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## TORT, CRIME AND THE PRIMITIVE

GERHARD O. W. MUELLER

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At a time when the social and economic development of a nation is rapidly progressing, the lawyers' interests are easily restricted to matters of immediate concern for the practice. So it is gratifying to note that at just such a time the great books of the law are being brought into the foreground again. In publishing the Twentieth Century Legal Philosophy Series the Association of American Law Schools emphasizes the importance of the classics of law—both for understanding the past and for molding the future of our legal system. However, it is not easy to “read” these classics. Though they contain matter of lasting importance, it must be kept in mind that any scholar, however capable, is handicapped in his work by the amount of general knowledge available at his time. It is therefore both useful and necessary to re-evaluate the conclusions which our law classics have drawn, especially with regard to historical matter. This paper is devoted to a re-evaluation of statements made by Max Weber with regard to the primitive law of wrongs.<sup>1</sup> In part one I shall compare modern law of wrongs with Weber's description of primitive law of wrongs. Part two will be devoted to a discussion of the primitive law's distinction between crime and tort. Part three attempts to answer the question whether primitive law of wrongs does concern itself with the frame of mind, the *mens rea*, of the wrongdoer. Weber said “no”. There is one fundamental question which appears again and again: Do all primitive systems of justice show the same or similar features? I have kept this problem in mind while doing my research and I think that this question is fully answered in the following discussion.

A few words must be said about the sources which were open to Weber and which

<sup>1</sup> MAX WEBER ON LAW IN ECONOMY AND SOCIETY, edited with introduction and annotations by Max Rheinstein, Max Pam Professor of Comparative Law, University of Chicago Law School. Translation from MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT*, Second Edition (1925) by Edward Shils, Professor of Sociology, Committee on Social Thought, University of Chicago, and Max Rheinstein, Cambridge, Massachusetts, Harvard University Press (1954). This work is volume VI of the 20th Century Legal Philosophy Series.

quite obviously determined his position. Apart from the original sources on early Germanic, early Roman, and other ancient law of wrongs, in which field our knowledge has not been enlarged by any major new discoveries, Weber seems to have derived his main impetus from Sir Henry Maine's *ANCIENT LAW*,<sup>2</sup> and the writings of Sir Henry's continental contemporaries, Bachofen, Post, Bernhoft, and Kohler, writers grouped around the *Zeitschrift fuer vergleichende Rechtswissenschaft* (Journal of Comparative Law). He appears to be little influenced by students representing opposite theories, especially von Amira. A number of excellent studies on primitive law have been undertaken since Weber wrote. New information on old subjects has become available particularly through research in the field of legal ethnology, to be discussed below.

## PART I

### WHAT IS WEBER'S DESCRIPTION OF PRIMITIVE LAW OF WRONGS? HOW DOES MODERN LAW OF WRONGS COMPARE WITH THIS DESCRIPTION?<sup>3</sup>

Max Weber states that the distinction between tort and crime "was certainly unknown in primitive administration of justice."<sup>4</sup> Closely related to this statement is a second observation: "There is a complete unconcern with a notion of guilt, and consequently, with any degree of guilt, reflecting the inner motivations and psychological attitudes. He who thirsts for vengeance is not interested in motives; he is concerned only with the objective happening of the event by which his desire for vengeance has been aroused. His anger expresses itself equally against inanimate objects, by which he has been unexpectedly hurt, against animals by which he has been unexpectedly injured, and against human beings who have harmed him unknowingly, negligently or intentionally." "Every wrong is . . . a 'tort' that requires expiation, and no tort is more than a wrong that requires expiation."<sup>5</sup>

Weber's description implies that in primitive society the only reaction to "wrong", which by definition is a violation of some standard or norm set by community agreement, tacit or express, is the revenge or compensation<sup>6</sup> of the group or individual injured. Perhaps we should interpret Weber's statements not quite that narrowly, but should add that not all reactions to "wrongs" were in the nature of expiation, but that some reactions were of religious significance, i.e. the sacrifice.<sup>7</sup>

We may try now to summarize Weber's opinion about primitive law of wrongs: Primitive society knows three reactions against a person or object which "committed"

<sup>2</sup> "Only exceptionally does [Sir Henry Maine] supply references to support his opinions." "It is often difficult to imagine what were the considerations which lead him to his conclusions, and often it is certain that there was no real evidence to support him." A. S. DIAMOND, *PRIMITIVE LAW*, London, 1935, p. 3. "The early German students of savage law again were all at once committed to the hypothesis of 'primitive promiscuity' and 'group marriage,' just as their British contemporary, Sir Maine, was handicapped by his too narrow adhesion to the patriarchal scheme." B. MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY*, New York, 1932, p. 3.

<sup>3</sup> WEBER, *op. cit. supra*, Ch. III Secs. 4 and 5.

<sup>4</sup> *Ibid.*, p. 50.

<sup>5</sup> *Ibid.*, p. 51, and see, *The Common Law*, Boston, 1949, pp. 2, et seq.

<sup>6</sup> MAX WEBER, *op. cit. supra*, secs. 4 and 5 *passim*.

<sup>7</sup> *Ibid.*, p. 56.

a violation of a norm recognized by this society as binding, namely, satisfaction of a desire for vengeance against this person or object, compensation for the harm done, and expiation of the likewise harmed deity by dedication of the wrongdoer or wrongdoing object in the form of a sacrifice, perhaps through mortification and destruction respectively, without concern for the guilt or motives of the wrongdoer or wrongdoing object.

These criteria, according to Weber, distinguish the primitive law of wrongs from the modern view, but especially from modern criminal justice which is "that public concern of morality or expedience decrees expiation for the violation of a norm,"<sup>8</sup> and which obviously is—at least to some degree—concerned with the notions of guilt and motives.<sup>9</sup> The writer here concurs with Karl von Amira in criticizing this theory with the words: "One has to admit that [this theory] recommends itself at least through its simplicity."<sup>10</sup>

Squaring these definitions of primitive and modern law of wrongs, especially criminal justice, can we detect any significant differences? Apart from fundamental procedural differences today which he terms "protection of a regular procedure,"<sup>11</sup> Weber seems to indicate that today's public concern for morality and expedience, which supposedly expresses itself both in the nature of those actions deemed wrongs and in the concern with the wrongdoers' frame of mind, is the main, perhaps only distinguishing criterion.

Accepting, for the present, Weber's opinion that the most primitive law of wrongs did not distinguish between tort and crime, and ignoring, likewise only for the present, our modern crime-tort distinction, can we really accept Weber's judgment about the law of wrongs?

Let us investigate the extent to which 20th century law is concerned with morality. We have many laws on our statute books which some concern for public morality must have placed there and which, nevertheless, are more often broken than observed, e.g., liquor laws, lost goods laws, gambling laws, traffic laws, divorce laws,<sup>12</sup>

<sup>8</sup> Ibid., p. 50.

<sup>9</sup> The modern tort objective, according to Weber, is "restoration", at least primarily. Ibid. p. 50.

<sup>10</sup> DIE GERMANISCHEN TODESSTRAFEN, *Untersuchungen zur Rechts- und Religionsgeschichte*, München, 1922, in ABHANDLUNGEN DER KÖNIGLICHEN AKADEMIE, vol. 31, p. 3.

<sup>11</sup> WEBER, op cit. supra, p. 50.

<sup>12</sup> BONYNGE, JUSTICE, in *Reed v. Littleton*, 289 N. Y. Supp. 798, 159 Misc. 853 (1932): "[Furthermore] has not my good brother overlooked the fact that a certain amount of naivete is an essential adjunct to the judicial office? Does not the Supreme Court grind out thousands of divorces annually upon the stereotyped sin of the same big blonde attired in the same black pajamas? Is not access to the chamber of love quite uniformly obtained by announcing that it is a maid bringing towels or a messenger boy with an urgent telegram? Do we not daily pretend to hush up the fact that an offending defendant is insured when every jury with an ounce of wit recognizes the defendant's lawyer and his entourage as old friends? More than half a century ago P. T. Barnum recorded the fact that the American people delight in being humbugged, and such is the national mood still. Nowhere is this trait more clearly shown than in the field of gambling. A church fair or bazaar would scarcely be complete without a bevy of winsome damsels selling chances on bed quilts, radios, electric irons, and a host of other things. If the proceeds are to be devoted to the ladies' sewing circle or the dominie's vacation, no sin is perceived and the local prosecutor, whoever or wherever he may be, stays his hand. But if a couple of dusky youths are apprehended rolling bones to a state of warmth, blind

and perhaps most notably sex laws. But rarely does non-observance of a law justify its removal from the statute books, e.g. prohibition laws. Is it tragic that among a segment of our population breaches of such laws are not even regarded as immoral?<sup>13</sup>

To what extent then is our modern law of wrongs concerned with expedience? There is not a single criminologist to the writer's knowledge who disputes the fact that it is our modern form of criminal procedure which shapes the criminal personality, viz. the experiences of the culprit on the stairway in our building of criminal justice that lead from the police lock-up to the penitentiary, via the magistrate's office, juvenile detention homes of various degrees, courtrooms and county jails. A person who is not a criminal at heart by the time of his release is the exception and not the rule. Those who confide in the invention of parole as a moral and expeditious instrument in our criminal law administration likewise will have to face disappointments in many jurisdictions.<sup>14</sup>

Are we justified in calling such a system of criminal law administration one that is concerned with public expedience? We certainly cannot do so unless we mean by expedience no more than to apprehend criminals and keep them in confinement for a specified time like warehouse contents.

To what extent is our modern law of wrongs concerned with the frame of mind of the wrongdoer? It would lead too far to cite cases of absolute liability in modern tort law,<sup>15</sup> but one comparison should be made: Weber, no doubt, was familiar with some reports about absolute liability in primitive law for persons who had left their arms at a place where a third person had access, which third person accidentally lost his

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justice perceives the infamy of the performance and the law takes its course. Sweepstakes and lotteries are unspeakably vile, and yet through them we have contributed so many millions to the Irish hospitals that it is rumored that patriotic Irishmen cheerfully volunteer to have their tonsils and appendixes removed just to keep the hospital beds occupied and the nurses employed. For a generation or more betting at horse races was unlawful. After this prolonged burst of morality the legislature suddenly discovered the need of 'improving the breed of horses' and enacted art. 20 of the Membership Corporations Law (sec. 280 et seq.), followed later by chapter 440 of the Laws of 1926. In a backhanded way this legislation restored race track betting by removing the criminal penalties. But let no one suspect that our best citizens repair to Belmont Park and other nearby tracks for the purpose of betting or gambling. Perish the thought, for their minds rest on higher things. Improving the breed of horses is their aim, and the conversation, aside from formal greetings, deals solely with sires and dams, foals and fillies, blood lines, consanguinity, and inherited characteristics. These things a judge must believe, even at the risk of being chided as naive, because they are contemporary America." See STEPHEN AND LEVI, *I ELEMENTS OF THE LAW* 158, Chicago, 1950.

<sup>13</sup> DR. ALFRED C. KINSEY, Professor of Zoology, in an address delivered before the Illinois Academy of Criminology, at Allerton Park, Illinois, on May 18, 1952, stated that his nation-wide research (*SEXUAL BEHAVIOUR IN THE HUMAN MALE*, Philadelphia and London, 1948, and *SEXUAL BEHAVIOUR IN THE HUMAN FEMALE*, then in print) has revealed that 90 percent of our American population of the years between puberty and senility violate five different sex statutes on two hundred different occasions. Compare this with the record of a primitive people like the inhabitants of the Carolines in the Pacific. See KARIG, *THE FORTUNATE ISLANDS*, New York 1948, chapters 6-8. On *The morality of our traffic rules* see GEORGE E. MATHIEU, *THOU SHALT NOT KILL*, XIX *VITAL SPEECHES OF THE DAY* 94 (1952).

<sup>14</sup> See DR. JOSEPH D. LOHMAN, article on parole policy, *CHICAGO SUN TIMES*, June 1, 1952, pp. 10, 28, to cite only one of the many authorities.

<sup>15</sup> See PROSSER, *TORTS*, 1941, chapter 10.

life by unauthorizedly handling such arms. This has been reported about several primitive and early legal systems.<sup>16</sup> These laws are to be compared with the rule of *Sullivan v. Creed*,<sup>17</sup> and we have to admit that distinguishing criteria are absent.

But in the criminal law itself we have examples of little or no concern for the offender's actual frame of mind. It was only a century ago that a man was legally insane, and thereby excused from responsibility, when he behaved like a wild beast, or when he could not count to three, and in many jurisdictions we still measure a defendant's mental capacity for the commission of a criminal act by such irrational a test as "whether he was able to distinguish between right and wrong." The results of such a procedure frequently are pitiful. Moreover, under the present system it might even happen on occasion that—in Weber's terms—"the protection of a regular procedure" prevents evidence that might be highly relevant from being introduced (e.g., for purposes of showing defendant's mental incapacity) simply because "in the eyes of the law" it is not relevant or competent.<sup>18</sup>

Weber states quite correctly about the man in primitive society that "his anger expresses itself equally against inanimate objects", and we have at least some evidence that penalty was inflicted upon such inanimate objects as for instance a falling tree which had killed the woodcutter, by burning this "delinquent" tree. Does such behaviour differ to any considerable extent from an order for the destruction of fish-nets used in violation of someone's fishing rights, or perhaps general fishing regulations? Yet, this is our reaction today.<sup>19</sup> The same holds true with respect to "revenge against animals".<sup>20</sup> Was this then and is it today an action of revenge, as Weber seems to imply, or has it always been a rather practical and utilitarian provision?

My conclusion could be either that 20th century law of wrongs is primitive, or that primitive law of wrongs is quite modern; of course, I would be accused of generalizing certain specific cases which show "elements of primitive thinking" in our modern law.<sup>21</sup> Therefore, the examples cited should not lead to any concrete judgment, they merely help to illustrate that not only do theory and practice often differ from each other in our modern laws, but that present day law contains a number of propositions which are quite consistent with Weber's definition of primitive law.

The question that presents itself now is: Do primitive and modern law of wrongs

<sup>16</sup> E.g., POLLOCK AND MAITLAND, I HISTORY OF ENGLISH LAW 54, Cambridge, 1899, as to early Anglo-Saxon law: "*Legis enim est qui inscienter peccat, scienter emendat* . . . seems to have extended, or to have been thought by some to extend, even to harm done by a stranger with weapons which the owner had left unguarded." A like report comes from E. SCHULTZ-EWERT and LEONARD ADAM, DAS EINGEBORENENRECHT, OSTAFRIKA I, Stuttgart, 1929, VI Strafrecht, p. 289, as to the Ruanda of former German East Africa; but we will come back to this subject later.

<sup>17</sup> Ir. Rep. 317 (1904). Defendant left a loaded gun leaning on a fence on his property, next to a public highway. The defendant's sixteen year old son found the gun. He took it with him to the highway and, not knowing that it was loaded, pointed it, in play, at the plaintiff. The gun went off, and the plaintiff was injured. Held: A person who leaves a dangerous weapon at a place to which other persons have access, is liable for injuries caused by the handling of the weapon.

<sup>18</sup> E.g., *People v. Jenko*, 102 N.W. 2d 783 (Ill., 1951), esp. brief and argument for plaintiff in error, pp. 16/17. See also LOUIS H. COHEN, MURDER, MADNESS AND THE LAW, Cleveland, 1952.

<sup>19</sup> E.g., *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499 (1894).

<sup>20</sup> Compare *actio de pauperi* with modern "Dog-bite laws".

<sup>21</sup> A better term would be "elements which even the primitives had thought of".

differ only in degree? We are not ready to answer this question yet, and we probably will not be able to do so until we have disposed of all particular problems.

## PART II

### TO WHAT EXTENT DOES PRIMITIVE LAW OF WRONGS DISTINGUISH BETWEEN CRIME AND TORT?

At the outset a definition of law for the purposes of this inquiry is necessary. Law, as the writer defines it, is the body of rules of conduct the enforcement of which is guaranteed by community sanction. Law presupposes a community, i.e. an organized group of human beings, which stands for its enforcement, or, perhaps vice versa, it is the presence of law which gives a group of human beings the status of a society. therefore, law without society is just as impossible as society without law.<sup>22</sup>

The era of our inquiry, therefore, begins when at various geographical locations communities are formed. Much more difficult is the determination of the end of the era of primitive law, or the beginning of modern, i.e. early modern law. We may accept A. S. Diamond's classifications which are both convenient and logical, i.e. the era of first "codifications"—in the general sense, not in Weber's terminology—, namely the first compilation of written laws.<sup>23</sup> The end of the era is set arbitrarily to an extent; the boundaries between primitive law and early modern law are wavering. The term "early modern law" in itself is inadequate. Our inquiry, therefore, ends for the following peoples at the designated times, viz.:<sup>24</sup>

BABYLONIANS: The CODE OF HAMMURABI, about 2270 B.C.

JEWS: The PENTATEUCH, middle of second millennium, B.C., possibly as late as 7th century B.C.

ROME: The TWELVE TABLES, 451 B.C.

HINDUS: The LAWS OF MANU, about 200 B.C.

GERMANIC PEOPLES: The LEGES BARBARORUM, about 6th century.

INCAS: The time of the Spanish conquest of Peru, 16th century.

NORTH AMERICAN INDIANS: Up to 20th century.

INNER AFRICAN PEOPLES: 20th century.

PACIFIC INSULAR PEOPLES: Up to 20th century.

The available sources are obvious, namely documentary evidence on stone, clay, and paper, from which we risk inferences, and studies of twentieth century ethnologists and anthropologists. It is the cumulative value of all these sources which make their use in modern comparative law valuable.

The workers in the field of primitive law quite frequently occupy themselves with rather general aspects and observations, such as the development from custom to law, or the ethical aspects of punishment. These aspects are here of secondary importance only, but it is quite significant for this inquiry whether community reaction to a wrong in primitive society is in the form or for the purpose of retaliation, deterrence,

<sup>22</sup> On this point see R. VON HIPPEL, *DER DEUTSCHE STRAFPROZESS*, p. 14, see further WOLFF, *THE ROMAN LAW*, NORMAN, 1951, pp. 52-53.

<sup>23</sup> *PRIMITIVE LAW*, London, 1935.

<sup>24</sup> Supplemented. This writer does not follow Diamond's dates entirely. The date of the Code of Hammurabi is in dispute. See DRIVER AND MILES, *I THE BABYLONIAN LAWS XXIV, XXV*, Oxford, 1952.

resocialization or neutralization, all of which are present-day theories. If it is in any of these forms that society reacts to wrong, then we must conceive of the wrong as a crime, whereas if the reaction to a wrong is *only* in the form of exacting compensation to the person or group of persons (excepting the community itself as a group of persons) harmed, then we must treat it as a tort.

It is likewise of importance here whether primitive society acts from magical motives, religious conviction (fear and satisfaction of the deity), from instinct, or for utilitarian reasons. Needless to say, just as at present we find that in our law almost all crimes are also torts and must be compensated for, or as we have punitive elements in our tort law in the nature of punitive damages, we may expect such an interchange of notions in primitive legal systems. It is undoubtedly true and here not contested that among primitive peoples the use of punitive damages in tort law was considerably larger than it is today. This explains, in part, the fact that the area of strictly criminal law was considerably smaller than it is among modern peoples.<sup>25</sup> But what I shall dispute strongly is Weber's assertion that primitive legal systems are entirely devoid of a branch of law called criminal law. In the following I shall discuss a selection of provisions from legal systems of a number of primitive peoples in an attempt to show that there was an area of criminal law in each one of these systems.

### 1. GERMANIC LAWS

The *Leges Barbarorum* make a marked distinction between torts and crimes, e.g., sec. 49 *Lex Thuringorum*: "Who not wilfully but by some accident kills a human being or wounds him, shall pay the lawful compensation." But e.g., sec. 24 *Lex Saxonum*: "Who conspires either against the kingdom or the life of the king of the Franks or his sons, shall be punished with the capital punishment."<sup>26</sup>

In the case of the first example the law is clearly of tort, "shall pay the lawful compensation," in the second example the conspiracy appears as a crime, "shall be punished with the capital punishment."

We have some knowledge about Germanic law even prior to the *Leges Barbarorum*, e.g., the Goths at the time of Ulfilas (4th century) declared the serious wrongdoer to be the enemy of king, people and God. He was named a "wolf," for like the wolf he was destined to death. Not only could he be killed at sight, but being on his own in the wilderness itself meant sure death.<sup>27</sup>

With respect to this "wolf declaration" Schroeder says that the Goths made a distinction between the cases where the evil-doer was apprehended and cases where

<sup>25</sup> Cherry calls the widespread use of punitive damages among primitive peoples a "Penal Law" as distinguished from "Criminal Law" which, as he believes, came into existence at a much later date in historical development. R. R. CHERRY, LECTURES ON THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES, London, 1890, lecture 1.

<sup>26</sup> 49 LEX THURINGORUM: *Qui nolens sed casu quodlibet hominem vulneravit vel occiderit, compositionem legitimam solvet.* 24 LEX SAXONUM: *Qui in regnum vel in regem Francorum vel filios ejus de morte consiliatus fuerit, capite puniatur.* Edition of the LEGES BARBARORUM in SCHRIFTEN DER AKADEMIE FÜR DEUTSCHES RECHT, GERMANENRECHTE.

<sup>27</sup> ULFILAS, in his bible translation, translated "condemned to death" with "gaworgjan danpan", i.e. declaring a wolf. Judgment or sentence was translated with "worgipa", which in itself seems to prove that wolf declaration was the only public penalty among the Goths. See RICHARD SCHROEDER, LEHRBUCH DER DEUTSCHEN RECHTSGESCHICHTE, Leipzig, 1894, p. 73.



he was at large. In case the criminal was in the hands of the judicial authority, he was destined to the gods. The deity was asked whether it would accept the sacrifice; if not, the "wolf" was let loose for a "get-away." This penalty seems to have applied to all heavy breaches of the peace (*Friedbruche*), whereas minor breaches of the peace were mere torts, hence subject to compensation.

Brunner, who also is convinced of the sacral importance of the criminal law of the old Germans, lists the various methods of sacrifice (death penalty) for the serious peace breaker who had offended the gods.<sup>28</sup>

The sacral importance of the serious breaches of the peace is disputed by some scholars who think that too much emphasis has been placed on religion in primitive criminal law. But the feeling that a deity has been offended (or can be offended at all) certainly has had its part in the shaping of the law and still has its impact today.<sup>29</sup> Yet the fact that the peace had been breached might have been just as important for inflicting a heavier, namely the death penalty, which still is reflected in our law.<sup>30</sup>

Von Amira supports the dual aspect of the Germanic criminal law, classifying the wolf declaration, common to all Germanic peoples, as a profane law, the death penalty as a sacral law. This view is criticized by Mitteis with the words "This does not seem to correspond to the unity of archaic feeling of justice" (*Rechtsempfinden*).<sup>31</sup>

Schmidt, quite correctly, states that though penalizing was not yet a monopoly of the community (society, state), there was at least the ever present likelihood that penalty will be the consequence of certain norm violations.<sup>32</sup> It is true that vengeance of the injured person or sib was frequently the only penalty, it nevertheless was in the nature of a penalty since it was sanctioned by the society which immunized (or prescribed!) the deed of vengeance. By the time Tacitus wrote (A.D. 98) the community sanctions had become more humane. Many appeared then in the form of the enforcement of a *bot* (Busse, blood-money), but quite frequently accompanied by a fine, *fredus*.

Tacitus reports about the Germanic blood money system as follows: "But hostilities do not last forever, as even manslaughter will be compensated for with a certain number of cattle or arms, and the whole household accepts this satisfaction."<sup>33</sup> About the "sacral" (criminal) punishment he writes: "It is also possible to make accusations and apply for infliction of the death penalty before the assembly. The differences of penalties depend on the (nature of the) crime. Traitors and deserters they hang on trees, cowards, war objectors and people bodily disgraced they drown in mud and swamps, even throwing wattlings on top."<sup>34</sup>

<sup>28</sup> See HEINRICH BRUNNER, *GRUNDZUG DER DEUTSCHEN RECHTSGESCHICHTE*, Leipzig 1901, p. 18.

<sup>29</sup> See §§166-168 B.St.G.B. (German Penal Code).

<sup>30</sup> Ill. Rev. Stat. 1951, Ch. 38, §358; Ill. Crim. Code §140: "Murder is the unlawful killing of a human being, in the peace of the people," etc.

<sup>31</sup> *DEUTSCHE RECHTSGESCHICHTE*, Munchen & Berlin, 1949, pp. 19-20.

<sup>32</sup> EBERHARD SCHMIDT, *EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE*, Göttingen. 1947.

<sup>33</sup> *GERMANIA*, cap. 21 (first century A.C.): "*Nec implacabiles durant (inimicitiae); licitur enim etiam homicidium certo peccorum, armorumque numero; recipitque satisfactionum universa domus.*"

<sup>34</sup> *Ibid.*, cap. 12: "*Licet apud concilium quoque accusare et discriminem capitis intendere, distinctio poenarum ex delicto, proditores et transfugas arboribus suspendunt; ignavos et imbelles et corpore infame caeno ac palude, injecta insuper crate, mergunt.*"

Tacitus obviously talks in Roman terms, and one should not infer from his report that in fact the death penalty was of a sacral nature. But even so, the infliction of a penalty, from whatever considerations and under whatever aspects, as a consequence of norm violation, is exactly what we define as criminal in its nature.

Fehr likewise believes in the dual system of Germanic criminal law, the sacral and the profane system.<sup>35</sup> In the former system he lists sacral proper, the breach of the peace of the gods,<sup>36</sup> sacral, in the wider sense, serious breach of the peace of the people, e.g. fornication, arson and homicide. The latter group contains such breaches of the peace as originally were subject to community-sanctioned revenge, vengeance, later composition and fine (*fredus*), but, in certain cases even the death penalty.<sup>37</sup> But Fehr is convinced that both systems, sacral and profane, are criminal law. "Criminal law and deity are inseparably chained to each other."<sup>38</sup>

Von Amira in his *TODESSTRAFE* proceeds with an admirably scholarly minuteness to attack the theory that primitive law always developed from what Weber terms "a tort that requires expiation."<sup>39</sup> At least those wrongs which are followed by the death penalty, always a primary and immediate reaction of the society as an entity, must be regarded as crimes in a very modern sense. Of course, we cannot expect that society at all times regarded the same acts as evil deeds. It is our task to find whether society always regarded some acts as evil deeds and regarded some reactions to these deeds as a punishment. Do not we 20th century peoples ourselves differ from country to country, or state to state and even city to city as to what constitutes an evil deed, a crime? Do we not take account of that in modern law?<sup>40</sup>

Von Amira refers to early Scandinavian law as an illustration: "Whoever carries his arms against his almighty king and against his country, wherein he is born, '*han hawaer fore giört hals*' " (he has forfeited his neck).<sup>41</sup>

Pollock and Maitland, writing about the Anglo-Saxons in Britain, state that "some of the gravest offenses, especially against the king and his peace, are said to be '*bot-las*', that is, the offender is not entitled to redeem himself at all, and is at the king's mercy."<sup>42</sup> The Anglo-Saxons likewise knew the distinction between *wergild*, *bot*, and *wite*, (fine), the latter clearly a criminal penalty. But the *bot* has to be regarded as a compensation (tort), though it may carry punitive elements in the nature of punitive damages; the *wergild* clearly is a simple tort recovery.

## 2. ROMAN LAW

Kunkel infers that the primitive Romans had a criminal law system quite similar to that of the Germanic peoples almost a thousand years later. His inference was

<sup>35</sup> R. FEHR, *DEUTSCHE RECHTSGESCHICHTE*, Berlin, 1948.

<sup>36</sup> Reference to Tacitus, *GERMANIA*, cap. 40.

<sup>37</sup> Fehr's interpretation of Tacitus, *GERMANIA*, cap. 12, "concilium" as "verdict" in the Roman sense.

<sup>38</sup> *Ibid.*, p. 14: "*Strafrecht und Gottheit sind untrennbar miteinander verkettet.*"

<sup>39</sup> VON AMIRA, *op. cit. supra*, esp. pp. 3-4.

<sup>40</sup> *Rex v. Esop*, 7 Car. and P. 456 (1836), but see *Regina v. Machekequonabe*, 28 Ont. Rep. 309. (1898).

<sup>41</sup> UPLANDS, 1 Mb. 15 pr. This clearly is unrelated to tort.

<sup>42</sup> POLLOCK AND MAITLAND, *I History of English Law* 48, Cambridge, 1899.

based upon sources that became known after the primitive Roman era had passed, but as he said, "the strict traditionalism of the Romans offers at least some warranty" for the inference that the law of the early primitive era was similar to that of the later phase.<sup>43</sup> This has been explained on the ground that both systems have the same Indo-Germanic origin. But if we accept the theories of modern ethnological jurists, then this relationship is of lesser importance than commonly thought.

Judging from the fragments of the XXII Tables, we may infer that all "penalty" once was *ποινή* (*poena*), which not only refers to a blood-money; but Sallust, Livius, Ovid and others use *poena* with the meaning of "vengeance." In some instances of norm violations it was sufficient to "*damnum sarcire*," (repair the injury) but in other cases it becomes quite clear that *poena* had also a punitive character, or had such character in addition, e.g. a multiple of the value of the harm caused to property had to be paid. But apparently minor wrongs, e.g. batteries, were mere torts. However, the penal character of the reactions to certain major physical wrongs is very obvious in the community threat that in case a *pactum* is not made, either by refusal of the plaintiff or the defendant, *talio* will result.<sup>44</sup> *Talio*, unfortunately, still seems to be with us in 20th century legal thinking.<sup>45</sup> The reciprocal character which *talio* had in primitive law, an eye for an eye and a tooth for a tooth, is an immensely important aspect of justice, not only civil justice, but especially criminal justice. We will come back to this point later. If we furthermore believe the early law writers then Roman law likewise knew the death penalty for some wrongs at earliest times.<sup>46</sup>

Wolff, one of the most brilliant writers on Roman law, shows quite clearly the difference between *ius* and *fas*. *Ius* included the profane criminal law. *Fas* included sacral criminal law, such as was dealt with by the *pontifex*. Subject to the latter were abuse of the *imperium* of the *pater familias*, and certain kinds of theft or gross breaches of faith. Violators of the sacral criminal law were declared *ignominius* and suffered some curtailment of their legal capacities through the *pontifex*.<sup>47</sup> But sacral criminal law provided for additional and more severe punishment for certain violations, to which we will refer shortly.

The oldest mention of the difference between *ius civilis* and *ius criminalis* is found in a rescript issued by Secerus and Caracalla in A.D. 194: Cod. Iust. 2.1.2., ascribed to Septimius Severus, at the very beginning of the absolute monarchy.<sup>48</sup>

The two most thorough workers in the field of Roman criminal law are Rein and Mommsen. Both writers are primarily jurists and not sociologists in the modern sense. They both say that Roman criminal penalties most likely had their origin in sacral law, i.e. satisfaction of the offended gods,<sup>49</sup> or that it grew out of the human primeval instinct of revenge for suffered wrongs.<sup>50</sup>

<sup>43</sup> W. KUNKEL, *ROMISCHE RECHTSGESCHICHTE*, Heidelberg, 1948, p. 140.

<sup>44</sup> All of these provisions are in Table VIII.

<sup>45</sup> F. J. P. VEALE, *ADVANCE TO BARBARISM*, Appleton, Wisc., 1953.

<sup>46</sup> KUNKEL, *op. cit. supra*, p. 22.

<sup>47</sup> A very modern form of penalty, at least as "*Nebenstrafe*" (additional penalty), compare with §§32 et seq. B.St.G.B. (German Penal Code).

<sup>48</sup> WOLFF, *op. cit. supra*, p. 70.

<sup>49</sup> REIN'S *DAS CRIMINALRECHT DER ROMER* AND MOMMSEN'S *ROMISCHES STRAFRECHT*, both Leipzig, 1844 and 1899, resp.

<sup>50</sup> See REIN, *op. cit. supra*, pp. 24 et seq., Mommsen, *op. cit. supra*, pp. 3 et seq.

It is by the very definition of the term society that the group of human beings forming that society are in a state of interdependency, obeying and enforcing certain set norms. Therefore, if it is society, as distinguished from the associations of other animals of the species of *zoon politicon*, then we necessarily have a regulation of both the instinctive obedience to deity with regulated enforcement of penalties for offending it, and a regulation of profane wrongs with enforcement by threat and execution of punishments of fixed metes and bounds. This is where the discovery of the instinctive human feeling for reciprocity and balance enters the picture. This feeling for balance is the creator of justice, i.e. a stable "quantity and quality" of punishment for each recurring wrong.<sup>51</sup> The only profane wrongs that were punished in primitive society were probably such acts which society deemed detrimental to its continued existence.

On the other hand, as Rein and Mommsen make clear, there was a sphere of private wrongs, which community in its then primitive forms did not bother with since they were not of such a nature as would endanger the very existence of this society. It is here where, at least for a while, the unregulated revenge instinct of the wronged person or group of persons demanded retaliation. The check on the "justness" of both regulated (criminal) and unregulated (civil) wrong-consequence (*Unrechtsfolge*) is, as our modern anthropologists establish, and as has been mentioned before, the instinctive sense of everything human for the "balance of the scales."<sup>52</sup>

But these civil and criminal, or private and public reactions to wrong by no means form the "cake of custom" as is thought by most writers. It may be true that the sphere of public wrongs is rather small in primitive society, but it certainly is present as a distinct group, existing side by side with the other distinct group, the private wrongs.

Rein lists for the time of the monarchy the following crime groups: 1. Acts against piety and removal of the sacred boundary stones, both punishable with *sacratio capitis* (death penalty), as of sacral nature; 2. *Crimina publica*, crimes against the existence of the state, esp. treason and *coniuratio* (conspiracy), as of profane nature. From these two groups he distinguishes the concern of the state in enforcing the proper observation of the limits of *talio* for private wrongs. But some of these private wrongs also might have been treated as public wrongs. These latter, however, seem to represent civil law proper.

Mommsen, who calls this latter category "*Privatstrafrecht*" (Private Penal Law), is perhaps not quite justified in doing so. This term, though stemming from the oldest sources, is somewhat misleading, since in the enforcement of the law of these private wrongs the private aspects, compensatory, were much larger than the punitive aspects, as we can infer from the sources. They apparently were very much in the nature of our malicious torts, which result in punitive damages.<sup>53</sup>

Mommsen made a very valuable contribution to our knowledge of Roman criminal law with his *ROMISCHES STRAFRECHT*. From his detailed studies he seems convinced

<sup>51</sup> Some legal philosophers regard the "balancing [of] awards and punishments in the scale of merit" as merely one of several factors constituting proto-justice. E.g., E. N. CAHN, *THE SENSE OF INJUSTICE*, New York, 1949. pp. 15 et seq.

<sup>52</sup> See part III, *infra*.

<sup>53</sup> See MOMMSEN, *op. cit.* *supra*, pp. 7 et seq.

that penal law started with the reaction to wrongs against the security of society, and that such wrongs were not compensable in a tort manner. It was only side by side with it that private law of compensation grew.<sup>54</sup>

The confusion which seems to exist stems from the fact that some scholars are comparing our modern substantive criminal law with primitive law and they find that many acts which are crimes in our times were mere wrongs in primitive society, or were even regarded as lawful. It has been pointed out that this is irrelevant even though true, for we have to find whether some acts, no matter what they were, were regarded as injurious enough to the safety of society to require punishment to prevent recurrence. The important fact is that this punishment differs from mere unregulated—or even regulated—vengeance or compensation by its psychological significance, and by the fact that it was inflicted in behalf of the society.

### 3. LAWS OF BABYLONIA AND ANCIENT PALESTINE

In 1902 a French archaeological expedition under M. de Morgan found a pillar of dark stone, eight feet high and two feet across, at Susa near the Persian Gulf. This find turned out to be the most amazing discovery of an ancient legal document. The pillar bore inscribed the 282 sections of what is now known as the Code of Hammurabi from about 2270 B.C. "It represents the law of probably the most advanced of ancient civilizations—Babylonia. At the time when we first meet the nations in history, their laws are in a primitive stage (relatively speaking). This is true of the Jews, Arabs, the Hindus, the Chinese, and the Germanic and Celtic stocks. Even the Romans, at the time of the Twelve Tables (about 300 B.C.) were still primitive. Only Egypt can be compared with Babylon. But Babylon had already outstripped Egypt, at the time of Hammurabi, in the development of commerce and commercial law."<sup>55</sup>

Though on a higher level of culture than many other primitive legal systems discussed here, the Code nevertheless reveals a wealth of information about our subject, the distinction between tort and crime in primitive society. We find a marked distinction between crime and tort. In the following I shall list the relevant sections of the Code of Hammurabi in comparison with similar provisions of the Mosaic law. For purposes of convenience I did not follow the section order of the Code, as logical as its organization is<sup>56</sup> but grouped the sections under more familiar headings.

It becomes thus clear that in ancient Babylonian law there was a distinct area of criminal law. The gravest crimes were those of witchcraft and those directed against the administration of justice and religion, as evidenced by their treatment in the first sections of the code. The elaborate treatment of crimes against the sex taboo indicates a close second in importance. From all that appears, Mosaic law was very simi-

<sup>54</sup> Ibid., pp. 58 et seq., and pp. 4 et seq.

<sup>55</sup> WIGMORE, *The Code of Hammurabi*, NORTHWESTERN UNIVERSITY BULLETIN, Vol. XIV, No. 25 (1914), reprinted in KOCOUREK AND WIGMORE, *I EVOLUTION OF LAW* 387. The following discussion of the Code and of the law of ancient Palestine is based on W. W. DAVIES, *The Codes of Hammurabi and Moses*, reprinted in Ch. XIV of KOCOUREK AND WIGMORE, *supra*. In this discussion torts which we also regard as torts today will not be discussed.

<sup>56</sup> "It is a work of art and the drafting . . . is clearly excellent. The terminology is well chosen and used with unerring skill and accuracy." DRIVER AND MILES, *op. cit. supra*, p. 49.

lar in its penalties for these crimes. There is no indication in either legal system that these crimes were ever subject to civil retaliation or compensation. In the next area of crimes, those against property and the person, there is some divergence between the two systems. In Babylonian law theft appears as both tort and crime, it may be either, depending on the circumstances, and in some cases it appears as tort-crime hybrid. This could be an indication that most sorts of theft were, at one time, mere torts, as it was in other primitive systems. Mosaic law, admittedly on a lower cultural level—at least in most respects—regards theft only as tort. The law of homicide is clear under Mosaic law where strictly retaliatory thinking demanded the death penalty of the perpetrator in all cases. It is not clear in Babylonian law. Here the retaliatory principles appear in mayhem cases, but only occasionally in manslaughter provisions. A general murder provision is lacking altogether. Only the case of husband murder is discussed. Were we to apply our construction rule *inclusio unius est exclusio alterius*, we would arrive at the conclusion that cases of murder, other than those special cases mentioned in the code, were regarded as not important enough to be dealt with by society as a whole. Hence, murder might have been left to private compensation. But so to conclude would be only one possibility among many possible guesses.<sup>57</sup> It might here be mentioned that in the next following sections we shall meet other primitive people who (likewise) do not regard murder as a crime in the modern sense.<sup>58</sup>

#### 4. CONTEMPORARY PRIMITIVE LAWS

We will now turn to the consideration of the contributions of ethnological jurisprudence, a science which was not nearly as developed at Weber's time as it is now. If it was not only excusable but even natural that Weber and his contemporaries arrived at results which now appear dubious, it is not understandable that some modern jurists still carry on in the old and outworn tracks. Mitteis, for instance, in A.D. 1949, places more reliance on folk-fable and myth than on the results of modern comparative ethnological jurisprudence,<sup>59</sup> and thereby still shares Binding's antipathy and suspicion of "non-legal" contributors.<sup>60</sup>

We are now quite familiar with the legal system of the Incas of Peru both before and after the Spanish conquest. Inca law made the following acts a crime: 1. theft, 2. adultery, 3. murder, 4. blasphemy against the sun, 5. removal of a bridge (because of the importance of transportation over a terrain criss-crossed with ravines). The

<sup>57</sup> According to DIAMOND, op. cit. supra, the code is not a codification of law but of laws, i.e. it is not all inclusive. (pp. 27 et seq.) "As for murder, the explanation, in all probability, is that the rule had not been altered by legislation, and there was therefore no occasion to mention it." p. 29. Accord: DRIVER AND MILES, op. cit. supra, sec. 4.

<sup>58</sup> For discussion of further ancient primitive legal systems reference may be had to A. S. DIAMOND, op. cit. supra, KOCOUREK AND WIGMORE, op. cit. supra, and HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE, New York, 1952, especially ch. 1, for a discussion of the distinction between crime and tort in Mosaic law.

<sup>59</sup> See MITTEIS, op. cit. supra, pp. 2, 20. Note: "Myth as historical 'evidence' is not sound, since primitives have a way of erasing the uncertainty of unknown origins by an act of fiction which, when hailed as truth, gives sanctity to prevailing mores." LLEWELLYN AND HOEBEL, THE CHEYENNE WAY, 1941, pp. 67-68.

<sup>60</sup> KARL BINDING, HANDBUCH DES STRAFRECHTS, vol. I, Leipzig, 1885.

Crime	Code of Hammurabi		Mosaic law		Remarks
	source	penalty	source	penalty	
I. Witchcraft					
witchcraft	secs. 1-3	death	Ex. 22:18 et al.	death	(Probable analogy in early Roman Law: VIII, 1, Twelve Tables)
II. Against Administration of Justice, Religion, State (Royal House)					
false accusation and witchcraft bribing witnesses	secs. 1-3 sec. 4	death same penalty as def. in the case	Ex. 22:18 et al. Ex. 23:8	death ?	(Probable analogy in early Roman Law: VIII, 23, Twelve Tables)
malfeasance of judge	sec. 5	impeachment and fine 12 X judgment value	Ex. 23:6-8, Sam. 8:3, et al.	?	
theft of sacred or state property	sec. 6	death	see Gen. 31:32, 44:9	probably death at early times	
receiving such stolen property	secs. 6, 19	death	?	?	
theft of ox, sheep, ass, pig, boat, belonging to sacral or profane govt.	sec. 8	fine 30 X value of article stolen, but death for indi- gent thief	?	?	indication that theft, even of public property, possibly was once only a tort
kidnapping royal slave	sec. 15	death	?	?	
various acts of malfeasance by govt. officials	secs. 33, 34	death			
non-compliance with draft order	sec. 25	death	see Deut. 24:5, 20: 5-9	?	apparently much more liberal under Mosaic law
tavern keeper harboring con- spirators	sec. 109	death			
votary entering or keeping a tavern	sec. 110	death by fire	?	?	
slandering a votary	sec. 127	branding forehead	?	?	

## III. Against Sex Taboo

	branding forehead	?	?	
slandering a votary or married woman	death (both parties)	Lev. 20:10, Deut. 22:22	same	but see discussion of Code Sections 133, 134 in Sec. III, 3 of this article, <i>infra</i> .
adultery	death	Deut. 22:25	same	
seduction	impaling	see murder, <i>infra</i> .	same	
wife murdering husband, for sake of other man	ban from city, death by fire, water	Lev. 18:7-8; 20:11-14; 21:9	same and by stoning	
incest				

## IV. Against Authority of Head of Household

officer's son or sacred prostitute	loss of tongue	—	—	Compare: Hindu law (200 B.C.), Laws of Manu, sec. 334: "With whatever limb a thief in any way commits (an offence) against men, even of that (the king) shall deprive him in order to prevent (a repetition of the crime)." Reprinted in 1 Kocourek and Wigmore, op. cit. supra, pp. 469 et seq. These penalties are obviously more than a mere reaction against the harm-causing organ.
denouncing foster parents	loss of eye	—	—	
same, returning to real parents	loss of hand	Ex. 21:15	death	
child striking parent	loss of ear			
slave denouncing master				

## V. Crimes Against Person (except those covered under III and IV, supra)

kidnapping a freeman	death	Ex. 21:16	death	if robber not apprehended, governmental subdivision has to compensate victim.
kidnapping a royal slave	death	—	—	
highway robbery	death	?	?	



Crime	Code of Hammurabi		Mosaic law		Remarks
	source	penalty	source	penalty	
V. Crimes against Person (except those covered under III and IV, supra)—Continued					
mayhem, resulting in death of a distraised son of a freeman	sec. 116	death of son of defendant	sec Deut. 24:16	death of defendant	a most literal application of <i>lex talionis</i> in Babylonian law. One of the few situations where C. of H. is on a more primitive stage than Mosaic law.
battery with: loss of eyesight fracture of bone loss of teeth	sec. 196	loss of eye	Ex. 21:24, 25, 26; Lev. 24:20; Deut. 19:21	"Thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, strike for strike." — —	<i>Lex talionis</i> , common to all Semitic peoples, perhaps all primitive peoples. (Note: If committed on slave or freedman, only tort action would lie.)
battery on man of higher rank slave battering freeman unintentional striking during quarrel	sec. 201 sec. 205 sec. 206	public whipping loss of ear payment of physician's bill	— — Ex. 21:18 et sequ.	same!	strictly tort in both legal systems (for further discussion see Sec. III, 3 of this article, <i>infra</i> .)
wife murdering husband for sake of other man murder (other than under sec. 153, <i>supra</i> )	sec. 153 ?	impaling ?	see murder, <i>infra</i> Ex. 21:12	death	This contrast seems to indicate that homicide is not a proto-crime. The criminality of homicide depended on the general needs of a particular primitive society.
manslaughter manslaughter of a freedman battering pregnant woman, with resulting miscarriage	sec. 207 sec. 208 secs. 209, 211, 213	tort compensation tort compensation tort compensation	Ex. 21:12 Ex. 21:20 Ex. 21:22	death "punishment" tort compensation	
if result is death of woman	sec. 210	death of defendant's daughter	Ex. 21:23 et sequ.	"life for life"	strictly retaliatory punishment. Under C. of H., if committed on slave or minor freeborn, only tort action will lie.

VI. *Against Property (except those covered under VII, infra)*

Other than thefts listed under I, *supra* (from sacral or profane government) only theft of cattle from a freeman finds mention, giving rise to the speculation that theft is not a proto-crime. Such theft was punished like theft of state property, but the "fine" now appears as punitive damages, up to tenfold the amount of the goods stolen. Death penalty would lie for an indigent thief.

burglary sec. 21	death	same Ex. 22:2, 3	to be inflicted by house owner on the spot (definitions differ from each other and from common law)
plundering by fire fighter sec. 25	death in same flames	—	—

VII. *Arising Out of Business or Profession*

Underhanded buying from or selling to irresponsible person sec. 7	death	see Ruth 4:2 et sequ.	?	
using false measures in tavern sec. 108	death by drowning	—	—	
wet nurse substituting babies sec. 194	loss of breast	—	—	
surgeon's malpractice on free man, resulting death or blindness sec. 218	loss of hands	—	—	but if committed on slave, only tort action will lie, secs. 219, 220
brander fraudulently branding slave sec. 226	loss of hands	—	—	
inducing crime under sec. 226 sec. 227	death	—	—	
builder building house in negligent way so that it falls, killing owner sec. 229	death	Deut. 22:8; Ex. 22:30 et sequ.	death	
if under sec. 229 owner's son is killed sec. 230	death of builder's son	—	—	strict adherence to retaliatory principles. C. of H.: "this case is not subject to litigation."
keeping an ox that gores a human being sec. 250	no remedy	Ex. 21:28	"the ox shall be stoned"	
if under sec. 250 propensity of ox was known to owner sec. 251	tort compensation	Ex. 21:29	"ox and owner shall be stoned"	This writer questions the validity of the translator's term "indicted", i.e. "shall be indicted, and shall render to their owner ... tenfold..."
fraud by shepherd sec. 265	tort compensation	Ex. 22:1, 4	tort compensation	

vengeance or (private) compensation aspect is completely lacking in Inca law. The nature of the acts deemed crimes shows clearly that both reverence for deity (the sun) and "*Zweck*",<sup>61</sup> the utilitarian aspect, were instrumental in Inca "legislation." All crimes were capital, "the aim of punishment being to rid society from the wrong-doer and thereby to eradicate the evil."<sup>62</sup>

Very accurate observations have been made on our North American Indians by Llewellyn and Hoebel.<sup>63</sup> Some of the excellent conclusions must be quoted in full: "What is clear is that one has no business expecting of any primitive culture that its law shall have achieved the official and doctrinal unity *allegedly* found in the modern state."<sup>64</sup> "Tort and Crime. Against such a background of the problems which force law-men to devise law ways, law-concepts, and law rules, many of the common 'contrasts' between primitive law and modern lose much of their seeming contrast; and they gain understandability thereby. There is, for instance, the conception that primitive law runs much more heavily to 'tort', i.e., private wrong, than to 'crime', or public wrong. Viewed purely as a matter of procedure, there is truth in this. But it is when viewed as a matter of substance and function that the truth takes on its needed perspective. The fact is that in any group or culture any wrong concerns the whole to some extent at the same time that it gives concern to the more particularly aggrieved."<sup>65</sup> If it did not concern the whole, the aggrieved would be looked upon as an aggressor, not as a redresser, when he undertakes his redress."<sup>66</sup> "'Crime' differs from 'tort' not in kind, but in the effective predominance for purposes of administration of the public or the private elements, both of which are always present to some degree."<sup>67</sup>

These authors refer to the Cheyenne law of homicide, which was both a crime and a tort, but not a tort-crime hybrid, just as in developed law. "What distinguishes primitive from developed law in regard to 'public' and 'private' enforcement thus becomes the range and clarity of available administrative machinery."<sup>68</sup> As to the origin of

<sup>61</sup> RUDOLF VON JHERING, *LAW AS MEANS TO AN END*, translated by Isaac Hussik, New York, 1924. "Purpose [*Zweck*] is the creator of the entire law, \* \* \* there is no legal rule which does not owe its origin to a purpose, i.e. to a practical motive." (p. liv) "I define law in reference to its content as the form of the security of the conditions of social life, procured by the power of the state." (p. 330) "The higher a good stands, the more thought we take to make it secure. \* \* \* The list of penalties gives the standard of values for social goods." (p. 367) "According to my theory, utility forms the sole concern of the law." (pp. 393, 394).

<sup>62</sup> LEON R. YANKWICH, *LAW AND ORDER UNDER THE INCAS*, 1949, reprinted from 22 So. Cal. L.R. 132, 149.

<sup>63</sup> Op. cit. supra.

<sup>64</sup> Ibid., p. 60, emphasis mine.

<sup>65</sup> Note supplied. Among the Wyandots the sphere of private wrongs was considerably smaller than the sphere of public wrongs. But the tribe supervised the enforcement of all compensations for private wrongs, in some cases imposing punitive damages. The only major public wrongs, not harming an individual tribal comrade, were treason and witchcraft, punished by death. The penalty of outlawry was available. Minor crimes (adultery) were punished by mutilation. J. W. POWELL, *16th Annual Report of the Bureau of American Ethnology*. Reprinted in KOCOUREK AND WIGMORE, *I Evolution of Law* 279 et seq. (1915).

<sup>66</sup> Ibid., pp. 47-48.

<sup>67</sup> Ibid., p. 49.

<sup>68</sup> Ibid., p. 49.

punishment among the Cheyennes the authors deny the correctness of assertions of other scholars (especially the Romanists) that the origin of law was in religion. They find that Cheyenne homicide law was originally affected by the supernatural, whereas theft shows clearly secular origin. Murder is not a matter for blood vengeance, though it might have been such at earlier times, but it apparently always was considered a "sin", a sacral crime.<sup>69</sup>

Again, we find the "*Zweck*" for the punishment, i.e. not much "fuss" was made about theft of a chattel in daytime, yet, theft of a horse in daytime was serious.<sup>70</sup>

Malinowski likewise reports about a primitive people, even less developed in their state of culture, the inhabitants of Melanesia. He too denies that criminal law had a single sacral origin, having found much evidence of the notion of "reciprocity" among these very primitive peoples. Malinowski expresses the conclusions of his experiences with the Melanesians, amply supported by findings reported in his "*Crime and Custom in Savage Society*,"<sup>71</sup> in the following way:

"The fundamental function of law [of the Melanesians] is to curb certain natural propensities, to hem in and control human instincts and to impose a non-spontaneous compulsory behaviour, in other words, to ensure a type of cooperation which is based on mutual concessions and sacrifices for a common end."<sup>72</sup> "There exists finally the sanction of tribal punishment, due to reaction in anger and indignation of the whole community. By this sanction human life, property, and last not least, personal honor are safeguarded in a Melanesian community." [These] "sanctions might be described as 'criminal law'—very often over-emphasized by anthropologists and falsely connected with the problem of 'government' and 'central authority' and invariably torn out of its proper context of other legal rules."<sup>73</sup> "Each class of rules just enumerated is distinguishable from the rest by the sanctions and by its relation to the sacral organization of the tribe and to its culture."<sup>74</sup>

We must conceive of Malinowski's words as a critique of—among others—Weber's opinion, i.e. the emphasis on strong central government as a factor determining the creation of criminal law.

Other studies among Pacific-insular peoples, i.e. those of Micronesia, the Carolines, Nauru, Ponape and Jap, have been made by E. Schultz-Ewert and Leonard Adam.<sup>75</sup> The authors find almost everywhere 1. punishment of the offender of sacral law,<sup>76</sup> but also certain profane norms,<sup>77</sup> held important for communal safety. Besides this system of law enforcement is again 2. the system of obligatory and "supervised" vengeance between persons and sibs. Vengeance is sanctioned only for specified

<sup>69</sup> Ibid., chap. on *Homicide and the Supernatural*, pp. 132 et sequ.

<sup>70</sup> So we find in most Germanic laws that the theft of bee hives was often a capital offense, because of the importance of honey as the only source of sugar, (esp. in the manufacture of "Met?"); e.g., *LEX SAXONUM*, secs. 30 and 31.

<sup>71</sup> London and New York, 1932.

<sup>72</sup> Ibid., pp. 65–66.

<sup>73</sup> Ibid., p. 64.

<sup>74</sup> Ibid., pp. 65–66.

<sup>75</sup> *DAS EINGEBORENENRECHT*, Stuttgart, 1929.

<sup>76</sup> E.g., death penalty for evil magic among the Usambara, *ibid.* p. 320.

<sup>77</sup> Certain thefts and other breaches of trust among the Mhaga, *ibid.* p. 320.

wrongs. A third system of reaction to wrongs is clearly in the nature of tort, namely by compensation.

The authors' reports about the African peoples of the former German imperial colonies, East Afrika, Kamerun and Togo are quite similar. The nature of reactions to norm-violations of the second and third category becomes usually more humane, e.g. blood money takes the place of vengeance, where peoples live under a stronger central authority, seemingly an indication of higher culture, and evidence in support of the "central authority theory."

MacLean and Dugmore, who studied the law of the Amaxosa tribe of the Kafirs, found that the legal rules falling into the latter two categories warrant a classification into what we now call criminal and civil law. They report that "a distinction obtains in some respects similar to that which exists amongst us between Criminal and Civil law. In one class of cases the *chief* is always considered the aggrieved party, and the action is always entered on his behalf. In the other, the *people* are the only parties concerned, the chief having to do with the matter in his capacity as judge merely. The principle which regulates the classification of cases is, however, one that makes a very different division of the civil from the criminal to that which obtains in civilized jurisprudence. This principle is, that a man's *goods* are his own property, but his *person* is the property of his chief. Thus, if his possessions be invaded, he claims redress for himself; but if his person be assaulted, and bodily injury be the result, it becomes his *owner's* concern. . . ."<sup>78</sup>

Probably the most valuable contribution to ethnological jurisprudence has been made by R. Thurnwald.<sup>79</sup> Thurnwald's theory, arrived at after extensive studies, reaches further than any other theory known in this field. Most primitive society, i.e. organized groups of human beings without any central authority worthy to be given that name, always knew two and no more "public offenses", i.e. violations of the sex-taboo and black magic. Murder or theft were regarded as not sufficient to warrant community interference, since the community itself was not endangered by such wrongs. Whereas the "punishment aspect" entered criminal law at this point, or here laid the foundation for it, the notion of "criminal justice" was not born yet. It entered only with the coming into existence of blood vengeance. Thurnwald calls this blood vengeance the "expression of the original feeling for justice and ethics, which establishes balance and fairness among the participants."<sup>80</sup> Since our aim of criminal justice is of the same nature, Thurnwald regards the community sanctioned (and controlled) blood vengeance the progenitor of our modern criminal justice, though the phenomenon of punishment was inherited from the above mentioned "original" crimes.

Thurnwald's theory is not conjectural, it is based on an enormous amount of research and field work.

<sup>78</sup> MACLEAN AND DUGMORE, A COMPENDIUM OF KAFIR LAWS AND CUSTOMS, Grahamstown, Cape of Good Hope, 1906, p. 35. Reprinted in JOHN H. WIGMORE, A KALEIDOSCOPE OF JUSTICE, Washington, D. C., 1941, p. 408.

<sup>79</sup> WERDEN, WANDEL UND GESTALTUNG DES RECHTES IM LICHT DER VOLKERFORSCHUNG, Berlin & Leipzig, 1934.

<sup>80</sup> Ibid., p. 10.

## SUMMARY OF PART II

I have attempted to show how the results of the research done by 20th century scholars square with the fundamental findings of Thurnwald, which just have been discussed. Clarity on all points has not been achieved yet. This can be explained by the youth of the modern research methods and the fact that the world directs its attention at present to apparently more important subjects.

By comparing primitive law of various culture levels we can see, furthermore, how clearly A. S. Diamond's theory of legal development is supported: The "history of law is forever repeating itself, and the same stages that were reached many thousands of years ago in the east, are being reached and passed in parts of the modern world."<sup>81</sup> This is the impression every student of primitive law will get after comparing primitive law of various peoples. All more recent writers in the field share this experience.

"... Identity of usage did not arise from the adoption by one nation of the laws or institutions of another, but rather from the inherent principles of human nature. The close similarity between the early institutions of very distant races as regards Penal Law is extremely remarkable."<sup>82</sup>

Among the most primitive societies, with whose birth law came into existence, it was penal law, and not compensatory (tort) law which originated with punishment for certain primeval crimes; but it was *criminal justice* that originated with the reaction to other wrongs, in the form of blood vengeance, in form controlled by instinctive feelings for "justness" and "fairness."

The law of compensation for harm done came much later, in lieu of some of the permissible vengeance reactions, and it existed side by side with both genuine punishment and with remaining vengeance reactions, until it finally replaced all vengeance reactions at a certain point of cultural development.

"Whether and what will be punished depends partially on moral valuations, partially on utilitarian needs,"<sup>83</sup> but "forget (European) traditions if you want to judge the law of primitive peoples."<sup>84</sup>

## PART III

## IS IT TRUE, AS WEBER STATES, THAT PRIMITIVE LAW OF WRONGS DOES NOT CONCERN ITSELF WITH PSYCHOLOGICAL ATTITUDES?

At the outset, a definition of what we are looking for is necessary: Do primitive peoples punish the norm violator only for the result of the misdeed, and that they do

<sup>81</sup> Op. cit. supra, p. 1.

<sup>82</sup> RICHARD R. CHERRY, LECTURES ON THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES, London, 1890, p. v.

<sup>83</sup> Ibid., pp. 9-10. Not only did and do the primitives have different ideas about what should be punished, but their ideas of how these wrongs should be punished differed very much from our own ideas. Our number one mode of punishment, imprisonment, was probably unknown to most primitive peoples. One rare reference to imprisonment may be found in section 310 of the Laws of Manu: "Let the king carefully restrain the wicked by three methods—by imprisonment, by putting them in fetters, and by various (kinds of) corporal punishments." KOCOUREK AND WIGMORE, 1 EVOLUTION OF LAW 493, Boston, 1915.

<sup>84</sup> R. R. CHERRY, op. cit. supra, p. 15.

punish we have just seen, or do they consider the delinquent's attitude, i.e. psychological attitude, "frame of mind", or "*mens rea*"? Do they regard or disregard intent, negligence, malice aforethought, mental capability, etc.? Does the primitive law of wrongs only know "*Erfolgshaftung*" (strict liability for the harm done)?

The inference from Max Weber's statements, quoted at the outset of this paper, that we today are concerned with all these problems, and that primitive law of wrongs was wholly unconcerned with them. Of course, the statement that the present day law of wrongs is concerned with all these problems, requires explanations; some have been given in part I. It would be improper to say that modern law judges the delinquent by his inner motivations and psychological attitudes. Apart from the fact that modern criminal law contains a number of crimes, for the commission of which the inner motivations and psychological attitudes of the delinquent are entirely irrelevant, we are today (almost) never concerned with motivations at all, and as to psychological attitudes in the sense of "intent", we are merely *trying* to take them into consideration. It is true that a person of mental incapacity, e.g. insanes, etc.,<sup>85</sup> will not be held responsible for his misdeeds. But the test and limits of these defenses are arbitrary and imperfect. The intent of persons found mentally capable, or of those who do not claim mental incapacity,—its exact definition is not relevant here—is judged primarily by the extrinsic circumstances of the particular deed. That under such arbitrary rules ethical injustice may occur from time to time does not mean that this kind of judging psychological attitudes is senseless or futile. Improvements have been made and are being made. We are simply trying to do the best with the means and knowledge available to us. Max Weber, undoubtedly, was aware of this dichotomy. His statements, therefore, must mean that society in primitive form has either no knowledge or means available at all, or, if it does, it does not try to "do the best" with them. It simply does not judge the "psychological attitudes" of the culprit, that this is so in all primitive laws of wrongs, that only the result of a particular act determines whether the particular culprit is to be punished or held liable. The truth of this statement is the issue.

# 1. GERMANIC LAWS

Few inferences are possible from the earliest reports of Germanic law, by Caesar and Tacitus. The oldest reliable documentary evidence is contained in the *leges* of the 6th century and thereafter. In section 49 of the *Lex Thuringorum* we read: "Who unknowingly but accidentally wounds or kills a human being, shall pay the lawful compensation." If the author of the *lex* specifically says that "accidental killing" or "accidental mayhem" shall have the same legal consequences, if done "*nolens sed casu*",<sup>86</sup> ("not wilfully but accidentally") then this is an indication that there must have been at least a doubt as to the like treatment of wilful and accidental injury.<sup>87</sup>

<sup>85</sup> In American criminal law jokingly referred to as the "in"-group, viz.: INsanes, INfants, INtoxicated persons, INCorporations, INdians, all with exceptions.

<sup>86</sup> The Irish at the time of St. Patrick (middle of 5th century), considered to be primitive, knew the distinction between killing with "intention" or "by foul deed" and unintentional killing. The death penalty was only applied to uncompensated and intentional killing. RICHARD R. CHERRY, LECTURES ON THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES, London, 1890, p. 19.

<sup>87</sup> "Si nolens sed casu quolibet hominem vulneravit vel occiderit, compositionem legitimam solvat."

A study of the *Lex Saxonum* is even more fruitful: in section 22 we read: "The instigator of the perjury shall redeem the hand of the innocent perjurer."<sup>88</sup> The author of the perjury, but not the ignorant perjurer will be punished. In section 38, arson, we find an express reference to psychological criteria: "*Suo tantum consilio volens*" ("by his own decision").

It is quite important that distinctions are often made, in the measure of punishment, between crimes committed at day time, and those committed at night time. This observation applies likewise to crimes which carried less punishment of committed in an open way, as compared with a like crime committed in a secret and wicked manner. We will refer to such instances below. How have these and similar provisions been treated by the Germanist legal historians? A review of some seems appropriate:

Schroeder says that "the old Germans shared with all primitive peoples the incapability of distinguishing between evil intent (*fara*, *gewaeld*, *vili*) and mere negligence (*vapawerk*, *unweldich dede*)." Yet in the same breath he goes on to explain that what has been described as mere negligence did not carry any punishment, but was followed by simple tort liability, if the culprit would report his deed to the authorities.<sup>89</sup>

The only meaning which Schroeder's statement possibly can have, is that the old Germans were not too good in judging by the circumstances of the deed what was *fara* and what was *vapawerk*. But does it follow that the old Germans had no concern for the "intent" at all? The defense of "mere negligence" in Germanic law was restricted to certain specific instances—according to Schroeder to all cases which we would call a nuisance. Criminal penalties never attached in these cases. Such a case was, for instance, damage done to the neighbor's property by grazing cattle. Apparently in all nuisance cases, and perhaps in the whole tort law, no inquiry into the frame of mind of the wrongdoer was had, but in all such cases strict tort liability followed.

Brunner tells us more about the nature of the *vapawerke*. They were in their definitions qualified by certain extenuating factors which, if they occurred in that particular manner, would entitle the culprit to a lesser punishment than would the—by its definition—unqualified crime. The old Germans apparently did not judge the psychological attitude of the culprit from crime to crime, but they concerned themselves with extenuating circumstances, i.e. "less wicked attitudes of the offender as shown by the nature of his misdeed",<sup>90</sup> in a more general and certainly easier way. It must be in this way that the treatment of psychological attitudes differed from our modern case to case method. But it should be remembered, that our modern statute books are full of "qualified" and "unqualified" crimes of otherwise the same substance, and that these crimes—likewise by their definition—treat the offender more severely. The modern law is merely on a level of higher rationality.

On the whole, Germanic law followed a very rigid formalism. As example for this Brunner cites a provision of one of the old *leges*, where the seriousness of the delict (a case of mutilation) was measured strictly by extrinsic circumstances: If the offender would maim his adversary by cutting off a piece of bone of his body, "which, when

<sup>88</sup> "Qui nescius perjuravit, manuu suam redimet auctor sacramenti."

<sup>89</sup> Op. cit. supra, p. 80.

<sup>90</sup> See BRUNNER, op. cit. supra, p. 18.



thrown at a buckle from a distance of twelve feet, would make this buckle sound," then the culprit had to respond in punitive damages. Does this really differ so much from our modern law, where we likewise base the punishment on the degree of wickedness of the offender? As yardstick we too often use the amount of harm done, so that, even today, extrinsic circumstances are determinative of the punishment. Some of these instances are, of course, arrived at by taking into consideration the dangerousness of a particular activity or instrument used, so as to deter from acting in a particular manner. Others are solely aimed at punishing the specially wicked intent which manifests itself in such activity, and this wicked intent is thought to be implicit in the act put under penalty. But in all these cases the outward circumstances are determinative.<sup>91</sup> The old Germans, for instance, inferred a wicked intent from the fact that the (accidental or intentional) killer had hidden the body of the victim. This causes even Schroeder to concede that the "typical state of evil intent was determinative for the concept of *Meinwerke* (wicked deeds)."<sup>92</sup>

With this von Amira concurs. He further explains that "evil deeds" (*Meinwerke* or *Neidingsstaten*) were: Certain homicides, thefts, rape, sometimes arson, and treason. According to von Amira's sources, even recidivism was specially considered, whereas "attempt" had no special treatment.<sup>93</sup>

Eberhard Schmidt's conclusions deserve to be translated in full: "Criminal responsibility (*Erfolgshaftung*) does not mean that Germanic legal thought disregarded the evil intent entirely. Germanic justice is entirely familiar with the idea that harm done with intent and *scienter* weighs more heavily than a mere act of negligence. But whether the deed was accompanied by evil intent or not, was not judged from the [particular] 'physical circumstances,'—for that German legal thought then lacked all possibilities—but it was judged by [standard] extrinsic circumstances of the deed, as is said now, in cases which are peculiar to and indicative of the evil intent of a certain criminal type. Germanic legal thought had not been able to apprehend that such extrinsic circumstances quite frequently can be indicative of quite different motives."<sup>94</sup>

Maitland and Pollock, though still tending to the view that absolute responsibility was the rule rather than the exception, cite interesting instances of aggravated crimes among the Anglo-Saxons, namely killing by poisoning, and witchcraft, both in their nature aimed at evil intent.<sup>95</sup>

## 2. ROMAN LAW

Kunkel and Wolff write about the fragments of the XXII Tables, according to which the inference is inescapable that, at least at that time, a distinction was made between murder and manslaughter, for we read the following passage in the frag-

<sup>91</sup> E.g., Automobile traps, *Gesetz gegen Strassenraub mittels Autofallen*, vom 22. Juni 1938 (R.G.B.I. S. 651), as compared with "normal" robbery, §249 R.St.G.B. (German Penal Code). In this category belong all cases of aggravating circumstances, but compare especially §224 B.St.G.B. (German Penal Code) with the old Germanic norm for mutilation, quoted above.

<sup>92</sup> *Ibid.*, p. 18.

<sup>93</sup> VON AMIRA, *op. cit. supra*, p. 48.

<sup>94</sup> SCHMIDT, *op. cit. supra*, §17. His sections 27 et seq. are a commendable reading on this subject matter.

<sup>95</sup> See POLLOCK AND MAITLAND, *op. cit. supra*, p. 52.

ments: "If a spear escaped the hand rather than that he threw it . . ." <sup>96</sup> But the distinction between murder and manslaughter is thought to be much older. It is a code provision, attributed to Numa Pompilius: "If somebody kills a free man knowingly and with evil intent, he shall be [regarded] a murderer [of a countryman]." <sup>97</sup>

Rein, <sup>98</sup> as expected, gave these sources particular treatment. He is convinced from all the sources available to him—over a century ago—that most primitive Roman law already considered the frame of mind of the offender, though this was restricted to such crimes as were considered as particularly dangerous to the security of the state, and only with respect to the completed act. But the later so important distinction between *dolo* and *culpa* apparently was not so important in Rome's earliest days as it later became. <sup>99</sup>

Rein confirms about Roman law what Germanists found over 100 years later in Germanic law, namely, that *eventus* was the only determinant for liability in tort law, but that in penal law the frame of mind of the offender was of grave importance.

Mommsen's theory is more orthodox. He gets an impression of the Roman sources which is contrary to Rein's. Mommsen thinks that earliest, unrecorded Roman law was entirely unconcerned with the delinquent's psychological attitude and guilt. However, important is one other observation of Mommsen's: The Romans never regarded inanimate objects as being capable of the commission of a wrong. <sup>100</sup> This observation, based on the absence of any mention of instances of object-responsibility, is quite indicative that primitive Romans had at least some vague conception of the participation of the human mind in the commission of wrongs.

Knowledge of all these data, both of Germanic and of Roman origin, unenlightened by present day knowledge of human behaviour, reasonably could lead one to different conclusions as to this aspect of most primitive criminal law, i.e. Rein's view and Mommsen's view. Both views are speculative to an extent. If Rein's view was the better guess, it probably is not his merit. The prevailing view, however, seems to have been Mommsen's, proof of which is the fact that Max Weber relied on it.

How correct Rein's view and how incorrect Mommsen's view are may not be answered now, but may be postponed until we have consulted our ethnological jurists.

### 3. LAWS OF BABYLONIA AND ANCIENT PERSIA

As previously mentioned <sup>101</sup> it has been thought that the adherence to principles of strict liability is an indication of primitive legal thinking. <sup>102</sup> That this is simply not so has been said. Mosaic law provides that "ox and owner shall be stoned" when it

<sup>96</sup> "*Si telum manu fugit magis quam eiecit . . .*" Table VIII, 24, a. See KUNKEL, op. cit. supra, WOLFF, op. cit. supra.

<sup>97</sup> "*Si quis hominem liberum dolo sciens morti duit, paricidas esto.*" Numa Pompilius, 2nd King of Rome, 715-673. References to this passage are in the works of SERVIUS, MARCELLUS, FESTUS, DYONISIUS, PLUTARCHUS, MACROBIUS, LIVIUS, HORATIUS. See BRUNS, FONTES IURIS ROMANI ANTIQUI, Tübingen, 1909, p. 10.

<sup>98</sup> Op. cit. supra, pp. 42 et seq.

<sup>99</sup> See REIN, op. cit. supra, pp. 144 et seq.

<sup>100</sup> Ibid., p. 65.

<sup>101</sup> I, supra.

<sup>102</sup> n. 5, supra.

has been established that a vicious ox, the propensities of which are known to his owner, had gored a man.<sup>103</sup> Possibly the sanction is based strictly on revenge, but it is just as likely that this law is strictly utilitarian, i.e. to rid society of a vicious beast—as far as the sanction against the beast is concerned—and to deter cattlemen from keeping vicious beasts—as far as the punishment against the keeper is concerned.

The Babylonians provided for a case of this nature merely a tort remedy,<sup>104</sup> (thereby indicating the policy that the cause was not harmful enough to society as a whole to justify penal sanction). Clearly, one can find no trace of revenge in this provision.

A very fine feeling for the *mens rea* is shown in the provisions about adultery and bigamy in the Code of Hammurabi. The wife of a prisoner of war who commits adultery (bigamy?) when there is still sustenance in the family home, is guilty of the crime.<sup>105</sup> But if there was no more sustenance in the home, she incurs no penalty.<sup>106</sup>

Remarkable are also the provisions of secs. 192–193 of the Code of Hammurabi, evidencing a deep concern with ethical considerations: The foster son who is ungrateful to his foster parents is to be punished by mutilation. This is a severe penalty, but was considered appropriate for what was a grave crime among the ancient Babylonians: ingratitude. Section 153 of the Code of Hammurabi likewise shows a deep concern with the moral baseness of a wrongdoer. The law provided that a wife who murdered her husband for the sake of another man should be punished with the most severe penalty known to the Babylonians: impaling.

One of the best pieces of evidence in the Code of Hammurabi of concern with the *mens rea* or inner motivations of a culprit is contained in secs. 206–207. “If one man strike another in a quarrel and wound him, he shall swear, ‘I did not strike him intentionally’ and he shall pay the physician.” And: “If the man die of his wounds, he shall likewise swear, and if he [the victim] be a free-born man, he shall pay one-half mina of silver.”

These provisions evidence two things:

(1) The frame of mind of the offender was inquired into in all cases of mayhem and homicide. If it could be established that the intention to produce the result was lacking, the crime was not made out and only a tort action would lie.<sup>107</sup>

Like all primitive peoples the Babylonians did not have a good feeling of reliability—trustworthiness—of evidence. In this case an oath was considered sufficient evidence; but this is beside the point.

(2) The law is concerned with the duty of the wrongdoer toward the victim by providing that he shall pay the victim’s doctor bill. The mere concern for the victim’s health as expressed in the code shows us how important ethical considerations were to this primitive people.

On this second point we have a close parallel in Mosaic law. In Exodus 21:18 et seq. we read that the tortfeasor in personal injury cases “shall cause [the victim] to be thoroughly healed.” As I shall show in the next following section, such commands are still the law among at least one primitive people of this century.

<sup>103</sup> Ex. 21:28.

<sup>104</sup> One half mina of silver, sec. 251 C. H.

<sup>105</sup> Sec. 133.

<sup>106</sup> Sec. 134.

<sup>107</sup> See also sec. 227, absence of intent in deceit.

The common law justification of necessity, preventing culpability of what would otherwise be a crime, can be traced back directly to Biblical times.<sup>108</sup> From the first chapter of Jonah we can infer that jettison of cargo was probably lawful, perhaps even that the throwing-over-board of a human being to save other lives on distressed ships was excusable.<sup>109</sup> And there is more than one provision in both the Old and the New Testament indicating that necessity was a defense to the charge of theft among the ancient Jews.<sup>110</sup>

These instances indicate that as far back as we can trace the Babylonians and the Jews in history, these peoples did not adhere to strict result-responsibility, but did consider the frame of mind of the wrongdoer in establishing the culpability of a harmful act.

#### 4. CONTEMPORARY PRIMITIVE LAWS

Starting again with Inca law before the Spanish conquest, one of the more developed primitive systems: "He that kills another without authority or just cause, condemns himself to death", so reads one of the sections of the Inca Pachacuttee, translated into modern English.<sup>111</sup> A legal system of such nature has a high regard for the inner motivations of the offender.

Llewellyn and Hoebel report quite similar facts about our North American Cheyennes.<sup>112</sup> The council had to determine whether a killing was murder or accident. The authors summarize Cheyenne law of justifications excuses and mitigating circumstances in the case of homicide as follows: (The summary is in code form.)

##### Article 3, Exceptions and Mitigations

###### (a) A killing is justified:

- (i) Where necessary in a self defense against the incestuous rape,
- (ii) Where necessary to remove a homicidal recidivist, generally felt to be dangerous to the people (?)
- (iii) Where utterly and absolutely necessary to military police in the execution of an important duty. (?)
- (b) A killing is excused if (within the family, and ?) demonstrably accidental.
- (c) Provocation, drunkenness, seeming necessity for self defense, or other mitigating circumstances are for consideration of the authorities in admeasuring, or later, in remitting banishment.
- (d) The authorities may adjudge the killing secularly excused or justified and yet take such measures as may seem to them desirable in pursuance to communal safety, in regard to possible supernatural effects of a killing. Only in extraordinary cases are the arrows to be renewed.
- (e) Voluntary withdrawal by a notable head chief who has killed under extenuating circumstances may serve in lieu of banishment (?)<sup>113</sup>

The authors report that—as in Germanic laws—there are aggravated crimes from which an especially evil intent could be inferred, i.e. theft at night time, but not in day time, and crimes which endangered the well being of the community, e.g. thefts

<sup>108</sup> JEROME HALL, *PRINCIPLES OF CRIMINAL LAW*, Indianapolis, 1947, Ch. 12.

<sup>109</sup> Compare Hindu law, *Laws of Manu*, secs. 349-351, in which killing in self defense or defense of women or sacred lives, is declared to be justifiable homicide. 1 KOCOUREK AND WIGMORE, *op. cit. supra*, p. 496.

<sup>110</sup> E.g., Matthew 12; Dent. 23:24, 25.

<sup>111</sup> See YANKWICH, *op. cit. supra*, p. 19.

<sup>112</sup> LLEWELLYN AND HOEBEL, *op. cit. supra*, pp. 136 et seq., and pp. 165 et seq.

<sup>113</sup> *Ibid.*, p. 168.

of horses, but not theft of other animals or chattels (at daytime). The aggravated crimes carry higher penalties.

Let us go some steps lower on the scale of culture:

Schultz-Ewert and Adam, reporting about the already mentioned African peoples, state their observations and inferences as follows: Among the Ruanda (East Africa), criminal responsibility seems to extend to harm done by a stranger with weapons which the owner had left unguarded, e.g. a spear left sticking in the ground.<sup>114</sup> It is most interesting to compare this case with Pollock and Maitland's findings about Anglo-Saxon law under King Canute, and it is quite remarkable that the condemnation for the wrong done was in neither case directed against the inanimate spear, but against the animate owner of the spear, who was thought to be somehow responsible for at least his absent-mindedness. Of course, another inference might be that a "forgotten" weapon quite frequently could have been a "trap" to harm an adversary, and that primitive society, not capable of efficient crime detection, inferred this evil intent from such standardized situations.

About the Uriundi we know that no penal consequences followed to harm caused in established self defense, or if done by an obvious idiot. However, this dangerous imbecile would be killed by society as a preventive measure.<sup>115</sup> Oddly enough, in this tribe the authors find no absolute responsibility for harm done by unguarded weapons.

The consequence to manslaughter among the Uha was a mere compensation in tort fashion, without any penal consequences.<sup>116</sup>

Among the Wassaugu a remarkable law is reported to exist. In case of mayhem the defendant was convicted to nurse the victim until he recovered.<sup>117</sup> This is an amazing consideration of the psychological attitude of the defendant for the purpose of re-socialization. This penalty is directed against the soul of the defendant, which becomes even more apparent by the fact that the defendant's life was forfeited not only when the victim died, for then the case of murder was completed, and capital punishment attached, but also when the defendant prevented the victim's recovery through lax care on the sick-bed.

The Mbago are reported to punish embezzlement much stronger than ordinary theft,<sup>118</sup> as quite frequently crimes involving a breach of trust are punished more severely than other crimes.

The peoples of Togo do not punish (in behalf of the state) the juvenile delinquent. In Buem the idiot is reported to be immune from prosecution; in Kunja, character defamation, a crime of serious nature, leads to a mere reprimand if committed while intoxicated.<sup>119</sup> Among the Bergdama, Nama, and Namib-Bushmen the unintentional wrong also remains unprosecuted, and intoxication and low mentality entitle the offender to "mitigating circumstances", i.e. little or no punishment.

According to the authors, most of the peoples of the investigated Pacific islands

<sup>114</sup> *Op. cit. supra*, p. 259.

<sup>115</sup> *Ibid.*, p. 291.

<sup>116</sup> *Ibid.*, p. 296.

<sup>117</sup> *Ibid.*, p. 296.

<sup>118</sup> *Ibid.*, p. 320.

<sup>119</sup> *Ibid.*, pp. 527, 643, 709.

are on a lower stage of culture than the investigated African peoples. Though on Nauru and Ponape only intentional wrongs are dealt with by society, on Truk no consideration of mitigating circumstances is had, which does not exclude that some wrongs—by definition—embody what is thought by these peoples to be “wicked”.<sup>120</sup>

But on Jap and Nauru we find marked distinctions between crimes committed with malice aforethought and intent, and mere negligence cases, intoxication and self-defense.<sup>121</sup>

The writers summarize about the Papua Melanesians: “It would be error to assume that the Papua Melanesians made no distinctions between accident and intentional wrong”, but they make it clear that modern distinctions, which are so extensively based on our superior knowledge in both crime detection and determining of judgment and sentence, should not be used as a measure.

Last not least we have Thurnwald’s observations: “It would be erroneous to believe that primitive peoples do not have a strong feeling for right and wrong, only the affect-accentuations are distributed in a different manner.” Thurnwald urges us to forget our modern conceptions in judging the laws of these primitive peoples.<sup>122</sup> He finds much evidence to the effect that—in irrational fashion—external circumstances are taken as proof of a wicked motive and that in many cases absolute responsibility for the harm done attaches. But his studies show also that it would be farfetched to say that these most primitive peoples are not aware of the distinction between intentional wrong and mere negligence or accident. Nor would it be accurate to say that they are not trying their best to determine all these facts in given cases in their own way with these distinctions in mind.<sup>123</sup> That primitive people do not have the ability to do a “better job” in considering psychological attitudes may not be taken as evidence of an utter disregard of mind and soul in their criminal justice. Thurnwald always reminds us that it is good to remember our own weaknesses, not only in medieval criminal law, but even today in our codes and court-rooms.

We may conclude with this statement: Even most primitive law does concern itself with the inner motivations and psychological attitudes of the culprit.

#### SUMMARIZED CONCLUSION

1. Primitive law makes definite distinctions between crime and tort.
2. In primitive criminal law society is concerned with the inner motivations and psychological attitudes of the culprit.
3. In primitive tort law society apparently shows little concern for the motives of the wrong-doer, approaching our modern concept of absolute liability.

These conclusions are contrary to those of Max Weber, his contemporaries and most of the scholars that wrote in the 19th century. We must not forget that those scholars were limited in their observations and conclusions to the materials and knowl-

<sup>120</sup> *Ibid.*, p. 528.

<sup>121</sup> *Ibid.*, p. 531.

<sup>122</sup> THURNWALD, *op. cit. supra*, p. 15.

<sup>123</sup> *Ibid.*, see esp. pp. 25 et seq.

edge available at their time. Today we have a vastly larger resource of evidence, we have a better understanding of human behaviour. It is obvious that our conclusions should differ. How close we are to the ultimate truth about the law of primitive society cannot be judged. It is only to be hoped that the human mind will never tire of searching for the springs of the giant stream law, for "the history of what the law has been is necessary to the knowledge of what the law is."<sup>124</sup>

<sup>124</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW*, Boston, 1949, p. 37.