulting debtor among his co-creditors in primitive law. The whole body could not be held by each; therefore a surgical operation was required to divide it among them."

The same author specifically shows, also, the reluctance of the interpreters of law to realize this, a phase of cultural lag with which we all are familiar, some of us painfully so.<sup>5</sup>

The recognition of the revolutionary modification of law, or at least of its hypothetical character, is not, however, an immediate novelty. To go back only five centuries, the English Courts of Equity

<sup>3</sup> Pound, Roscoe: *Law and Morals*, pp. 122-4.

<sup>4</sup> Kohler, Jos.: *Evolution of Law*. (Primitive and Ancient Legal Institutions—Wigmore and Kocourek.) Carter, J. C.: *Law, Its Origin, Growth and Function*. pp. 160, 268.

<sup>5</sup> Pound, Roscoe: "The End of Law, 27 *Harv. L. Rev.* 195.

are founded upon a recognition of the existence of fundamental principles paramount to legal precedents. Counterparts of this English institution could probably be found in every society, however ancient, which advanced beyond the simplicity of tribal existence.

This highest "law" has in the past described variously as the "Divine Law," "conscience," "natural right," "the moral sense," etc., according to the religio-philosophy of the time and place.<sup>6</sup> Such criteria having proved entirely too vague, shifting, and elusive, the recent tendency, concurrent with the decline of religious superstition and the beginnings of the hopefully-entitled social sciences, has been toward standards of deeper definition. This has been an especially pressing necessity in view of the unprecedented shift from primary group life to secondary which characterizes the social organizations of today, particularly in the United States of America.

Thus social values have come under a more critical scrutiny, and a vocabulary of a less emotional sort brought into use. Extremists assert that conscience is no more than "farsighted selfishness,"<sup>7</sup> and that "right" conduct is as likely as not based on fear of the consequences of "wrong" conduct.<sup>8</sup> The claim is made that moral sentiment originated in primitive man's recognition of the maxim that there is safety in numbers,<sup>9</sup> that uniformity of environment gave rise to uniform behavior patterns,<sup>10</sup> which became custom,<sup>11</sup> which became right.<sup>12</sup> The Deity is thus, as it were, exercised. To call a man good or bad will no longer do. He is or is not "socialized."<sup>13</sup> Man, once in the image of God, is now, thanks to Darwin et al., a human animal, though having a psychological makeup that is not merely personal but social also, and therein lies his virtue, if virtue he hath,<sup>14</sup> for unless we satisfy ourselves that this animal has indeed "the desire to help others," inherent or environmental, along with his selfishness, it cannot be said that he has any social nature at

<sup>6</sup> Carter, J. C.: *Op. cit.*, pp. 131, 165, 174. Blackstone: *Commentaries*, I, p. 41. Post, A. H.: *Ethnological Jurisprudence*. (Primitive and Ancient Legal Institutions, pp. 34-5.) del Vecchio, Giorgio: *Science of Universal Comparative Law*. (Primitive and Ancient Legal Institutions, p. 65.) Austin, John: *Jurisprudence*: I, pp. 105, 144.

<sup>7</sup> Carter, J. C.: *Op. cit.*, pp. 152-3.

<sup>8</sup> *Ibid.*, p. 124.

<sup>9</sup> *Ibid.*, p. 126.

<sup>10</sup> Tarde, Gabriel: *Les Transformations du Droit*. (Primitive and Ancient Legal Institutions, p. 38.)

<sup>11</sup> Sumner, W. G.: *Folkways*, *passim*.

<sup>12</sup> Carter, J. C.: *Op. cit.*, p. 123.

<sup>13</sup> *Ibid.*, p. 148.

<sup>14</sup> Post, A. H.: *Op. cit.*, p. 15.

all. In such an event the principles of Christianity must be rejected as illusory, the utterances of its founder classified as the pratings of a fool, and the allegedly civilized world must continue to be a moral jungle. In other words, "business is business."

But there is plain reason, it seems, for a different opinion, unacceptable though it evidently is in practice to a majority of the race of men now living; for whereas in some individuals the we-feeling is so feebly developed as to be scarcely extensible to include one's own immediate family, and mother-love is extolled in song and cinema as the highest expression of human loyalty, there have lived and now live those in whom that sense of comradeship has reached such proportions as to engulf all their selfish inclinations. It was said of the late Eugene V. Debs, for example, that he would not only embrace his fellow-man but give him his coat, and whose own words, a fitting text to his life, ring with the harmony of organ music: "While there is a soul in prison, I am not free." Thus there is evidence to support the conviction that there are non-predatory possibilities in the future evolution of the human race and civilization.

That there are no separate pieces to history is evident.<sup>15</sup> However it seems that wherever one focusses attention upon a point in the evolution of social behavior, of which crime is a persistent item, there can be discerned as one of the most important threads a reasonably clear degree of we-ness. There are always those who belong and those who do not, and it might be postulated that the social soundness of a community is measurable by the proportion of those who are actual members, economically as well as politically. Such a criterion at least accords with the fundamental dogma of democracy, and by it can be measured the extent to which the house is divided against itself. Specifically, in dealing with the problem of criminal conduct one should take pains to determine at the outset whether he is going to regard the individual malefactor as a member of society or merely as an inept tool failing in its intended usefulness to an exclusive group of this-or thatocrats.

Even authoritative writers upon social subjects sometimes make the eminently fallacious assumption of the membership of all in the community. For example, the state has been defined as "the political organization of the individuals for the common good."<sup>16</sup> Regrettable

<sup>15</sup> Maitland, F. W.: *A Prologue of a History of English Law*. (Selected Essays in Anglo-American Legal History. I. p. 52.)

<sup>16</sup> Blackmar, F. W., and Gillin, J. L.: *Outlines of Sociology*, p. 162.

though it may be, such has never yet been the case, except possibly in a few sporadic utopian communities and in savage tribes of the very simplest group-life. It is generally conceded that such is not quite the case even in Soviet Russia, conceded by those who are disinterested students as well as by emigres and repudiated creditors. The idea of a general distribution of shares in community benefits was so novel at the time of the twelve disciples that they did not even grasp it; it was soon, with the help of St. Paul, forgotten, and not revived until the eighteenth century, when for the first time it received wide currency; since then it has been a fashionable philosophy of the western world. But even today, certainly as far as criminals are concerned, it is at most a distant ideal, clung to by some but for immediate practical purposes discountenanced by most, including a majority of the conspicuously influential. Vindictiveness is still the keynote, and naturally so, since it is simple, emotional, unthinking, and in accord with historical tradition, root and branch.

## II. *Guilt in Primitive Society*

Although conclusions regarding primary cultural origins must be to a large extent guesswork,<sup>17</sup> it may be stated with reasonable accuracy that the very idea of crime is anthropologically a recent development. Simple societies do not betray a recognition of a type of conduct which we style criminal, nor a practice of punishment.<sup>18</sup> It has frequently been noted, often with some astonishment, by observers of present-day primitives, that these people do not even punish their young children. Force among them is an extremely intertribal practice, not intratribal. Their we-ness, like the *esprit* of the Marine Corps, is virtually complete, solid,<sup>19</sup> and undoubting, so that group control is independent of any coercion. There is no need of the individual's defending himself against another

<sup>17</sup> Cairns, Huntington: *Law and Anthropology*, 31 *Columbia L. Rev.*, pp. 40-41—

"The origins of customs and institutions are irretrievably lost even beyond the possibility of discovery by the prehistorian. . . . But anthropology can exhibit to us, in studies of ruder cultures, other forms of the customs and institutions which constitute the social organization of our particular civilization. When the parts of primitive social organization have been collected and compared on a more extensive scale than that with which the anthropologist at present works, it may be possible to construct a scheme of social evolution which will be, if not history, at least the best available substitute for history."

<sup>18</sup> Faris, Ellsworth: *The Origin of Punishment*. (*Primitive and Ancient Legal Institutions*, pp. 153-60.)

<sup>19</sup> Pike, L. O.: *History of Crime in England*, II, p. 496.

individual of his own tribe. In a sense there are no individuals. The American Indian was not even able to comprehend the idea of private property, although keenly sensitive to tribal encroachments.

Thus primitives war, but do not punish. Punishment involves a semi-sympathetic attitude,<sup>20</sup> a diluted hostility, whereas the simple savage knows but two extremes, community and estrangement. Thus punishment exists only in a society which has become comparatively complex and developed varying degrees of fellow-feeling.<sup>21</sup>

"Wergeld, blood feud, and other primitive institutions were manifestly not punishments,"<sup>22</sup> but a feature of a state of decentralization which may be described as intertribal anarchy, analogous to the international anarchy of today. The analogy is made more vivid by the present controversy over international sanctions, moral and legal; without one or the other there can be no international crime in either sense.

The sociological accommodation from which this increased complexity in primitive society results is thus seen to be of two sorts: (1) co-operation on more or less equal terms, and (2) some form of slavery. There is considerable weight to the opinion that our industrial civilization savors more strongly of the latter,<sup>23</sup> and is more in harmony with the attitudes engendered by such a state of affairs, in spite of our protestations of democracy. Fascism is a frank Fichtian withdrawal from these pretensions. At any rate outright slavery was the predominant social relationship in England until the twelfth century,<sup>24</sup> and subsequent history may be viewed as a gradual evolutionary modification thereof, still far from complete.

However that may be, the criminal as well as the civil law must be regarded as a compromise emerging out of a state of conflict, in other words, a treaty of peace.<sup>25</sup> Preceding this there were only the customs of the isolated tribes,<sup>26</sup> the "right,"<sup>27</sup> uncontradicted folkways.<sup>28</sup>

<sup>20</sup> Faris, Ellsworth: *Op. cit.*, p. 153.

<sup>21</sup> *Ibid.*, p. 160.

<sup>22</sup> Maitland: "The Criminal Liability of the Hundred," *Collected Papers*, I, p. 217.

<sup>23</sup> Ward, Lester F.: *Evolution of Social Structures*. (Formative Influences of Legal Development, III, Ch. 21, p. 506.)

<sup>24</sup> Pollock and Maitland: *History of English Law*, I, p. 35, pp. 415-6.

<sup>25</sup> Merkel, Adolph: *The Compromise Nature of Law*. (Formative Influences of Legal Development, Ch. 17, Sec. 2, p. 448.)

<sup>26</sup> Carter, J. C.: *Law, Its Origin, Growth and Function*, pp. 18-19.

<sup>27</sup> Gray, J. C.: *The Nature and Sources of the Law*. (Select Essays in Anglo-American Legal History, I, pp. 303-6.)

<sup>28</sup> Sumner, J. G.: *Folkways*, *passim*.

The first step then in the evolution of criminal law is the hostile and harsh contact of one tribe with another in primitive economic competition. There would naturally be bloodshed, resulting, for example, from a dispute over the carcass of a deer. The body of the losing participant is left at the place of dispute, to be found by his kinsmen, and a tribal war thus precipitated.<sup>29</sup> The attitude of the tribesmen was undoubtedly free from serious concern about "right." They were incapable of even the thought, "right or wrong, my tribe." The battle was to the strong, but later, of course, to the cunning.<sup>30</sup>

Those tribes, however, which continued on this basis, were certain to weaken themselves, and to be subjugated by those possessing a calmer spirit. The ones capable of alliance and conquest would inevitably prevail. And with alliance and conquest, measurement of retaliation for injury, as between allies or castes, was essential to such accommodation. Hence the blood-feud, and the still familiar principle of one life for one life, and *only* one eye for one eye,<sup>31</sup> with the necessity for an institution in the nature of a tribunal

<sup>29</sup> Keller, F. A.: *Experimental Sociology*, p. 227.

<sup>30</sup> Bagehot, Walter: *The Use of Conflict*. (Formative Influences of Legal Development, III, Ch. 18, p. 456.)

"There is,' it has been said, 'hardly any exaggerating the difference between civilized and uncivilized man; it is greater than the difference between a tame and a wild animal,' because man can improve more. But the difference at first was gained in much the same way. The taming of animals as it now goes on among savage nations, and as travellers who have seen it describe it, is a kind of selection. The most wild are killed when food is wanted, and the most tame and easy to manage kept, because they are more agreeable to human indolence, and so the keeper likes them best. . . . Man, being the strongest of all animals, differs from the rest; he was obliged to be his own domesticator; he had to tame himself. And the way in which it happened was that the most obedient, the tamest, tribes are, at the first stage in the real struggle for life, the strongest and the conquerors. All are very wild then; the animal vigor, the savage virtue, of the race has died out of none, and all have enough of it. But what makes one tribe—one incipient tribe, one bit of a tribe—to differ from another is their relative faculty of coherence. The slightest symptom of legal development, the least indication of a military bond, is then enough to turn the scale. The compact tribes win, and the compact tribes are the tamest. Civilization begins, because the beginning of civilization is a military advantage.

"Probably if we had historic records of the ante-historic ages—if some superhuman power had set down the thoughts and the actions of men ages before they could set them down for themselves—we should know that this first in civilization was the hardest step. All the absolutely incoherent men—all the 'Cyclopes'—have been cleared away long before there was an authentic account of them. And the least coherent only remain in the 'protected' parts of the world, as we may call them. . . ."

<sup>31</sup> Cherry, Richard: *Primitive Criminal Law*. (Prim. and Anc. Legal Instits., p. 122.) Hobhouse, L. T.: *Morals in Evolution*. (Prim. and Anc. Legal Instits., p. 133.) Jenks, Edward: *A Short History of English Law*, p. 7. Pike, L. O.: *Op. cit.*, p. 86.



to do the measuring,<sup>32</sup> just as between twentieth century nations.<sup>33</sup> It was, indeed, an age of personal violence,<sup>34</sup> in view of which the somewhat orderly trial by battle can be appreciated as a distinct advance toward world brotherhood.<sup>35</sup> That self-help persisted for centuries as a recognized mode of redress<sup>36</sup> testifies to the proposition that rules of conduct are born in the agony of travail.<sup>37</sup>

During the first attempt at some sort of intertribal organization the new supertribal sanction would naturally be weak, and many persons nominally members of such organization would as naturally tend to continue in their habit of destroying each other without formality, and at wholesale instead of according to some measurement,<sup>38</sup> a situation again comparable to modern nationalism. The problem of enforcement thus became important, and extremely difficult in the absence of a non-partisan police force of some kind. Outlawry was therefore an attractive device, about the only one available.<sup>39</sup> Religious institutions, by the way, have frequently used this same tool, calling it excommunication, and because of the same embarrassment, to wit, the lack of more direct means. The most that can be said for outlawry is that it was a beginning, and better than no sanction at all, though ineffective in proportion to the persistent prevalence of ancient attachment to narrow tribal loyalties. Tribocentrism, though its complexion has changed, is even now not extinct by far in the most highly organized civilizations. Candidates for office who appeal to various special interests among their constituents, whether by outright vote-purchase, political jobbery, or protective tariffs, usually fare very well at the polls. Moreover the classic prayer: "God bless me and my wife, my son John and his wife—us four and no more," expresses a breadth of vision not much more limited than that of millions of our contemporaries.

The development of a super-tribal unit of society, whether by conquest or alliance, shows as one of its most important results,—and, evolutionally, as a very significant cause or excuse also,—an increasing consciousness of the need of measured redress to replace the impromptu and extravagant retaliation and counter-retaliation

<sup>32</sup> Hobhouse, L. T.: *Op. cit.*, p. 145.

<sup>33</sup> Faris, Ellsworth: *Op. cit.*, p. 159.

<sup>34</sup> Pike, L. O.: *Op. cit.*, pp. 79, 85, 88, 90, 98.

<sup>35</sup> Pollock and Maitland: *History of English Law*, I, p. 50.

<sup>36</sup> *Ibid.*, II, p. 574.

<sup>37</sup> von Jhering, Rudolph: *The Struggle for Law*. (Formative Influences of Legal Development, III, p. 447.)

<sup>38</sup> Pollock and Maitland: *Op. cit.*, II, p. 450.

<sup>39</sup> *Ibid.*, II, pp. 449-50.

of the feud.<sup>40</sup> Thus the early kings, acting as judges, gradually came to a cataloguing of such activities as were injurious to the welfare of the community, or of that portion of it which was recognized as important to those in power; such a catalogue must recognize that there are various degrees of gravity among such offenses, and indicate corresponding degrees in the respective penalties to be exacted.<sup>41</sup>

Criminal law has thus come into being. But in these early days of development the distinctions are purely objective, the severity or lightness of the punishment depending entirely upon the supposed importance of the injury, and not at all upon the state of mind of the one doing the damage.<sup>42</sup>

"What is the measure of culpability that ancient law endeavors to maintain? Is it high, is it low? Do we start with the notion that a man is only answerable for those results of his actions that he has intended, and then gradually admit that he is sometimes liable for harm that he did not intend, or, on the other hand, do we begin with a rigid principle which charges him with all the evil that he has done, and then do we accept first one and then another mitigation of this rule? There seems to be now little room for doubt that of these two answers the second is the truer. Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows."

Psychological nuances were entirely too subtle, and any Woodrow Wilson proclaiming them must have been set down as hopelessly academic and impractical. There was no such thing, in the law, as accidental injury.<sup>43</sup> Possession of stolen property was conclusive of liability. Murder and manslaughter as now distinguished were identical.<sup>44</sup> Such strictness and simplicity had of course the virtue of that certainty<sup>45</sup> so highly esteemed by business men, and many years of intellectual growth were necessary before its less attractive but correlative attribute,—formalism,—should become apparent.

The law of deodand is part and parcel of this stage of legal

<sup>40</sup> Pound, Roscoe: *The End of Law*, 27 Harv. L. R., p. 198.

<sup>41</sup> Davies, W. W.: *The Code of Hammurabi*. (Sources of Anc. and Prim. Law, p. 387.) Powell, J. W.: *Wyandot Government*. (Sources of Anc. and Prim. Law, pp. 287-8.) Pike, L. O.: *Op. cit.*, I, p. 41.

<sup>42</sup> Pollock and Maitland: *Op. cit.*, II, p. 470-1. See also Thorpe, Benjamin: *King Aethelbirt's Dooms*. (Sources of Anc. and Prim. Law, p. 515.) Henderson, E. F.: *The Lex Salica*. (Sources of Anc. and Prim. Law, p. 505.) Pound, Roscoe: *The End of Law*, 27 Harv. L. R., p. 204.

<sup>43</sup> Owen, A.: *Laws of Howell Dda*. (Sources of Anc. and Prim. Law, p. 546.) Pollock, J. F.: *Anglo-Saxon Law*. (Select Essays in Anglo-American Legal History, I, 102-3.) Pollock and Maitland: *Op. cit.*, I, p. 55.

<sup>44</sup> Pike, L. O.: *Op. cit.*, I, p. 469.

<sup>45</sup> Pound, Roscoe: *The End of Law*, 27 Harv. L. R., p. 207.

development, but more strikingly ridiculous, even to those of us who break in pieces recalcitrant golf-clubs. Animals and implements were favored with the honor of solemn destruction<sup>46</sup> for their misdeeds:<sup>47</sup>

"The deodand may warn us that in ancient criminal law there was a sacred element which Christianity could not wholly suppress, especially when what otherwise might have been esteemed a heathenry was in harmony with some of those strange old dooms that lie imbedded in the holy books of the Christians.

Science had hardly begun to dispel the fog obscuring the phenomena of existence. A superstitious answer to life's terrifying uncertainties was therefore necessary to relieve the intolerable tension of a psychic vacuum.<sup>48</sup>

From the orderly classification of crimes and measured retaliation, the next step is the substitution of money payments,<sup>49</sup> an improvement that cannot be over-estimated from the economic point of view. Here we have an early inkling of the difficult concept that two wrongs do not make a right. And while the *wer* compensated the victim the kingleit could gain revenue by means of the *wite*, imposed as a sort of disciplinary surtax.<sup>50</sup> The blood feud was thus gradually superseded.<sup>51</sup>

<sup>46</sup> Hobhouse, L. T.: *Op. cit.*, p. 143.

<sup>47</sup> Pollock and Maitland: *Op. cit.*, II, pp. 474-5.

(p. 475n) "Y. B. 7 Edw. IV. 2 (Pasch. pl. 2). So Hale, P. C., i. 429, speaking of witchcraft: 'It 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.'

<sup>48</sup> Levitt, Albert: *Origin of the Doctrine of Mens Rea*, 17 Ill. L. R., p. 128.

<sup>49</sup> Cherry, Richard: *Primitive Criminal Law*. (Prim. and Anc. Legal Instits., p. 124.) Hobhouse, L. T.: *Op. cit.*, p. 135. Pollock and Maitland: *Op. cit.*, I, pp. 47, 52.

<sup>50</sup> *Ibid.*, I, p. 48,—

"We find the public and private aspects of injurious acts pretty clearly distinguished by the Anglo-Saxon terms. *Wer*, as we have said, is the value set on a man's life, increasing with his rank. For many purposes it could be a burden as well as a benefit; the amount of a man's own *wer* was often the measure of the fine to be paid for his offenses against public order. *Wite* is the usual word for a penal fine payable to the king or to some other public authority. *Bot* (the modern German *Busse*) is a more general word, including compensation of any kind. Some of the gravest offenses especially against the king and his peace, are said to be *botless*, 'bootless,' that is, and the offender is not entitled to redeem himself at all, and is at the king's mercy. The distinction between *wer* and *wite* must be very ancient."

<sup>51</sup> *Ibid.*, II, p. 449,—

"A ready recourse to outlawry is, we are told, one of the tests by which the relative barbarousness of various bodies of ancient law may be measured. Gradually law learns how to inflict punishment with a discriminating hand. In this respect some of the Scandinavian codes, though of comparatively recent date, seem to represent an earlier stage than any to which our Anglo-Saxon law bears witness; outlawry in them is still the punishment for many even of the smaller deeds of violence. Among our English forefathers, when they were

Meanwhile the unity of the tribe or clan continued. The family, not the individual, was the unit of responsibility<sup>52</sup> and paid or received the *wer*. Ownership of land was, by the same token, tribal.<sup>53</sup> Of individual liberty there was practically none,<sup>54</sup> particularly as to females, who were of course chattels, and bought and sold as such.<sup>55</sup>

As life becomes more settled locality becomes significant. It may be supposed that during the early stages of settling down the tribe or family and the local community are practically co-extensive, the emphasis being still upon ancient blood ties as determining the unit of responsibility.<sup>56</sup> This influence has not entirely lost its force today, but, except in the Orient, it is safe to say that the locality has come to be more significant at the expense of the criterion of consanguinity.<sup>57</sup>

So we see the self-sufficient agricultural village, virtually isolated, becoming the unit of we-ness, but without appreciably enhancing individualism. When a breach of the lord's peace occurred within the territorial limits of a village community the apprehending of the individual culprit was of interest only to the members themselves. To the rest of the world the whole community was answerable. And where collective responsibility persists, any distinction between accident and design has little chance of being fostered.<sup>58</sup> On the one hand, the substantial interests of the group do not extend elsewhere, and on the other no observers of the incident in question except local persons are likely to be available during an investigation. The effect of making such a distinction would have been to assure an acquittal on every charge, all witnesses being friendly to the accused. Reprisals would ensue, with a reversion to private warfare. Indicia of this closely-knit and persistent group unity are the frankpledge, the tithing, and the wager of law,<sup>59</sup> not to mention

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first writing down their customs, outlawry was already reserved for those who were guilty of the worst crimes."

<sup>52</sup> Davis, W. W.: *The Code of Hammurabi*. (Sources of Anc. and Prim. Law, p. 409.) Kennedy, C. R.: *Oration of Demosthenes*. (Sources of Anc. and Prim. Law, p. 605.)

<sup>53</sup> Pike, L. O.: *Op. cit.*, I, p. 76.

<sup>54</sup> *Ibid.*, pp. 89-90.

<sup>55</sup> *Ibid.*, p. 91.

<sup>56</sup> Saibah, J. M.: *Fanti Customary Law*. (Sources of Anc. and Prim. Law, p. 328.) Kennedy, C. R.: *Oration of Demosthenes*. (Sources of Anc. and Prim. Law, p. 605.)

<sup>57</sup> Powell, J. W.: *On Regimentation*. (Prim. and Anc. Legal Instits., p. 73.)

<sup>58</sup> Hobhouse, L. T.: *Morals in Evolution*. (Prim. and Anc. Legal Instits., pp. 140-3.)

<sup>59</sup> Pike, L. O.: *Op. cit.*, pp. 55-60. Pollock and Maitland: *Op. cit.*, I, pp. 558, 568, 580.

the traditional rights in common,<sup>60</sup> which became so troublesome in later centuries. In a word, the prevailing criterion of liability ignored not only absence of individual intention but even the absence of participation.<sup>61</sup>

### III. *The Rise of Psychic Criteria*

Those early principles of responsibility are summarized by Post:<sup>62</sup>

"All wrongs are originally violations of rights between one clan and another. Every wrong done by an individual creates an obligation for his clan towards that of the injured person. There is thus no doctrine, in civil wrongs, about intent, negligence, guilt, capacity, voluntariness, mistake, fear, or the like. The whole point of view of individual mental states which dominates our modern tort-law (a law essentially of individual rights and duties) is alien to primitive law. Each clan is liable to the other for every injury suffered, whether it be done by adult clan-members or by women, children, animals, or lifeless objects belonging to the clan, and whether the wrongdoer be blamable, or be merely the involuntary tool of external forces."

Wigmore expresses much the same conclusions:<sup>63</sup>

"It is easy to understand that the notion of Responsibility for Harmful Results was determined largely by crude primitive instincts of superstition,—that our ancestors were satisfied with finding a visible source for the harm and following out their ideas of justice upon it.

"It must be remembered, moreover, that we are here dealing with a sentiment characteristic of primitive justice everywhere. It was, beyond question, universal. It appears not only in the strictly Germanic peoples, but in the records of all the race-stocks, however mixed, of post-Christian Europe—the Scandinavian, the Flemish-Dutch, the Celtic, the French, the Spanish, the Italian, the Slavic, the Hungarian. It is found in earliest Greece and earliest Rome. It is equally marked in the Semitic races—Jews and Mohammedans—as well as in their predecessors in Chaldea and Egypt; and in the totally unrelated Hindus and Chinese, as well as in the Japanese. And in the primitive tribes still surviving everywhere—in Africa, Australia, America, and Asia—it is still observable."

As civilization progresses distinctions and gradations of liability appear, particularly the state of mind of the accused becomes

<sup>60</sup> *Ibid.*, I, p. 620.

<sup>61</sup> *Ibid.*, II, pp. 529-32.

<sup>62</sup> Post, A. H. *Die Grundlage des Rechts und die Grundgeue seiner Entwicklungsgeschichte*, sec. 39, p. 350.

<sup>63</sup> Wigmore, J. H.: *Responsibility for Tortious Acts, Its History*. (Select Essays in Anglo-American Legal History, III, pp. 475-8.)

material. One might attribute this to any one of several significant phenomena, notably (1) the development of larger social units, (2) the transformation of predatory bands of fighters into settled agricultural communities, (3) the increase of intercommunication and commerce, (4) the development of sharp intellectual and moral sensibilities. A favorite explanation of the predominance of the mental factor in Anglo-American criminal law has been the introduction of Christianity. The logic of such a thesis is as follows: The Christian doctrine includes the propositions (A) that a sinful thought is as blameworthy as a sinful act, and (B) that the salvation of the soul is of more importance than the welfare of its transitory earthly vessel. Hence the introduction of Christianity, with its penances and spiritual purifications, into England<sup>64</sup> served gradually to wean the population from its harsh objective attitude.

What such particularism overlooks, or at least fails to mention, is that the same distinctions developed also in other civilizations, even those antedating the Christian era itself. Devotees of the Christian theology are wont to think of Jesus as the inventor of social consciousness and self-abnegation, and the spiritual emphasis thereby connoted.

The panorama of changing criminal criteria discloses rather that as mankind gains more and more experience in cooperation, which is the keystone of social life, there slowly develops the capacity for a deeper and more comprehensive we-ness, which becomes the quality of the highest survival value. Two sentences epitomize this: "In union there is strength," and "Blessed are the meek, for they shall inherit the earth." From a predatory animal, hunting in small groups, man evolved, and is evolving, into a sympathetic social

<sup>64</sup> Levitt, Albert: *Origin of the Doctrine of Mens Rea*, 17 Ill. L. R., pp. 128-37. Holdsworth, W. S.: *History of English Law*, pp. 53-4. Pike, L. O.: *Op. cit.*, pp. 49, 55-7. Pollock and Maitland: *Op. cit.*, II, p. 476,—

"Of course the Christian church in her penitential books, which exercised a not inconsiderable influence on the parallel tariff of *wite* and *bot*, laid stress on the mental elements in sin. Still some of the earliest of these books set up a very high standard of liability, even in *in foro conscientiae*, for remote and unintended harm. This may be due to that nervous horror of blood which at a later time would prevent an ordained clerk from taking part in a surgical operation, but is due in part to the example set by temporal law and public opinion. We receive a shock of surprise when we meet with a maxim that has troubled our modern lawyers, namely, *Reum non facit nisi mens sea*, in the middle of the *Leges Henrici* among rules which hold a man answerable for all harm that he does, and not far from the old proverb, *Qui inscienter peccat, scienter emendat*. But the borrowed scrap of St. Augustine speaks only of perjury, and that anyone should ever have thought of charging with perjury one who swore what he believed to be true, will give us another glimpse into ancient law."

being. These other circumstances are only the indicia of the progress of that evolution. Without some trace of this quality the first petty chieftains could not have ruled for a day. Without a further growth of it no kingdoms could have arisen. Similarly Christianity could never have taken root in England had not the spiritual soil been already greatly improved. On the other hand historical scholars now realize that the so-called Christianity of medieval Europe was really only at best a compromise with the prevalent paganism, a compromise in favor of Christianity only insofar as the existing intellectual and moral capacities of the peoples concerned had developed. It might be added that the disparity, so striking today in the militant Western world, between the avowed faith and the current practice, illustrates the same kind of adjustment.

That there is in the growth of psychic criteria for wrongdoing something far more fundamental than a superimposed religious dogma is shown by the story of the death of Baldur.<sup>65</sup>

"Baldur the beautiful was beloved by all the gods, and Frigga had exacted an oath from all things—fire, water, stones, trees, and all—not to harm Baldur; for Baldur had dreamed of his own death. Then the gods, his safety assured, began in fun to pelt him with stones, clubs, and battle-axes, and found him indeed invulnerable. But Loki the jealous was vexed because Baldur was not hurt; and going in disguise to Frigga he learned that the mistletoe alone had not been sworn, for it seemed too feeble a plant to do harm. Then Loki went to Hodur, the blind god, who had been standing apart, for he had nothing to throw. He could not see to aim, so Loki gave him the mistletoe twig and guided his hand, and the twig flew, and struck Baldur lifeless. The other gods were for laying strong hands on the murderer; but they were in a sacred place. And Hodur fled. And Odin said, 'Now, who will wreak vengeance on Hodur, and send Baldur's slayer to Hades?' The avenger was Wali, Baldur's younger brother, who washed not his hands and combed not his hair until he fulfilled his vengeance and smitten to death the slayer of Baldur."

The commentator adds, "A clearer case of innocence, one would think, in these days, could hardly be made out; but not so by the tests of our ancestors." But who can doubt that the teller of the tale, and every one of his auditors, felt that Loki was the real villain? The rest of the same mythology is eloquent of the status of this character. In other words, the story itself shows a dawning appreciation of the psychic quality of guilt, among people who had never heard of Christianity.

Now, it is fairly obvious that with the growth of more com-

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<sup>65</sup> Wigmore, J. H.: *Op. cit.*, p. 483.

prehensive units of social organization the intensity of unity in each component group languishes. Necessity is not only the great mother but in the long run the only nurse. Thus the King's Peace becomes paramount, while the Lord's peace loses its significance.<sup>66</sup> There is no clearer aspect of the history of English law than the steady encroachment of the Royal upon the Feudal courts, the much misunderstood Magna Carta being a temporary move backward,<sup>67</sup> probably necessitated by a previous forward step made more hastily than social evolution would justify. When the times had ripened the independence<sup>68</sup> of the feudal lords, to preserve which John's signature to the Great Charter had been compelled,<sup>69</sup> disintegrated.

Coincident with the increasing centralization of political power, even in its earlier stages, we find distinctions developing, accidental injury to property sometimes being distinguished before accidental personal injury.<sup>70</sup> It is suggested as a reason for this that in a simple society a greater proportion of the injuries to property would be of the unintended sort than in the case of personal injuries, where there could be a reasonable presumption of intent in every case. Primitive animosity would normally be personal, and direct in expansion.

As civilization proceeds such broad presumptions, if such they are, become increasingly unsatisfactory. Tribocentrism, with its correlative hostility to everything extratribal, decays, and contacts are more normally friendly. It is no longer reasonably correct to assume an evil purpose. Hence the exceptions tend to become so numerous that the general assumption is destroyed and the new element, the mental state, gains greater and greater significance, and finds its place in the law.<sup>71</sup>

The old-fashioned stark absolute, whether based on mental dullness or reasonable presumption, was nevertheless long a-dying. As late as the thirteenth and fourteenth centuries an accidental killer had to obtain a special pardon from the king,<sup>72</sup> and such procedure was also necessary, in the reign of Henry III, on behalf of a woman who killed in a fit of madness<sup>73</sup> and of one killing in self

<sup>66</sup> Hobhouse, L. T.: *Op. cit.*, p. 146.

<sup>67</sup> Beard, Charles and Mary: *Rise of American Civilization*, I, p. 18.

<sup>68</sup> Pollock and Maitland: *Op. cit.*, I, pp. 45-51.

<sup>69</sup> Munro, D. C.: *The Middle Ages*, p. 267.

<sup>70</sup> Dugmore, H. H.: *Kafir Laws and Customs*. (*Sources of Anc. and Prim. Law*, pp. 319-20.)

<sup>71</sup> Levitt, Albert: *Op. cit.*, p. 120. Pollock and Maitland: *Op. cit.*, II, p. 476n. *Select Pleas of the Crown*. (*Seldon Society*) p. 120.

<sup>72</sup> 33 Yale L. J., p. 528.

<sup>73</sup> Pollock and Maitland: *Op. cit.*, II, p. 480.



defense.<sup>74</sup> Moreover, the right of the decedent's kinsmen to compensation persisted even against one pardoned by the king, that is, excused from criminal liability.<sup>75</sup> This anomaly curiously resembles the modern workmen's compensation statutory liabilities.

At any rate degrees of blame are recognized in the late Anglo-Saxon dooms.<sup>76</sup> The Norman conquest unquestionably further stimulated the development of distinctions, in its introduction of political unity on a larger scale and of a more durable character than theretofore experienced in England. The King's Peace began for the first time to assume permanent significance and force. The real national development of England may be said to have begun, and with it, as already pointed out, broader sympathies and attitudes, involving more accurate rules of conduct. Added to this there was the always important factor of continued and close contact with a different culture. It is not surprising that Roman law began to play a part in English legal evolution.<sup>77</sup>

All along, the interaction of the various factors involved, namely (1) broadening political and economic cooperation, (2) peaceful intercommunication of ideas, (3) historical records, (4) the doctrines of Christianity, (5) economic individualism, (6) intellectual development, and (7) the increase of wealth, combine in a growth that is at the same time steady and self-accelerating. Out of this complexity emerged a criminal law calculated to respond at least roughly to a tremendously increased variety of recognized shades of culpability.

To trace all these intertwining threads of influence would require almost infinite learning and exposition, and historians according to their respective points of emphasis—legal, political, religious, economic, etc.—have of necessity elided the twilight zones of their particular interests, merely paying their respects to the others in passing.<sup>78</sup>

It goes without saying that this development, while on the whole a steady and continuous unfolding, was far from smooth. Entrenched habits of mind have hardly ever been known to yield without a bitter struggle. Nor is the natural predacity of the savage easily exorcised, requiring, rather millenia of evolution for its elimination, and it is surely no bombast to remark that the story is writ-

<sup>74</sup> *Ibid.*, II, p. 484.

<sup>75</sup> *Ibid.*, I, p. 53.

<sup>76</sup> *Ibid.*, I, p. 53.

<sup>77</sup> *Ibid.*, II, p. 477.

<sup>78</sup> Holdsworth, W. S.: *Op. cit.*, II-VIII.

ten in blood. The final chapter of this process seems to be yet far in the future.

From the Norman invasion of England until the nineteenth century a progressive refining of the principles of liability evolved. "The main principle of the earlier law is that an act causing physical damage must, in the interests of peace, be paid for."<sup>79</sup> By the time of Henry I (1100 A. D.) the duty to compensate still exists, even in cases of accident and self-defense. A man acts at his peril to that extent. But the crumbling process has begun. The general rule at this time shows at least two important modifications, namely the recognition of the irresponsibility of (1) lunatics and (2) young children.<sup>80</sup> During this reign the celebrated maxim, "*reum non facit nisi mens rea*" was coined, applied then to the crime of perjury, of all crimes the one most obviously involving an attitude of mind,<sup>81</sup> and although still creating liability to compensate the injured, the accidental wrong is emendable.<sup>82</sup> The king's power to pardon probably provided equity, of a sort, in cases where the absence of legal distinctions had become most glaringly absurd:<sup>83</sup>

"When in the following period these more advanced ideas gain greater influence, when all serious crime comes to be regarded as an offense against the king, the royal power to pardon will help to reconcile the new ideas with the old. The king, it is true, will not be able to prevent the injured man or his kin from prosecuting an appeal for *bot* or *wer* upon the old principles. But when *bot* and *wer* become obsolete, when crimes which call for punishment become differentiated from torts for which damage can be obtained, the ideas which ground criminal liability upon moral delinquency will have freer play—so much free play, in fact, as is consistent with political expediency."

From the accession of Henry II (1154) until the death of Bracton (1268) the centralization of authority, in spite of civil war and other indicia of political unrest normally attending a changing social order proceeded apace. We see the Royal courts gaining in power and prestige, with the correlative decline of local authority. Feudalism is on the wane. The relation of the king to the individual subjects becomes direct. The King's Peace becomes transcendent, and public policy a realm-wide matter. The doctrines of Christianity take firmer root. The people are more capable of appreciating the

<sup>79</sup> *Ibid.*, II, p. 51.

<sup>80</sup> *Leg. Henr.*, 59, 20, 78, 6, 7.

<sup>81</sup> *Ibid.*, 5, 28.

<sup>82</sup> *Ibid.*, 90, 11.

<sup>83</sup> Holdsworth, W. S.: *Op. cit.*, II, p. 52.

refinements of the Roman law. All these influences tend to make responsibilities more and more a personal affair.<sup>84</sup>

It is not surprising that the rules relating to criminal liability show a great advance:<sup>85</sup>

"Now a consideration of what guilt is morally imputable will lead us to make refined distinctions—to attach, for instance, some slight guilt to a man who kills by mischance, though we should not dream of holding him guilty of murder. . . . In those days to hold a man responsible for killing was to hold him liable for murder. The kinds of homicide and the degrees of punishment are not yet nicely adjusted. But, from another point of view, the insistence upon the element of moral guilt, which in the eyes of the canonists varied the penance to be imposed, helped to overthrow the older system."

This change of attitude, of which Bracton was the outstandingly articulate prophet, became manifest during the reign of Edward I (1216-1272). The practice of pardoning children under seven who have committed a felony becomes an established rule, and rising by the same process are the defenses of lunacy, misadventure, and self-defense, although there is not yet any distinct legal classification.<sup>86</sup> Likewise in theft, the *animus jurandi* is coming to be considered an element of the offense, as Bracton had been insisting it should, according to the canon law, and these doctrines were to be accepted as the civilization grew up to them.

In the fourteenth and fifteenth centuries the distinctions between wilful murder, on the one hand, and accidental, justifiable, and in self-defense, on the other, are definitely enunciated. Other felonies, such as rape, burglary, arson, and robbery, depend upon wilfulness. The law has left far behind the old rules which look merely at the result and neglect the intent.

Various shades of moral guilt in homicide had by that time found their way into the law, as that between negligent injury and that resulting from premeditated malice,<sup>87</sup> the latter gradually coming to be designated by the name of murder, the old word for secret killing, peculiarly odious to the forthright Anglo-Saxons of preceding centuries.

Suicide came to be a felony during the fourteenth century.<sup>88</sup>

<sup>84</sup> Jenks, Edward: Edward I, the English Justinian, pp. 142-5.

<sup>85</sup> Holdsworth, W. S.: *Op. cit.*, II, p. 259. 33 Yale L. J., p. 528.

<sup>86</sup> Holdsworth, W. S.: *Op. cit.*, II, p. 359.

<sup>87</sup> Fitzherbert: Abridgement, Cor. Pl. 284.

<sup>88</sup> *Ibid.*, Cor. Pl. 301.

This innovation derives not only from the religious emphasis upon the importance of the soul, but from at least two other aspects of current social evolution, the public policy of discouraging a reduction of the population, and the interest of the Crown in forfeitures.

It is noteworthy that in 1397 there was enacted a statute making it treason to "compass the king's death or deposition."<sup>89</sup> Thus an intent alone was made a crime, though an overt act be absent.<sup>90</sup> In general, however, even where a felony was so far intended as to be unsuccessfully attempted, it was not a felony.<sup>91</sup> Even today, as everyone knows, this distinction survives in the lesser punishment to the mere attempter.

Feudal attitudes survived to the extent that each individual was considered as having a permanent status, and he could not legally alter it, even in the towns. The current expression, "*stadtluft ist frei*," was a comparative. That different classes of society should have special privileges was a matter of course. Political equality was not even an ideal, and that it was not is certainly no matter for surprise. Social evolution had not proceeded far enough, for a multitude of inseparable reasons already discussed.

On through the sixteenth century the conditions of criminal liability continued to become more precise. The law was feeling its way toward classification.<sup>92</sup> The work of discriminating between one or another sort of homicide furnishes a clear picture of this. The old excuses requiring royal pardons came to be recognizable classes, receiving pardons customarily, and finally to be enunciated in positive law, as in the statute exonerating from forfeiture of goods those who killed defending themselves from robbery, arson, and burglary.<sup>93</sup> Misadventure<sup>94</sup> and self-defense<sup>95</sup> were recognized excuses by the year 1500.

To hold one criminally liable for damage done by his animals his knowledge of the animals' tendency must be shown.<sup>96</sup> A child under fourteen was protected by a presumption of incapacity to

<sup>89</sup> St. 21 Richard II, co. 3 and 4.

<sup>90</sup> Holdsworth, W. S.: *Op. cit.*, II, p. 450.

<sup>91</sup> *Ibid.*, III, p. 311.

<sup>92</sup> But see Fitzherbert Abridgement: Cor. Pl. 383 (1322), where an attempt to murder was punished as if accomplished.

<sup>93</sup> St. 24 Henry VIII, co. 5.

<sup>94</sup> Year Book 6, Edward IV, Mich. pl. 18.

<sup>95</sup> Year Book 11, Henry VII, Pasch. pl. 14.

<sup>96</sup> Fitzherbert: Abridgement, Cor. Pl. 311.

commit a felony.<sup>97</sup> Madness at the time of committing the act became a lawful excuse.<sup>98</sup>

By the beginning of the seventeenth century medieval feudalism was gone from England,<sup>99</sup> and nationality had taken its place. The increasing contacts of commerce and communication, tremendously enhanced by the increase of wealth and by the spread of information through the printing press, released in large measure the opportunities for individual activity and development. An increasingly large proportion of the population found itself free of the old-fashioned restraints of permanent status and in a position to exercise initiative under the centralized government of the realm.<sup>100</sup> New alignments of interests and social groups attained importance and influence, property and tools of new kinds came into use, and relationships and rights became more and more complex. Modern civilization seemed to leap forward. The criminal law reflected this development most obviously in a great growth in the list of crimes and their graduations,<sup>101</sup> but no less truly in the increased recognition of distinctions and degrees of culpability. The old principles continued to be elaborated, and the rules deduced from them to become more definite and refined in their distinctions.<sup>102</sup> The doctrine of attempt could not longer be ignored, and the guilt of those who chanced to be thwarted in their harmful designs became legally recognized and punishable.<sup>103</sup>

Thus in the year 1700 the rules of criminal liability had by statute and precedent reached a high degree of refinement, following apace contemporary social processes—economic, intellectual, poli-

<sup>97</sup> Year Book 3, Henry VII, Hil. pl. 4.

<sup>98</sup> Year Book 21, Henry VII, Mich. pl. 16.

<sup>99</sup> Pike, L. O.: *Op. cit.*, I, p. 383.

<sup>100</sup> Holdsworth, W. S.: *Op. cit.*, IV, p. 402.

<sup>101</sup> *Ibid.*, VI, p. 399 ff.

<sup>102</sup> *Ibid.*, VI, p. 629 ff.,—

"The doctrine of constructive treason was developed; the line was drawn more clearly between murder and manslaughter; new illustrations were afforded of the narrowness of the crime of larceny at common law; the scope of burglary and robbery was more clearly explained; and the necessary ingredients of such crimes as riot, perjury, and bigamy were illustrated. It was a reckless age—politically and morally—so that crimes of violence were common. Also it was an age of commercial expansion, so that various new forms of fraudulent dealing needed suppression. For these reasons the criminal law developed with some rapidity.

(VIII, pp. 302-4) "The readiness with which all classes resorted to lethal weapons to assert their rights, or to avenge any insult real or fancied, gave abundant opportunity for elaborating the distinctions between the various kinds of homicide, and, in particular, the distinctions between murder and manslaughter."

<sup>103</sup> *Ibid.*, V, p. 201.

tical, and religious. The requirement of personal culpability had become firmly fixed as a principle of criminal liability.

The state of mind necessary for guilt in different classes of crime is seen to vary.<sup>104</sup> The guilty intent required for murder is different from that required for larceny.<sup>105</sup> And due to the still-present difficulty of proving intent, as "the devil himself knoweth not the thought of man," certain overt acts are held to be conclusive of intent. The doctrine of "substituted intent" was also found necessary, as "when one ompasseth to kill, wound, or beat another, and doth it *sedato animo*, though it be intended against one, it shall be extended towards another."<sup>106</sup> Intent to commit one felony came for similar reasons of public policy to be considered sufficient intent to support criminal liability where other damage resulted, though by accident, from the situation thus guiltily created. Thus unintended killing resulting from the doing of another unlawful act came to be murder, and punishable as such.<sup>107</sup> If, however, the intended act happened to be of a not very serious unlawfulness, a resultant accidental death was placed in the category of manslaughter. Here we see the recognition of various degrees between extreme guilt and complete innocence, a notable refinement. Similarly, an unpremeditated killing in a sudden quarrel came to be placed in this intermediate class.

Guilty intent came to be negated in five kinds of cases in all, namely, those of (1) reasonable inadvertence, (2) self-defense, (3) extreme infancy, (4) insanity, and (5) public necessity. Drunkenness, if caused by other parties, became a defense also, or at least recognized as a mitigating circumstance. And a wife could excuse herself as having been coerced by her husband. In that case the husband became the guilty party, his presence even causing a presumption of coercion.

"In these various ways the law, starting from the idea that a *mens rea* or element of moral guilt is a necessary foundation of criminal liability, has so defined and elaborated that idea in reference to various sorts of crimes that it has come to connote very many different shades of guilt in different connections. But, though *mens rea* has thus come to be a very technical conception with different technical meanings in different contexts, it has never wholly lost its natural meaning; and because its natural meaning has never been wholly lost sight of, the necessity for its presence, in some form, has supplied the principle upon which

<sup>104</sup> *Ibid.*, VIII, p. 434.

<sup>105</sup> De Pace: Oxford Studies in Social and Legal History, VII, p. 378.

<sup>106</sup> Holloway's Case (1629), Cro. Car. 131. 20 Mich. L. R., p. 234.

<sup>107</sup> Coke: Third Institute, p. 56.

many of the circumstances which will negative criminal liability are based. These, in their turn, have been so developed that they have become the foundation of different bodies of technical doctrine; and in these ways a large part of our modern criminal law was developed."<sup>108</sup>

#### IV. *Guilt in the Light of Sociology*

Looking at the criminal law as it stood in England at the beginning of the eighteenth century one sees clearly that by that time the simple old objective test of liability had been completely superseded by the subjective or psychic test. To be sure, it had not reached the point where a man was held guilty of a crime by evil thought alone, but the evil state of mind was essential. The maxim, "*reum non facit nisi mens rea*," became the guiding principle of criminal jurisprudence, and still is.<sup>109</sup> That date (1700) is therefore a reasonably convenient point at which to compare the ancient and the modern picture. The contrast is of course obvious, and is explained by the enormous social development intervening. Instead of the hundreds of small and virtually independent political units of pre-Norman England there has risen a single nation, knit together by millions of threads of cooperative interest among its citizens. Superstition has largely made way for social philosophy.<sup>110</sup> "We" is a word taking in millions instead of a handful. The avowed purpose of criminal law now is to safeguard this huge society, rather than to recompense an injured family. Instead of crude and rigid rules of thumb there is an elaborate refinement of distinctions in the law generally as well as in the criminal branch. Instead of trial by mob, by duel, and by boiling kettle, there is an intricate and careful procedure for determining the facts. Instead of unbending hereditary class distinctions there is a large measure of freedom and individual initiative,<sup>111</sup> culminating in the economic doctrine of *laissez-faire*. Society is dynamic rather than static. Utter ignorance has given way to widespread literacy and comparative enlightenment, while the supremacy of force has been greatly moderated by the power of intelligence. Peace rather than war is regarded as the normal state of affairs. Society emphasizes constructive rather than

<sup>108</sup> Holdsworth, W. S.: *Op. cit.*, VIII, p. 447.

<sup>109</sup> Holland, T. E.: *Jurisprudence*, p. 381. Clark, A. J.: *Analysis of Criminal Liability*, pp. 109, 112, 152, 172. Holmes, O. W.: *The Common Law*, pp. 47, 50, 75. Austin, John: *Jurisprudence*, I, p. 488; II, pp. 683, 695, 709. May, John W.: *The Law of Crime* (3d ed.), pp. 27 ff.

<sup>110</sup> Pike, L. O.: *Op. cit.*, II, p. 490. *Abrams, et al. v. U. S.*, 250 U. S. 616, at p. 624 (Holmes, J.).

<sup>111</sup> Pike, L. O.: *Op. cit.*, II, p. 563.

destructive activity. Cooperation has largely succeeded conflict and mere accommodation. Instead of the supreme rule of prejudice there now may be found tolerance and scholarly investigation. Sympathy is admired more, and callousness less. Impatience is tempered by more perspective. All these fruits are far short of ripeness, but the difference is none the less clear, all along the line, sufficiently clear to indicate mutual correlation.

The extremity reached in the eighteenth century in individualism, marked by the economic and political doctrine of *laissez-faire* on the one hand, and the philosophic principle of free-will on the other, is in the nature of a climax. It would seem that a prerequisite to such liberation was the first establishment of the principle of nationalism. The restraints of locality and status were sloughed off, and the released reservoirs of individual initiative effected tremendous economic gains.

Nevertheless it should be remembered that it had once been the recognized duty of the lord to protect his vassal, and of the master to feed and house his slave. What is gained in liberty is often lost in security, and the abuses of the Spencerian philosophy have made it apparent to increasing numbers that individualism may provide so little of the latter that the former is unavailable. Such is the paradox of liberation, under the operation of the truism of "to him that hath." The shortcomings of current human nature seem to lead only from one form of regimentation to another.

That the criminal law is too narrowly individualistic in its present principles has become increasingly apparent during the past two centuries. Before long it was observed, for example, that the doctrine of *mens rea* could not apply to the modern business corporation,<sup>112</sup> and the definition of culpability therefore had to be modified, both in tort and crime, by statutory changes. There have been enacted many statutes imposing not only tort liability without fault<sup>113</sup> but also establishing certain acts as crimes without regard to the mental factor.<sup>114</sup> Such tendencies call to mind Maine's celebrated observation that the progress of human relationships is from status to contract, and seem to contradict it. It is interesting to speculate how much more emphatic this reaction, if reaction it is,

<sup>112</sup> Lee, F. P.: Corporate Criminal Liability, 28 Columbia L. R., pp. 1, 181. Edgerton, H. W.: Corporate Criminal Responsibility, 26 Yale L. J., p. 827.

<sup>113</sup> 15 Harv. L. R., p. 335; 33 Harv. L. R., p. 542. Street, D. F.: Foundations of Legal Liability. Wigmore, J. H.: Responsibility for Tortious Acts, 7 Harv. L. R., pp. 315, 383, 441.

<sup>114</sup> Salmond, J.: Jurisprudence, pp. 323, 332. Holmes, O. W.: *Opt. cit.*, p. 54. 24 Mich. L. R., p. 304; 30 Yale L. J., p. 762.



might have been in the two hundred years just past if during that time there had been no trek of surplus populations into new and unsettled regions. Present social tensions are attributed in large part to the cessation of such activity, which alleviated the pressure, but thereby merely postponed the necessity of a program of permanent adjustment. Now a less individualistic philosophy seems to be a pressing necessity.

Since 1700 there has been evident a continuance of the process of increasing social consciousness. Adaptability and breadth of outlook have improved, together with an enlargement of sympathy, fostered particularly by convenience of communication and the emphasis upon secondary group organization. To state it in another way, people have become emotionally more sensitive and intellectually more scientific. On this account there is a greater proportion of those capable of sympathizing with conditions that are not part of their own immediate experience, and at the same time willing to inquire closely into sources. The strictly modern ideals of world peace and social equality are notable aspects of such development.

In the field of crime there has been during the last few years a veritable army of men and women who, deploring the prevalence of criminal behavior, have earnestly inquired concerning it, and endeavored to determine its deeper significance. To such people the legal investigation of the criminal's intent seems woefully superficial and inadequate. Hence the enormous amount of comment on this subject in books, magazine articles, and lectures, indicating every conceivable point of view, and in general agreement only on the negative proposition that the existing treatment of crime is not satisfactory. A mere list of these contributions fills a volume of 635 pages,<sup>115</sup> with 25 or more titles per page. Here, then, is a clamor of 15,825 voices. The words of the advertising sloganeer are appropriate: "Such popularity must be deserved."

And what do these writers reveal, or attempt to reveal, as factors in criminal behavior? Here are some of the subtitles under which the material is grouped: The Physical Environment; Heredity; Physical Defects; Mental Abnormalities; Economic Factors; Alcoholism; Drugs; Civilization and Crime; Crime as a Social Heritage in Groups and Families; Religion and Crime; Social Conditions; Cultural Conflicts; Home Conditions; The Press and the Theatre; Delinquency and Spare Time; Defective Administration of Criminal Justice; Influence of the War.

<sup>115</sup> Kuhlman: Guide to Material on Crime and Criminal Justice.

To analyze this mass of material is practically impossible. Some of the significant contributions may be briefly mentioned. Beccaria, writing in 1778, expressed a philosophic sympathy for the criminal, emphasizing the economic factor,<sup>116</sup> and protested eloquently against capital punishment. L. O. Pike, in 1873, noted extremes of wealth and poverty as a cause of crime,<sup>117</sup> also a correlation between increases in the forms of property and increases in capital crimes,<sup>118</sup> inherited tendencies,<sup>119</sup> the background of moral attitudes,<sup>120</sup> the correlation of immigration and crime,<sup>121</sup> insanity<sup>122</sup> and drunkenness.<sup>123</sup> Lombroso during the latter part of the nineteenth century carried on researches attempting to correlate criminality with certain physical proportions, and though his hypothesis was afterwards shown to be false he may be said to have introduced the modern scientific method of investigation into this field. Gabriel Tarde developed the theory of socio-psychological maladjustments as the source of criminal behavior, while W. A. Bonger expounded the doctrine of economic determinism, both being, like Lombroso, particularists. Later Ferri recognized the narrowness of such explanations,<sup>124</sup> as did Healy, though the latter laid greater stress upon sociological factors.<sup>125</sup>

Goring endeavored to correlate criminality negatively with intelligence,<sup>126</sup> but Murchison<sup>127</sup> and others effectively repudiated the validity of this type of particularism. The investigations of Cotton supporting the hypothesis that irregularities of conduct are traceable

<sup>116</sup> Beccaria, Marquis of Milan: *Essay on Crimes and Punishment*, p. 120,—

"I am sensible that to develop the sentiments of one's heart is an art which only education can teach, but although a villain may not be able to give a clear account of his principles, they nevertheless influence his conduct. He reasons thus: 'What are these laws, that I am bound to respect, which make so great a difference between me and the rich man? He refuses me the farthing I ask of him, and excuses himself by bidding me to have recourse to labor with which he is unacquainted. Who made these laws? The rich and the great, who never deigned to visit the miserable hut of the poor; who have never seen him dividing a piece of mouldy bread, amidst the cries of his famished children and the tears of his wife. Let us break these ties, fatal to the greatest part of mankind, and only useful to a few indolent tyrants.'"

<sup>117</sup> Pike, L. O.: *Op. cit.*, II, p. 412.

<sup>118</sup> *Ibid.*, II, p. 447.

<sup>119</sup> *Ibid.*, II, pp. 494, 667.

<sup>120</sup> *Ibid.*, II, pp. 495-6.

<sup>121</sup> *Ibid.*, II, p. 517.

<sup>122</sup> *Ibid.*, II, p. 580.

<sup>123</sup> *Ibid.*, II, p. 587.

<sup>124</sup> Ferri, E.: *Criminal Sociology*, Ch. 2, p. 51.

<sup>125</sup> Healey, Wm.: *The Individual Delinquent*, p. 310.

<sup>126</sup> Goring, Chas.: *The English Convict*.

<sup>127</sup> Murchison, C.: *Criminal Intelligence*.

to physical defects<sup>128</sup> have also been shown inconclusive.<sup>129</sup> On the whole, the sociological explanation has stood out as the most rational, due regard being had to other factors. The conclusions of such notable scholars as Burgess,<sup>130</sup> Sutherland,<sup>131</sup> Park,<sup>132</sup> Gillin,<sup>133</sup> Pound,<sup>134</sup> Van Waters,<sup>135</sup> Darrow,<sup>136</sup> Ogburn,<sup>137</sup> Parmelee,<sup>138</sup> and Munsterburg,<sup>139</sup> all bear this unmistakable emphasis.

Even as the scope and refinement of current judicial practices in the determination of guilt make the blunt simplicity of primitive tribunals seem childish, almost equally so are their own solemn determinations made to seem when viewed in the light of the above investigations. On the other hand, legislators and judges may well be excused from attempting to extend the research incident to a criminal trial so far as to include this welter of relevancies. The "trial" would tend to resolve into an exhaustive appraisal of society itself. That even the present scope of the legal inquiry is too complicated is shown by the increasing use of the expert witness and administrative agencies.<sup>140</sup>

For this reason the idea of further developing the legal definition of guilt along the same line as its past development, namely, refinement, qualification, and definition of extenuations, can hardly be tolerated. What can be, and in fact generally is, suggested by non-legalistic students of the subject is a distinct change of attitude away from the individualistic attitude toward the criminal. Happily some of the recent innovations in the criminal law are along this line.

Notable among such changes are the indeterminate sentence, the habitual criminal provision, and the lessening of capital punishment, as well as the reform of prison practices and the institution of the juvenile court. The tendency seems to be somewhat away from

<sup>128</sup> Cotton, H. A.: *The Relation of Physical Defect to Abnormal Conduct*. (Amer. Pris. Assoc. Proc., p. 177.)

<sup>129</sup> Thomas, W. I. and D. S.: *The Child in America*.

<sup>130</sup> Burgess, E. W.: *Study of the Delinquent as a Person*.

<sup>131</sup> Sutherland, E. H.: *Criminology*.

<sup>132</sup> Park, Robt. E., et al.: *The City*.

<sup>133</sup> Gillin, John L.: *Criminology and Penology*.

<sup>134</sup> Pound, Roscoe: *Criminal Justice in America*.

<sup>135</sup> Van Waters, Miram: *Youth in Conflict*.

<sup>136</sup> Darrow, Clarence: *Crime, Its Cause and Treatment*.

<sup>137</sup> Ogburn, W. F.: *Social Change*, p. 200.

<sup>138</sup> Parmelee, Maurice: *Anthropology and Sociology in Relation to Criminal Procedure*, pp. 408-9.

<sup>139</sup> Munsterburg, Hugo: *On the Witness Stand*, pp. 10, 231 ff.

<sup>140</sup> Pound, Roscoe: *The Future of the Criminal Law*, 21 *Columbia L. R.*, p. 1.

"organized revenge"<sup>141</sup> toward a more enlightened policy of "malice toward none," although the former attitude is still very vigorous.<sup>142</sup>

The problem of crime may be stated basically as follows: The interest of the community as a whole must be protected from acts by individuals or groups which are adverse to that interest, however useful or profitable such acts may be to the participants. In other words, anti-social activity, the antithesis of cooperation, should be eradicated.

The traditional technique used in dealing with this problem is the simple one of segregation and harshness, the latter feature being defended as minatory not only to the convict but also to his potential imitators. Whatever success the application of such principles may have (and great is the outcry even now that crime can be satisfactorily eliminated by making the punishment more severe and certain), two other principles have been introduced: (1) constructive treatment of the convict<sup>143</sup> and (2) social sanitation at the sources of criminal conduct<sup>144</sup>—preventive criminology. Most of the litera-

<sup>141</sup> Kellor, F. A.: *The Criminal Law as Organized Revenge*, Ch. 12. Robinson, James J.: *Recent Legislation Concerning Crime*. Barnes, H. E.: *The Story of Punishment*.

<sup>142</sup> DeFord, M. A.: *Shall Convicts Write Books*, 131 *The Nation*, p. 495.

In Los Angeles, after the publication of the shocking murder and dismemberment of a kidnapped child (December, 1927), it is hardly an exaggeration to say that a substantial number of citizens thirsted for the blood of the murderer, the earnest desire to inflict upon him the most excruciating torture being freely expressed by otherwise sweet and benevolent old gentlemen. Following the publication of a photograph of the murderer (then still at large), an innocent man, having the misfortune to seem to resemble the photograph, was pursued and attacked by an infuriated mob, who were convinced of their error in identification barely in time to save their victim from being torn limb from limb.

<sup>143</sup> Wines, F. E.: *Punishment and Reformation*, passim.

<sup>144</sup> *Ibid.*, p. 459,—

"It might almost be said that the effective prevention of crime will proceed *pari passu* with the diffusion of knowledge concerning the causes of crime and the real nature of criminals. This diffusion doubtless will be greatly aided by the special training of teachers, judges, lawyers, physicians, ministers, social workers, and other groups who come into close personal contact with potential offenders. But the diffusion must be more widespread than that. . . . Doubtless an acquaintance with criminology will be of very little effect in keeping an individual from becoming a criminal, but it will enable him to take a more intelligent attitude toward crime in others. It will also lead to a readier acceptance by society and by legislative and administrative officials of specific measures of improvement."

Bushee, F. A.: *Principles of Sociology*, p. 203,—

"For example, formerly, petty violations of law on the part of children in cities were suppressed by force. . . . At the present time a large part of this lawlessness has been removed by the establishment of playgrounds where children have a normal outlet for their activities."

Parmelee, Maurice: *Op. cit.*, p. 408.

ture on the subject of crime deals with this second principle in its myriad aspects.<sup>145</sup>

How is the criminal law to be integrated with the considerations of natural science and sociology, so that there may be "continuous intelligence brought to bear upon the fundamental problem, and the application in detail of all that legal and social and medical science have worked out?"<sup>146</sup> Whether one's favorite contributing factor in conduct be companionship, constipation, or congenital capitalism, crime is a vigorous reality. Though we may deprecate the puerility of Commissioner Mulrooney,<sup>147</sup> we must sympathize with his frantic tom-tom beating.

In view of the above it seems that it would be a rational step for courts of law to adopt a purely objective standard of "guilt," determining the simple question, somewhat as of old: "What occurred?" When the court has determined this it has done enough. Thereafter competent experts could analyze the active personal agent and decide what ought to be done about him.<sup>148</sup> It is true that

<sup>145</sup> Vide *supra*, p. 52.

<sup>146</sup> Pound, Roscoe: *The Future of the Criminal Law*, 21 *Columbia L. R.*, p. 16.

<sup>147</sup> New York Herald-Tribune, Feb. 22, 1931: "War Is Declared on New York Gangsters."

"Swift war against murderers and gangsters was declared tonight by Police Commissioner Mulrooney."

"Through Acting Detective Chief John J. Sullivan, the commissioner said: 'I want these racketeers and killers dug out of their holes like rats. Dig them out and bring them in and we'll mug (photograph) them, fingerprint them, and clap them into jail if we can. They're showing no quarter and we'll show them no quarter, nor ask for any. We are going to put these people out of business or know why. And we're going to put their places out of business, whether they be speakeasies or night clubs or hideaways.'"

"Three killings within 30 hours of each other last week prompted the new order. Detectives believe the murders presage a new and bitter gang war in New York."

Note, four years later: It hardly needs to be pointed out that the afore-said gangsters and racketeers are still doing a nice business in their various specialties on the island of Manhattan; but whether Mulrooney has learned why, as he promised to do, may be seriously doubted.

<sup>148</sup> Parmelee, Maurice: *Op. cit.*, p. 212,—

"In the first place, as we have several times contended, moral responsibility should be abolished as a fundamental criterion of criminality and should be replaced by the dangerousness of the criminal to society. The responsibility and intention of the criminal will then become indications of his character. But so long as the hypothesis of moral liberty remains at the base of the penal law it will be deductive in character. With the dangerousness of the criminal as a criterion, the general principles of penal law can be developed. These principles will be based upon the sciences which throw light upon the character of the criminal and upon the data and statistics concerning crime and the criminal. They will, however, necessarily be very general in their character, so as to permit of individualization. This will result in limiting the practical scope of penal law. On the other hand, as we have already indicated, the scope of procedure will be increased because the application of the law in each case will be determined by procedure."

experts are prone to disagree, and may be mistaken when they do agree. But the same is fully as true of judges and juries, particularly when they are confronted, as is now frequently the case, with questions in fields completely outside their acquaintance.

What of our vaunted individualism, so dear to the hearts of the nineteenth century philosophers and economists? The world of science and the world of economics, being responsive to facts as they find them, no longer take it seriously.<sup>149</sup> Theology and the law are more inclined to prefer the dogma to the fact when the dogma and the fact conflict. The business man, who likes to divide and conquer, accords to individualism lip-service.

The establishment of fundamentally correct criteria and preventives of crime is most important and most difficult, and no amount of painstaking effort can be too great for this huge task, which must touch the mores at every point, reaching to the heart of the social order. It has been observed that the racketeering mode of life is not confined to the heroin-dealer, and that the difference between the stick-up man and the high pressure salesman, the gangster and the financial conjurer, serves merely to emphasize certain fragrant resemblances.<sup>150</sup> It is pressingly important for the law of crimes to come abreast of these phenomena.

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<sup>149</sup> Pound, Roscoe: *The New Feudalism*, 16 *Amer. Bar Assoc. Journ.*, p. 553.

<sup>150</sup> Pound and Moore: *They Told Barron*.