Encyclopaedia of the SOCIAL SCIENCES

EDITOR-IN-CHIEF

EDWIN R. A. SELIGMAN

ASSOCIATE EDITOR

ALVIN JOHNSON

VOLUME VII

GOSSEN–INDUSTRIAL RELATIONS COUNCILS

THE MACMILLAN COMPANY
NEW YORK

Published June 1932
Reprinted April 1935

Reissued (Volumes VII and VIII combined) November 1937.

Sixteenth Printing 1967

THE MACMILLAN COMPANY, NEW YORK
Collier-Macmillan Canada Ltd., Toronto, Ontario
Printed in the United States of America

INTENT, CRIMINAL. The modern notion of responsibility in both civil and criminal law seems to involve a mental element. But if in the civil law it is more readily recognized that liability may exist without fault, a criminal act is scarcely conceivable unless deliberately committed by the guilty person. It thus appears almost axiomatic in the modern criminal law that two elements are necessary to constitute a crime: first, an injury; and, second, an intention to cause it.

Nevertheless, the history of the doctrine of criminal intent shows plainly that it is an element that has usually been rendered largely illusory. In many circumstances there may be enormous practical difficulties in distinguishing intent from negligence, and even an accident may appear to be negligence. The legal and popular conceptions of intent do not always coincide. In popular speech physical act, intention and motive are not as sharply differentiated as they usually are in law. In legal contemplation the requirement of intent is met not by the willing of the mere physical act but by the accomplishment of the constitutive elements of a crime. Even when the rules for determining criminal intent have been settled, it is far from an easy matter to apply them. The proof can be had only from external circumstances, a factor which leads either to the relaxation of the rules themselves or to the indulgence of presumptions. Fundamentally a great part of the confusion has been due to the failure to accept all the logical consequences of the requirement of guilt as the basis of punishment. Old notions have persisted.

For historically the necessity for the existence of any mental element is the late requirement. The right of satisfaction recognized by early law is an undifferentiated claim which may in modern terminology be based on tort, crime or a breach of contract; but whatever the basis of liability it attaches to purely external consequences. Since the right of satisfaction is a right to reparation, the question of the wrongdoer's intent is considered irrelevant.

Still the idea appears fairly early that some difference must be made between injuries caused deliberately and those caused involuntarily. In the Pentateuchal legislation (*Numbers* xv: 27–28) a thoroughgoing distinction was made between "ignorant" and "presumptuous" wrongs because in theocratic society sins and crimes are similarly regarded. In Plato's *Laws* voluntary and involuntary injuries are systematically distinguished, and the latter are more severely punished than the former; but Plato is aware that the distinction is something of a paradox and by no means generally adopted. In Hellenistic times various philosophic sects, notably the stoics, introduced moral concepts into legislation and thereby made it necessary to distinguish between the harmful result and the evil will. Punishment was confined as far as possible to the latter: thus Cicero could say that it is an implied rule of mankind (*tacita lex est humanitatis*) to punish not the event but the *consilium* (*Pro Tullio*, 22, 51).

This conception was adopted more and more fully in the mature Roman law. It had always played a larger part in the Roman law than in other ancient systems: the qualification *sciens dolo malo*, "wittingly and willfully," is found in early documents and the supposed sacral law of Numa uses the expression *dolo sciens*. The term *dolus malus* in its abbreviated form *dolus* became in popular and later in technical speech the embodiment of the concept of wrongful intent. While public punishment was permissible only if *dolus* was present, *culpa*, or negligence, sufficed for the *delicta privata*. It is disputed whether in the imperial period after the reign of Hadrian *culpa* was not sufficient in the case of such heinous crimes as murder and arson.

A criminal theory had to be recreated for western Europe during the Middle Ages. The concept of law of the Germanic tribes consisted almost entirely of more or less elaborate tariffs of compensation for injuries. Practically no account was taken of intent or of wrongful

purpose. The liability for consequences was indeed recognized in a maxim: *Qui inscienter peccat, scienter amendet*. But contact with the Roman law and especially the canon law—the developed Christian theology went the full distance of considering only the wicked will as really punishable and the harm done as immaterial—forced men once more to pay attention to the subjective condition of the wrongdoer. The result was, nevertheless, merely a compromise.

The Roman *dolus* received only lip service. The canon law held that *versanti in re illicita imputantur omnia quae sequuntur ex delicto*, which implied no relation of will between the act and its consequences; the mere fact that the offender was engaged in evil sufficed. The ruling doctrine of the Italians, who were especially important in the elaboration of the general doctrines of the criminal law, was that the accused was responsible for all the consequences of an intentional deed which according to an objective standard must necessarily or probably follow from it. From such sources emerged the *dolus indirectus* of Carpzov, which dominated criminal theory almost into the nineteenth century. In its essence *dolus indirectus* is the assertion that all the foreseeable but not necessarily foreseen consequences of a criminal act are to be regarded as willed. *Dolus indirectus* thus represented merely a modification of the idea of *versari in re illicita*.

The necessity for the existence of intent in English criminal law has been expressed in the maxim of *mens rea*. The old Germanic rule of criminal responsibility is found in the *Leges Henrici* of the twelfth century; in this same code, however, in what Liebermann called a "shrieking contradiction" there is a phrase unintelligently filched and corrupted from the *Decretum* of Gratian: *reum non facit nisi mens rea*. This is a sentence from the sermons of St. Augustine referring to perjury, and it is doubtful whether in that passage *reus* had yet acquired its mediaeval meaning of guilty. The maxim is not heard of again until it is cited by Sir Edward Coke in his Institutes (3, 6) with the addition of *actus*, and from Coke the requirement of a *mens rea* has been accepted in Anglo-American law.

The difficulties involved began to show themselves as soon as proof of a *mens rea* as an element distinct and separable from the unlawful act was deemed necessary. Such distinct proof was usually unobtainable and recourse in general was had to presumptions and inferences from the fact that an unlawful act had been committed. The denial of a *mens rea* required the averment of some specific defense, such as accident, incapacity or the like. It is small wonder that Sir James Fitzjames Stephen was ready to declare the phrase *mens rea* to be an entirely meaningless one.

When the source of the maxim is remembered, it would be natural enough to imply that only the "guilty intention" was punishable, but this was never seriously accepted in English law. The proposition *voluntas reputatur pro facto*, "the will is taken for the deed," was voiced in connection with the crime of treason, since the mere "compassing the king's death" was in itself treason. But even here as in conspiracy an overt act of some sort—if only writing the plan out on paper—was in fact required, and the few cases that went further were not considered authoritative.

Indeed English law has gone almost to the opposite extreme of maintaining the old responsibility for consequences. It presumes every adult to intend the natural consequences of his acts. The *mens rea* is present at least theoretically when a criminal act is committed in the course of the performance of a "wrongful" action. This may be not only an act that is a mere civil tort but an act that is a breach of the accepted rules of morality. Such was the opinion of many of the judges in Reg. *v.* Prince [(1875) L. R. 2 C.C.R. 154]. It is true, however, that some crimes require a "special *mens rea*": they are those that must be committed with "malice aforethought," "knowingly," "negligently," "fraudulently." But the effect in such cases is merely to change the burden of proof: the crown must prove the ordinary *mens rea* by further evidence than the mere inference from the *actus reus*. It must be remembered also that "malice" in English law is not equivalent to intent but includes also forms of evil purpose, design or motive. Thus while the terms *dolus indirectus* and *versari in re illicita* are not current English law, the ideas they represent are present perhaps in their most extreme forms.

The American law is much the same as the English, with one most important difference: the *mens rea* is not so readily constituted from any wrongful act. Many courts have held that an act merely *malum prohibitum* will not suffice. Offenses requiring special intent also constitute the exceptions to responsibility for indirect

intention. With respect to at least crimes of homicide (*q.v.*) American law, which has divided murder and manslaughter into degrees, is generally more rigorous than English law in insisting on direct intention. This is indeed a great difference, because crimes of homicide most frequently result in fortuitous consequences, and the most important aspect of the struggle to limit the scope of intention has everywhere been in connection with such crimes, a struggle that has succeeded in most European countries even where *dolus indirectus* is still otherwise recognized.

This is now the case, however, in a decreasing number of continental countries: the most important exception at present perhaps is France. The change has been brought about chiefly through the influence of German criminal law theorists. The campaign against *dolus indirectus* began with Leyser, Böhmer and Nettelbladt toward the end of the eighteenth century. Decisive for the subsequent development was Feuerbach's theory of the psychological compulsion of the criminal law, which led inevitably to the result that only conscious violations of express prohibitions could be punishable. The final result has been that German penal science and the German courts have abandoned *dolus indirectus* with all its associated ideas. Nevertheless, this again has not meant the complete triumph of direct intention. For in place of *dolus indirectus* there has arisen the modern doctrine of *dolus eventualis*, which has come more and more to be accepted in European doctrine and drafts of penal codes.

It is impossible to supply a generally applicable definition of eventual intention, for the reason that the doctrine is not everywhere held in precisely the same terms. In its essence, however, it consists of two requirements. In the first place, the consequences which result from an act must be actually not merely putatively foreseen. In the second place, the person who acts must have taken a certain intellectual or emotional attitude toward these consequences. It is with respect to this necessary attitude that opinions differ. The celebrated so-called Frank formula is based upon the hypothesis that the person who acts would not have been restrained from his deed even if he had come to the conclusion that consequences would certainly follow. The prevailing German doctrine, however, is of a more positive character: the person who acts must have decided to act in any event whether the consequences ensued or not. This doctrine is based upon the so-called *Willenstheorie*, whose most determined champion has been Hippel and which asserts that the consequences are willed because the person who acted was in "accord" with the eventuality. Opposed to this theory is the *Vorstellungstheorie*, numbering a strong minority of adherents, who assert that it is sufficient for the person who acts to consider the consequences as probable. But certainly not all consequences are willed which are considered probable. The will theory is also not free from difficulties but it probably has the merit of being closer to popular conceptions. It must be recognized, however, that the theorists who have distinguished between *Wille* and *Vorstellung* have perhaps advanced matters less than might be supposed, for the reason that the problem of proof makes it difficult to apply the distinctions.

Any consideration of the responsibility for intent apart from the responsibility for negligence would be misleading. In no legal system has responsibility been confined to intentional conduct alone. The tendency in earlier centuries was to consider some forms of gross negligence as at least presumptively intentional. Upon the basis of the somewhat obscure Roman *culpa lata* the Italian law constructed the doctrine of *culpa dolo proxima* to serve as a form of presumptive *dolus*. In the first period of the German common law absolute distinctions were made between *culpa lata*, *levis* and *levissima*. To escape the implications of his theory of guilt Feuerbach was eventually driven to invent a *culpa dolo determinata*, which served as a substitute for *dolus indirectus*. He also spoke of "conscious" negligence—an idea that has descended to modern German criminal law, where it now serves, however, solely as the boundary of *dolus eventualis*, having in itself no consequences for measuring punishment. Moreover it is only in modern law that the decision that an act was merely negligent does not as a rule entail at least milder punishment. Both the mediaeval Italian law and the German common law seem to have punished as a matter of general principle all crimes committed through negligence, unless indeed *dolus* was of the very substance of the crime. The practise under the German and French codes is to set the accused free when there is a failure to establish *dolus* unless the codes expressly or by necessary implication provide also a punishment for negligence in the particular case. Such express provisions are rare with respect to major but common with respect

to minor crimes. The contraventions of European codes are usually construed to require only negligence; while this result has been achieved by construction under the German and French codes it is provided expressly under the new Italian code of 1931. Again it is axiomatic that where *dolus indirectus* is recognized the field of criminal negligence will be small, as it is especially in Anglo-American law. Finally, it should be recognized that probably all countries can show some examples of responsibility not only for intentional or negligent crimes but for consequences alone; such provisions are usually found with reference to crimes of great public danger.

To realize the full reach of the doctrines of criminal responsibility it is also necessary to consider the effects of the doctrines of mistake or ignorance of fact or law. Their net result is often to make a violation of the criminal law intentional in only an artificial sense. The general tendency in all mature legal systems has been to excuse mistakes of fact. Of course the mistake must relate to the constitutive elements of the crime. If Jones intending to murder Smith mistakes Robinson for Smith and murders him, he is guilty of murder because the law forbids the killing of any human being. On the other hand, errors of law have been very rarely excused. However, for both the Roman law and the Italian law of the Middle Ages it has been disputed whether a consciousness of criminality was necessary. The Roman law seems to have allowed the plea of *ignorantia juris* to be made by rustics or women, an idea that was later recognized in various places. One of the causes for the controversy with respect to past systems is the difficulty of determining whether the excuse of ignorance or mistake of law represented a rule of responsibility or a presumption of proof. As has been seen, *mens rea* in English law was never held to mean that ignorance of the criminal law was an excuse. In the German common law down to the end of the eighteenth century the rule was *error juris non excusat*. Under the influence of Feuerbach the excuse was later actually admitted for several decades with the result that there set in a sharp reaction, which has restored the old rule in modern German law. In France exceptions are made in very unusual circumstances. The Norwegian code, however, provides that where there is a mistake of law the punishment may be decreased or even abrogated altogether. In fact many of the continental theorists are in favor of abrogating or at least modifying the generally prevailing old rule, and some of the recent drafts of penal codes provide for milder punishment. But the problem is a difficult one. It is true that modern criminal norms are so complex that the average citizen cannot be expected to know them all. On the other hand, a relaxation of the old rule may very well endanger the legal order.

It is obvious that the part played by intent as an element in crime has depended largely upon the penal theory which has been current at any given time. Where the underlying principle has been retaliation, as in early societies, intent will play only a very slight part, since the purpose of retaliation on its rational side is to equalize the loss of the injured. Under the theory of deterrence—still the accepted theory of modern communities—punishment is directed against the will of the prospective offender, and hence it is conceived that it can be effective only if the offense is a matter which the will can control. When reformation is considered the object of punishment, intent must still be considered the essential element of a crime, because it is only the wicked will that can be the subject of correction and reformation. But even where contrition has made punishment unnecessary as a corrective, it may still be required from a religious point of view in order to purge away the pollution of the crime. A version of this doctrine appears curiously enough in such statements as that of Fichte that the criminal has a right to be punished and that he is therefore unjustly treated when this right is denied him.

The writers of the Enlightenment emphasized classification of punishments according to the grievousness of the wrong. They directed their efforts chiefly against the penal system which had grown up in continental Europe—an amalgam of the primitive desire of retaliation, of the newer concept of the duty of the state to protect itself against destructive forces and of the canonical theory of crime as a sin to be discharged by purgation. In theory the last element demanded a very delicate gradation of evil intent and a much more precise adjustment of punishment to individual deserts than did the system of the reformers. In practise, however, the continental penal system had degenerated into the arbitrary and often brutal determination of punishment by "reasons of state." Only too often not *dolus* but the *praesumptio doli* sufficed. The reformers demanded the fitting of the punishment to the crime and insisted upon

the attribute of personal guilt, which meant necessarily the presence of intent.

The modern positivist school of criminology has compelled a reconsideration of most questions of penology from a scientific point of view. Since this school refuses to admit the freedom of the will and considers the right to punish to be justified simply as a measure of social protection, it might be expected that the adherents of these schools would insist upon concern only with the happening of injurious consequences. The initial tendency, from which there has been a reaction, was to accept overhastily theories of scientific determinism. The concept of intention may be retained by the most uncompromisingly scientific theory in order to express the fact that an individual has the power to select social rather than antisocial ends, although how and why he will use this power is not certainly predictable. This leaves the question exactly where it was in the most definitely "subjective" schools. The problem becomes one of inducing individuals to select social ends and of how they are to be treated when they refuse or neglect to do so. It follows that as long as in popular belief intention and the freedom of the will are taken as axiomatic, no penal system that negates the mental element can find general acceptance. It is vital to retain public support of methods of dealing with crime.

The positivists delight in pointing out the inconsistency of punishing a negligent act as a crime. Indeed it is difficult to see how such punishment can be reconciled with the postulate of guilt. Either the latter must be abandoned or a theory created which will fit the punishment of both intentional and negligent acts. A unified theory has usually been sought. Attempts have been made to see in the act of negligence a defect or a failure of the will. The application of the penal law to negligent as well as to intentional acts has been seen to be justified by its schooling of the will. The place of negligence in the theory of guilt seems to have attracted a particularly great amount of attention among Italian theorists. Two types of Italian theories may be distinguished: the theory of *prevedibilitia*, which regards negligence as punishable because the offender has not foreseen a consequence that he might have foreseen—a view that is taken essentially by the positivists; and the theory of *causalità efficiente*, which insists upon guilt and finds it in the willing of the bodily action which may be illegal. The latter theory really shifts the ground upon which the ordinary concept of intent rests; moreover the initial action may be involuntary or negligence may involve a total omission to act.

The question of criminal intent will probably always have something of an academic taint. Nevertheless, the fact remains that the determination of the boundary between intent and negligence spells freedom or condemnation for thousands of individuals. The watchfulness of the jurist justifies itself at present in its insistence upon the examination of the mind of each individual offender. Courts will doubtless long be compelled to separate from the mass of the community certain definitely recognizable irresponsible classes, such as infants and idiots, and to hold the rest of the community responsible for the direct consequences arising from their acts.

MAX RADIN

See: CRIMINAL LAW; CRIME; PUNISHMENT; HOMICIDE; NEGLIGENCE; INSANITY, LEGAL; SANCTUARY.

Consult: For English Law: Kenny, C. S., *Outlines of Criminal Law* (13th ed. Cambridge, Eng. 1929) ch. iii, and references there cited. For American Law: Bishop, J. P., *Criminal Law*, 2 vols. (9th ed. by J. M. Zane and C. Zollman, Chicago 1923) vol. i, chs. xi, xviii–xxii; Clark, W. L., and Marshall, W. L., *A Treatise on the Law of Crimes* (3rd ed. by J. A. Crane, Chicago 1927) ch. iii. For various aspects of the Roman Law: Mommsen, Theodor, *Römisches Strafrecht*, Systematisches Handbuch der deutschen Rechtswissenschaft, pt. i, vol. iv (Leipsic 1899) bk. *i*, pt. vii; Binding, Karl, "Culpa: Culpa lata, und culpa levis" in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung, vol. xxxix (1918) 1–35; Volterra, E., "Osservazioni sull' ignorantia juris nel diritto penale romano" in Istituto di Diritto Romano, *Bullettino*, vol. xxxviii (1930) 75–149. Of the enormous German literature, the following studies are especially valuable from the historical point of view: Löffler, A., *Die Schuldformen des Strafrechts in vergleichend-historischer und dogmatischer Darstellung* (Leipsic 1895); Englemann, W., *Die Schuldlehre der Postglossatoren* (Leipsic 1895), and *Irrtum und Schuld nach der italienischen Lehre und Praxis des Mittelalters* (Berlin 1922), and "Rechtsirrtum und Dolus im römischen und gemeinen italienischen Recht" in *Gerichtssaal*, vol. lxxxvi (1919) 161–206; Kollmann, H., "Die Lehre vom *versari in re illicita* im Rahmen des *Corpus iuris canonici*" in *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. xxv (1914) 46–106; Beschütz, J., *Die Fahrlässigkeit innerhalb der geschichtlichen Entwicklung der Schuldlehre*, Strafrechtliche Abhandlungen, vol. lxxvi (Breslau 1907); Hemmen, H., *Über den Begriff, die Arten und den Beweis des Dolus*, Strafrechtliche Abhandlungen, vol. civ (Breslau 1909); Schaffstein, F., *Die allgemeinen Lehren vom Verbrechen in ihrer Entwicklung durch die Wissenschaft des gemeinen Straf-*

rechts (Berlin 1930). The Frank formula mentioned in the text is contained in Frank, R., "Vorstellung und Wille in der modernen Doluslehre" in *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. x (1890) 169–228. The rest of the German literature may be found in such textbooks as Hippel, Robert von, *Deutsche Strafrecht*, vols. i–ii (Berlin 1925–30) vol. ii, sects. 23–26, and Mezger, Edmund, *Strafrecht* (Munich 1931) sects. 41–46. The German law is compared with that of other European countries in Hippel, Robert von, "Vorsatz, Fahrlässigkeit, Irrtum" in *Vergleichende Darstellung des deutschen und ausländischen Strafrechts, Allgemeiner Teil*, vol. iii (Berlin 1908) p. 373–599, which also contains references to Hippel's earlier studies. Hippel's survey is brought nearer to date in Schaffstein, Friedrich, *Die Behandlung der Schuldarten im ausländischen Strafrecht seit 1908*, Strafrechtliche Abhandlungen, vol. ccxxxii (Breslau 1928). For Italian and French literature: Carrara, F., "Dolo" in his *Opuscoli di diritto criminale*, 7 vols. (Lucca 1874–77) vol. ii; Spirito, U., *Storia del diritto penale italiano*, 2 vols. (Rome 1925); Ferri, Enrico, *Principii di diritto criminale* (Turin 1928) pt. ii, ch. iii; Garraud, R., *Traité théorique et pratique du droit pénal français*, 5 vols. (3rd ed. Paris 1913–24) vol. i, sects. 267–312.