THE THEORY OF NEGLIGENT OFFENSES IN THE ANGLO-AMERICAN CRIMINAL LAW

EMILIO S. BINAVINCE *

I. INTRODUCTION

When Holmes said, "The law did not begin with a theory," [1] he viewed the matter in a historical perspective. Law is not only a historical phenomenon; it has also a teleological direction. While Holmes can find support in the historical jural method of the common law, it is also relevant to note that the judges who "made" the law were guided by a critical, though sometimes obscure, theoretical insight, and that they have determined the course of the historical process. It was, of course, a drifting, heterogeneous and fragmentary method, and for this reason the system that they founded lacks a logical and correlated unity. The common law, like the continental legal system, is directed to the construction of a functioning system. This system within its relevant bifurcation in the criminal law can be the subject matter of a criminal law theory; criminal law theory is concerned with the methodical organization and critical elucidation of the structure of a criminal law system. However, because the Anglo-American criminal law is not penetrated by a spirit of harmonious unity, we must recognize that a definite formulation of the determinate relations, inter-relations, and meanings of the basic concepts and ideas within the system is unhappily a difficult task. This work aims to determine and evaluate the theories advanced, or at least assumed, in negligent offenses in the Anglo-American criminal law.

II. THE CONCEPT OF CRIMINAL CONDUCT

The criminal law operates in an area where, literally, man's individuality and sociality are critically engaged in a struggle for dominant recognition. From one point of view, a crime embodies the assertion of an individual's effort for the primacy of particular values; and from another point of view, it is the objectivity of a dangerous challenge to the social scale of values. This conflict finds its external expression in the criminal conduct. To the individual actor, conduct is an agency for the realization of personal values,

* A.A., LL.B., Manuel L. Quezon University, Manila; M.C.L., Tulane; LL.M., Harvard. Alexander von Humboldt-Stiftung Fellow, Rechtsphilosophisches Seminar, University of Bonn. Member of the Philippine Bar.

[1] The Common Law 77 (1887).

while to society, it is the agency for the negation of socially significant values. Thus, in itself, but at different dimensions of value-determination, conduct comprehends the qualities of value and disvalue.

In the definitions of specific crime, criminal law indicates a delicate element of selectivity in the evaluation of the various human activities. Some conducts are penalized as crimes; some are wholly irrelevant. Criminal law may demand the pursuit of a certain behaviour; it may also prohibit the bringing about of some other behaviours. The norm of criminal law, thereby, consists of prescription and proscription. By the systematic study of the structure of criminal conduct, it is possible to elucidate this element of selectivity in the criminal law; we can discover the distinctive qualities which signalize a crime from an innocent activity. From this general postulate, it is possible to derive and articulate the relevant considerations expressed in the doctrines of insanity, self-defense, coercion, necessity, ignorance, and the inchoate offenses. Contrary to the general opinion of English and American scholars in criminal law, the problem involved in the study of criminal conduct is not purely verbal.[2]

The Restrictive Theory

Austin's discussion of "act" and "forbearance" in his *Lectures on Jurisprudence*[3] commanded considerable influence among Anglo-American scholars in criminal law and tort. Although he did not thoroughly and systematically expound the relevant inter-relationship of the concepts of conduct and crime, his illustrations generally referred to delictual conduct.

In Austin's view, "act"[4] is a motion of the body which is the consequence of the determination of the will.[5] An act, in other-words, is a voluntary bodily movement, as opposed to one which is

[2] *E.g.*, "Although much of the discussion in this first chapter will be concerned with terminology, acceptance of a satisfactory terminology is of first importance for securing workable rules." Williams Criminal Law 1 (1961, 2nd ed.) (hereafter Williams); and further he also says that "The requirement of an act is not so important a restriction upon criminal responsibility . . . ." at 13. See also Cook, *Act, Intention, and Motive in Criminal Law*, 26 Yale L.J. 645, at 647, 649 esp. n. 6 (1917); Paton, Jurisprudence 243 (1951). There is thus, as it shall be seen, an unfortunate sterility of professional literatures in English and American criminal law concerning a theoretical discussion of criminal conduct. The sterility of criminal law scholarship in the Philippines is, of course, more acute.

[3] Vol. 1 (4th ed. Campbell, 1879) (hereafter Austin).

[4] At first, he tried to distinguish "internal acts," or acts of will from "external acts." at 377. He later abandoned this distinction which was "hastily borrowed . . . from Mr. Bentham." at 433. All acts were then meant to be bodily movements.

[5] *Id.* at 376.

involuntary, that is, one which is "not consequent upon determination of the will." [6] To fully appreciate Austin's view, it is helpful to know what, in Austin's theory, is meant by "volition." His point of departure is the "will." "Certain parts of the human body obey the *will*. Changing the expression, certain parts of our bodies move in certain ways as soon as we *will* that they should." [7] The bodily movement is the immediate and direct consequence of willing. When one "wills a movement," this movement immediately follows "without any intervening process or means." [8] He illustrates his meaning by the movement of the hand. "[I]f I wish that my arm should rise, the desired movement of my arm immediately follows my wish. There is nothing to which I resort, nothing which I wish, as a means or instrument wherewith to attain my purpose." [9] Only this "antecedent desire" is called "volition," and only the consequent bodily movement is "act strictly and properly so-called." [10]

This is an atomistic conception of "act." In conduct involving a complex and infinite number of bodily movements, a volition attached to each movement must be postulated."[11] The extension of the hand, planting of the foot, the movement of the eye, head, and fingers, have separate and independent volitions. In Austin's view, as long as these movements are the immedilate and direct consequence of a "wish" of them, each is a separate and distinct "act" in itself, however irrelevant and insignificant it may be.[12]

Austin also distinguishes the "act" from its consequence. In his opinion, every phenomenon which could not be an "act" is a consequence of the "act." In his often quoted example, he said:

> "If I kill you with a gun or pistol, I shoot you: And the long train of incidents which are denoted by that expression, are considered (or spoken of) as if they constituted an *act*, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon; point it at your head or body, and pull the trigger. These I *will*. The contact of the flint and steel; the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are *consequences* of the act which I *will*. I *will* not these consequences, although I may *intend* them." [13]

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[6] *Ibid.*

[7] *Id.* at 423.

[8] *Id.* at 425. He changed the word "will" to "desire or wish." "All that I am able to discover when I *will* a movement of my body, amounts to this: I wish that movement." At 424.

[9] *Id.* at 424.

[10] *Id.* at 424, 426-7.

[11] *Id.* at 425.

[12] 'The numberless movements of my arms and legs immediately follow my desires of these same movements." *Id.* at 426.

[13] *Id.* at 427.

This view has been restated in subsequent literatures in England and the United States without substantial elaboration.[14] The case-law, hardly a place for theoretical scholarship, although often assuming the validity of the Austinian theory, does not provide any relief of elucidation due to its unconcentrated, and at times, inconsistent doctrines.[15]

It is obvious that this analysis of conduct does not provide relevant generalizations of crime. From the simple presence of a "bodily movement" we cannot derive the concept of crime; it does not indicate what is distinctive in a conduct defined as crime. This was left for Holmes to make an attempt to find relevant and articulations which would provide the essential qualities of crime and tort.

Holmes utilized the Austinian theory of "act" to analyze the structure of crime and tort. He agrees fully with Austin's conception that "act" is a voluntary bodily movement, or in his terms, muscular movement. It does not include the consequences flowing from the "act." [16] He also accepts Austin's concept of "volition." [17] He realized, however, that this contraction of the muscle alone cannot fully explain the concept of crime or tort. This is because these "acts are indifferent *per se*." [18] "For instance," he argued, "to crook the forefinger with a certain force is the same act whether the trigger of a pistol is next it or not." [19] In the elaboration made by Holmes, he found that there are additional elements which make the "act" a wrong. He believes that these elements consist of some qualifying circumstances attendant to the execution of the "act." All muscular motions or co-ordinations of them are harmless apart from concomitant circumstances, the presence of which is not necessarily implied by the act itself. Thus to strike out with the fist is the same act, whether done in a desert or in a crowd.[20] The "act" detached or conceived independently of these circumstances is indifferent to the law.[21] The significance of these circumstances in the structure of the crime or tort is that they indicate that the act "will probably cause some harm which the law seeks to prevent." [22]

[14] See Cook, *op. cit.*, *supra* note 2; Paton, *op. cit.*, *supra* note 2, at 243; Markby, Elements of Law 118 (6th ed. 1905).

[15] "Another reason for the comparative unimportance of the "act" doctrine is that when an act seems at first sight to be lacking it is sometimes possible for the court to look critically back through the accused's past until a culpable act is discovered." Williams 13. See also R. V. Jarmain, (1946) K.B. 74 (C.C.A.); R. V. Hughes, 57 B. C.R. 521 (1942) (Canada); 2 Stephen, History of Criminal Law in England 113 (1883).

[16] The Common Law 91.

[17] *Id.* at 54.

[18] *Id.* at 75.

[19] *Id.* at 54.

[20] *Id.* at 131.

[21] *Id.* at 54.

[22] *Id.* at 75.

Holmes' concomitant circumstances are objective or factual circumstances which are not parts of the "act"; neither do they reflect, nor are they reflected in the act. They are parts of the natural state of affairs in the world of experience. They are material, visible, and physically perceptible realities. Holmes illustrates his view with his example of crooking the forefinger, "It is only the circumstance of a pistol loaded and cocked, and of a human being in such relation to it as to be manifestly likely to be hit, that make the act a wrong." [23]

This position of Holmes is consistent with his theory of objective liability where the subjective or mental elements are totally excluded from the structure or crime.[24]

This theory has been adopted by the American Law Institute in its *Restatement of Torts* [25] and in the *Draft of the Model Penal Code.*[26]

To fully evaluate the restrictive theory, it is well to remember Austin's and Holmes' positivistic backgrounds, and the philosophy of utilitarianism to which they were devoted exponents. The authority of Austin had frequently been Bentham,[27] and Holmes' inclination is well known.[28] Although we do not need to involve ourselves in philosophical conflict, we need to stress the fact that positivism and utilitarianism account, in great measure, for the suspicion and discomfort of Austin and Holmes to admit in their analysis the viable and less determinate or concrete concepts. In the ultimate analysis their mechanistic view of conduct and their utilization of physically defined concepts as determinative in the total structure of their theory must have to be referred back to these unexpressed, but pervading, presuppositions.

This theory cannot verify its utility and validity in the present system of Anglo-American criminal law. Its most fatal weakness is already indicated by its incapacity to elucidate the doctrine of defenses accommodated in the criminal law. The case of self-defense will clearly demonstrate this point. Let us suppose that A shot B in self-defense. There exist a "willed" or voluntary crooking of the finger, *i.e.*, the muscular movement immediately followed the desire

[23] *Id.* at 54. Holmes theory of liability makes no distinction between tort and crime. See *infra.*

[24] *See infra.*

[25] 1 Restatements, Torts 6-8, c.l. Sec. 2 (1934).

[26] Model Penal Code Secs. 1.14., 2.01., Comment 9, 11-12, 119-2v (Tent. Draft No. 4, 1955).

[27] Bentham, An Introduction to the Principles of Morals and Legislation 189-99 (1948).

[28] *Cf.* Fisch, *Justice Holmes, the Prediction Theory of Law and Pragmatism,* 39 J. of Philosophy 85, (1942).

for the movement; Holmes' distinctive qualities of an offense also undoubtedly exist. Thus the crooking of the finger was attended by the concomitant circumstances of a pistol loaded and cocked, of a human being in such relation to it was to be manifestly likely to be hit. Granted that the crooking is a conduct, no one, however, would seriously argue that the whole occurrence is criminal merely because it was qualified by the concomitant circumstances. The same difificulty could be seen in defenses of performance of a lawful order, right or office; the defenses of youth, insanity, and the honest mistake of fact. It fails to account also for the external circumstances which may limit the intelligence and freedom or self-determination such as necessity, or coercion, or those circumstances that the Anglo-American criminal law often allows as ground for mitigation of liability such as provocation or intoxication.

The structure of inchoate offenses cannot be adequately and consistently analyzed in this theory. In criminal attempt, its atomistic analysis would theoretically isolate each bodily movement and consider them as separate and independent from the antecedent or posterior movements. Thus, the determination of the concept of preparation and criminal attempt becomes obscured. It would be absurd to evaluate each bodily movement as having a separate significance in criminal conduct. A criminal conduct is an adequate and logical unity directed by a single determinant. The criminal law does not prohibit the crooking of a finger, neither the crooking of a finger with a loaded and cocked pistol next to it, and directed to a person likely to be hit. It prohibits the realization of death by any mode of behaviour, generally described in terms of this consequence, *i.e.*, kill another. In other words, conduct that realizes death, whether by crooking of a finger, letting some arsenic tablet drop, by stabbing, by pushing another over a cliff, by hanging, is prohibited, without consideration whether this conduct is constituted by one, two, or an infinite number of bodily movements. It is for this reason that criminal conduct is not defined in terms of bodily movements, *e.g.*, omission, neither by circumstances, but in terms of its undesirable consequence. It is also for this reason that an offense could be categorized into stages of execution, as the conduct is conceptually related to the realization of the undesirable consequence. In the case of solicitation and conspiracy, the inadequacy of this theory is more clearly demonstrated. As an observable phenomenon of bodily movements, there can be no visible relevant difference between a solicitation and a friendly cheering or gossip. So also we cannot perceive the outward difference between a meeting of a board of director of a corporation planning a merger with another corporation, and a criminal conspiracy.

This theory cannot also be reconciled with the normative orientation of criminal law. Its exclusive reliance on factual or physically perceptible circumstances to derive the concept of crime unduly limited the necessary extensions of the system of criminal law. The criminal law does not operate only in a world of tangible reality, but also in concepts and meanings. The legal values accommodated in the criminal law are not always contained within material or physical bounds. As a physical phenomenon, there is nothing distinctive in a slander upon a person or heaping upon him praises; a perjury or a statement of truth, the passing of a friendly greeting and a revelation of vital military secrets. In the definition of crime, the criminal law also utilizes objective significances which cannot be empirically ascertained. In the crime of larceny, for instance, as a physical or observable event, the "act" of "taking a property" by a thief and an owner indicates no material difference. The first, however, is guilty of larceny, but the latter is not. This distinction is rooted on legal significance, that is, the legal relation of an owner to a thing is distinct from that of a non-owner. This is an objective significance attached by the legal order to the relation of a person to a thing; a concept far from being physically ascertainable, though comprehensible.

Another serious error of this theory is its attempt to ignore the mental or physical factors in the postulate of criminal conduct. The meaning of an objective phenomenon directed by a human determination is not independent of the determinant. This determining factor conclusively defines the quality and extent of the objective phenomenon. Conduct may acquire varying relevant qualities in criminal law, as our evaluation upon the determinant of the conduct changes. These factors cannot be ignored because they play a not insignificant function in the system of criminal law. To illustrate this point, we can take the example of Holmes about the shooting of a person. Let us suppose that we are the spectators of an occurrance where A shot in the direction of B, who was not, however, hit. Mere observation of the succession of these events will not furnish us any intelligible judgment in criminal law. Thus, we must not rashly conclude, as Holmes would do, that this activity is unlawful. To make that determination, we must investigate the orientation of the subjective element of this conduct. If the shooting was without resolution to negate any legal values, such as life, health, peace of mind, public peace or order, the conduct might be an innocent activity. Assuming, however, that the conduct is unlawful, we are confronted further with the problem of subsuming the conduct into one of the various legal definitions of an offense. We must again ascertain and evaluate the subjective elements of this behav-

iour before we can categorize rationally the conduct as attempted murder, assault, attempted physical injury (assuming a distinction between assault and battery obtains in this jurisdiction), or merely a discharge of a firearm at a prohibited time and place.

The legal definition of some offenses expressly includes some subjective culpability other than intention or negligence,[29] These subjective culpabilities give to the conduct a distinctive socio-ethical quality by virtue of which the criminal law evaluates the conduct with a higher category of disvalue. This intense repudiation or reproach of the criminal law often takes the form of a definition of the conduct as a distinct offense, or a provision for a higher penalty. This is illustrated by the purposive culpability indicated by the phrases "intent to" or "in order to" in burglary, by the lewd or obscene designs or tendencies which are often present in sex offenses, or the moral perversity of the offender such as cruelty, treachery, or abuse of confidence.

We find that a criminal conduct is not purely a natural observable phenomenon of bodily movements and circumstances. It is a logical unity, a dynamic concept constituted by relevant facts, perceptible phenomena, mental attitudes, objective significances, and assumptions, interrelated and link together by a value-oriented system.

The Extensive Theory

The major proponent of this theory is Salmond, and unlike the restrictive theory, it does not enjoy a wide acceptance in legal literatures.

On the whole, there is no significant improvement that Salmond made on the theory of Austin and Holmes. He accepts the formulation of the concept of "act" by Austin, and endorses Holmes' view that the "act" as defined by Austin is, in law, indifferent.[30] But this theory of "act" is not as limited as Austin or Holmes had articulated. In his view, an "act" is not merely a bodily movement but "any event which is subject to the control of the human will." [31] The subordination of the "event or act" to the will, however, need only be potential, that is, "it is not essential that the control should be actually exercised; there need be no actual determination of the

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[29] In German criminal law, these are called *subjective Unrechtselemente,* and are considered part of the *Tatbestand* (Type-situation constitutive of the crime).

[30] "No bodily motion is itself illegal. To crook one's fingers may be a crime, if the finger is in contact with the trigger of a loaded pistol; but in itself it is not a matter which the law is in any way concerned to take notice." Jurisprudence, 369 (10th ed. Williams, 1947).

[31] *Id.* at 367.

will, for it is enough that such control or determination is possible . . . " [32] He believes that the "act-event" concept has three constituent elements, namely, (a) its origin in some mental or bodily activity or passivity of the doer, (b) its circumstances, (c) and its consequence. These elements have a distinct relationship in the "act." He illustrated this by an example of a practice shooting with a rifle by which a person was killed by accident.

> "The material elements of my act are the following: it's origin or primary stage, namely a series of muscular contractions, by which the rifle is raised and the trigger pulled; secondly, the circumstances, the chief of which are the facts that the rifle is loaded and in working order, and that the person killed is in line of fire; thirdly, the consequences, the chief of which are the fall of the trigger, the explosion of the powder, the discharge of the bullet, its passage through the body of the man killed, and his death." [33]

It is with the last two elements that the law maintains its attitude of selectivity in the definition of a wrongful act. "Out of the infinite array of circumstances and the endless chain of consequences the law selects some few as material. They and they alone are constituent parts of the wrongful act. All others are irrelevant and without legal significance. They have no bearing or influence on the guilt of the door . . . " [34]

Unlike Holmes, Salmond believes that there are valid differences between tort and crime. From the above general concept of wrong, he attempted to isolate crime from tort. Here he involves himself in obvious difficulties in conceptual analysis, and these difficulties force him to abandon this line of analysis. He evades the approach of theoretical discrimination, and instead he applies the technical differences in the procedural requirement of proof. In crime, proof of act is sufficient, but in civil wrong, proof of actual damage is required.[35] The obvious weakness of this proposition is the elucidation of negligent offenses. Negligent offenses are completed offenses, hence, proof of actual damage is always required. Although Salmond noted this difficulty, he did not abandon his proposition. Instead, he created the negligent offenses as exceptions because the proposition he advanced "is not always invariably so." [36] Needless to say, by this caveat, Salmond vanished all pretenses of validity of his distinction.

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[32] *Id.* at 368.
[33] *Id.* at 369, 370.
[34] *Id.* at 369.
[35] *Id.* at 371-2. He was trying to accommodate here the doctrine of criminal attempt which he utilized as a basis of distinction.
[36] *Id.* at 372.

Our appraisal of Salmond's theory cannot be less than the observation already made in the restrictive theory. As already indicated, there was hardly anything significant which Salmond made over Holmes' formulation of the criminal conduct.

The only point upon which we may make some observation is the significance of Salmond's approach of including the consequences as element in a wrongful act. There is a useful insight in this reference, but apparently Salmond did not seem to have perceived it. Had he not stopped when he was confronted with a theoretical difficulty about negligence offenses, it would have been probable for Salmond to discover that the consequences of conduct is the reference of social evaluation of criminal conduct. However, even his conception of consequence creates serious obstacles to allow articulation of relevant analysis to this direction.[37]

The Concurrence Theory

This theory was developed, and is represented by Jerome Hall. In the long history of AngloAmerican criminal law scholarship, it is not an exaggeration to say that Hall's work in criminal law is the first systematic and exhaustive theoretical study ever written.[38] For the first time, Anglo-American criminal law was expounded in terms of an adequate and consistent theory wherein all doctrines, principles, rules and concepts are attempted to be articulated within a system, in a determinate relation and interrelation, each being elucidated in reference to one another.[39]

In general, Hall's criminal law theory is a theory of the positive law of crime.[40] The whole criminal law system is constituted within the principle of *legality,* and all doctrines, principles, and concepts are elucidated and referred to the general principles of the law of crime. The law of crime is understood in its broadest sense and includes not only positive legislation but also the whole gamut of the common law of crime.

The criminal conduct in this theory is any human conduct whose object is the causation of harm. The criminal conduct possesses a teleological direction because of its being projected to the harm. In other words, conduct and harm stand in the relationship of means to end. This relation is a dynamic inter-relation by which the conduct influences the harm just as the harm influences the conduct. "For the essence of a means-end situation is precisely that means

[37] See *infra.*
[38] *Cf.* Mueller. Criminal Theory, 34 Ind. L. J. 206 (1959).
[39] Hall, Studies in Jurisprudence and Criminal Theory 10 (1958).
[40] "These conceptions and the principles which include them refer to the totality of the rules and doctrines of criminal law." *Id.* at 10.

can be defined *anly by reference to end,* and end, *only by reference to means."* [41] Since the harm is a legally proscribed harm,[42] the teleological relationship is thus a criminal law relevant concept. As distinguished from the "Finalistic Theory" in Germany, a theory which proceeds from an ontological orientation, Hall's theory proceeds from a legal postulate.

The polarities of conduct and harm are provided a relevant nexus by the concept of causation. All criminal conduct must have "caused" an actual harm.[43] To fully appreciate Hall's theory, it appears necessary to consider his concepts of harm and causation. However, for purposes of presentation, we shall limit ourselves presently with the structure of criminal conduct, and discuss later Hall's theory of causation and harm. It is enough to state that by causation, Hall understands a "means-end causing, *i.e.* a causing directed by a *mens rea."* By harm, he means, and this must be carefully noted due to its obscurity, any disvalue.[44]

A criminal conduct is a concept whose structure is constituted by the concurrence of its external and internal aspects. The internal aspects, which is *mens rea,* refers to the psychical or mental state directed to, and "expressed in the voluntary commission of a prescribed harm." [45] It has, aside from an intellectual (cognitional) element, a volitional element which is an "internal effort" represented by the "traditional movement of the will." [46] This internal aspect must have to be projected to reality, there must be an actualization in the world of experience to form the criminal conduct.[47] Here we leave the internal aspect, and we begin to enter the initial borders of the external aspects. The actualization of the *mens rea* in the world of experience is realized by an "additional effort." This "additional effort" is a "manifested effort" and is meant to square with the concept of "act" as understood by Austin and Holmes.[48] This "manifested effort" has, like the internal aspect, intellectual and volitional elements. The volitional element which is strongly identified with the "additional effort" is important, and must be distinguished from the "internal effort" in *mens rea.*[49] Hall describes the function of the "additional effort" as follows:

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[41] Hall, General Principles of Criminal Law (2nd ed. 1960) (hereafter Hall).
[42] Hall, Chapter VII.
[43] Hall, Chapter VIII.
[44] See *infra.*
[46] Hall, Chapter VI, at 104.
[45] *Id.* at 179.
[47] *Id.* at 170.
[48] *Id.* at 178, esp. n. 40. He avoided the use of "act" because of its confusing and vague meaning.
[49] *Id.* at 180.

> "The internal *mens rea,* held in check, is by that extra effort externalized. The floodgates are removed and the internal *mens rea* is expressed in conduct. It is manifested by an effort of the same genus as, but additional to, the effort already functioning in the intention of the *mens rea.* The additional effort may be viewed as the projection forward into conduct of the already existent action-thought *mens rea.*" [50]

The theory of concurrence logically correlates these two elements to form the criminal conduct. Its function, aside from elucidating the structure of criminal conduct, is to signalize the criminal conduct from the innocent conduct. "The principle of concurrence emphasizes . . . the *fusion* (concurrence) of the essential elements, *i.e.,* of the *mens rea* and the additional effort that manifest the *mens rea* in criminal conduct." [51] It is this principle of concurrence of *means rea* and manifested effort (act) which, in Hall's theory, "prescribes an essential quality of morally significant conduct—the conduct met in life-situations, which causes *criminal* harm." [52]

It is especially difficult to evaluate Hall's theory of criminal conduct without reference to his entire criminal theory. It seems that this theory has been anticipated by earlier writers like Bishop [53] and Burdick,[54] as well as by the case law.[55] It is, however, the significant contribution of Hall to have elevated the theory of concurrence from a temporal (concurrence in point of time) into an ideal or substantive logical concurrence. His theory, however, is greatly obscured by his failure to postulate a definite conception of harm unrelated to the culpability of the actor.[56] Rather than defining culpability in terms of the relation of the actor's mind toward the negation of a legally defined value, Hall made dependent the definition of values by the quality of the mind. The definition of the specific offenses is a catalogue of socially protected values, hence a determinate value is accommodated in the criminal law. This is the frame of reference in the evaluation of the mental attitude of the actor, and ultimately the conduct. In Hall's conception of harm, "life" is a legal value on one occasion, but may not be at another. Hence, the negation of life, *i.e.,* death, is harm in murder or manslaughter; while it is not in self-defense, insanity, mistake of fact, or youth. The definitions of legal values and legal harms are thrown to innumerable indeterminate variables. The difficulty becomes apparent in the defense of youth or insanity, or in cases of necessity or coercion. Suppose that A, a child below the age of

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[50] *Id.* at 179-80.
[51] *Id.* at 179; see also 185-6.
[52] *Id.* at 186; see also Chapter VIII.
[53] 1 Bishop, Criminal Law 263 (8th ed., 1892).
[54] 1 Burdick, Law of Crimes 131-2 (1946).
[55] See cases cited by Burdick, *Id.* at 132.
[56] Hall 242-3.

punishment, kills B. Hall would say that there is no harm because there is no criminal liability. The absence of criminal liability arises, however, because A is excused, not that there exists no realization of the death. He may not be criminally accountable for the realization of the death, but the indication that there was a harm realized is shown sufficiently by the fact that he may be civilly liable.

Hall's theory of "additional effort" is also difficult to accept. His "internal effort" and "additional effort" are not distinguishable concepts; both are processes of the mind. So long as "internal effort" and the "additional effort" are volitional categories, they must be referents of the mind, and thus internal. Cognition (comprehending, thinking about, and believing) of the world of existence is for the purpose of volition (deciding and doing).[57] On the basis of our cognitive premises (that which is comprehended, thought about, and believed), we are confronted with the alternatives of doing or not doing something, the necessary sequel of which is deciding (resolution). Once resolution has been reached, its externalization in the world of experience by physical intervention is the logical step. There are, of course, resolutions which are not externalized, and resolution is not itself externalization. Initiation of physical intervention by the will is necessary. This commitment is the doing itself.[58] As very well put by Lewis, "The commitment is that inscrutable fiat of the will, the 'oomph' of initiation, which terminates the mental part and is the bridge to the physical part of the act." [59] There is no duality of volition in conduct. It is a single and continuing mental activity which contemplates all its anterior and posterior stages. The physical intervention or "act" is but an external phenomenon in the world of experience which the will utilizes for the realization of its resolution. It is itself predetermined by the will.

Further, it is difficult to establish a teleological means-end nexus between the conduct and harm in negligent offenses, even one qualified with recklessness. In recklessness, the actor pursues the conduct or physical commitment not as a means to realize a prescribe harm but it is precisely due to the lack of this positive orientation of conduct to harm that recklessness becomes distinguishable from intention. "Awareness of the increase of risk" in recklessness is clearly not a means-end attitude. It requires an undue extension of con-

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[57] See Lewis, The Ground and Nature of the Right 43-45 (1955). "The primary—pervasive significance of knowledge lies in its guidance of action; Knowing is for the sake of doing". Lewis, Analysis of Knowledge and Valuation 3 (1946).

[58] Lewis, The Ground and Nature of the Right 44 (1955).

[59] *Id.* at 43.

cepts to identify the "internal effort in *mens rea*" in Hall's theory beyond what he referred as "effort functioning already in the *intention* of the *mens rea*." It seems that in Hall's theory, only intentional offenses could be properly elucidated.

III. THE CONCEPT OF NEGLIGENCE

The Theory of Negligence

The nature of negligence in Anglo-American criminal law is unhappily obscure.[60] Aside from the absence of a systematic theoretical study, there are difficulties occasioned f rom terminological vagueness, legislative superimposition of a variety of terms, and confusing judicial usage.[61] Austin considered injurious or culpable omissions as "negligence," [62] which was the old meaning of the term.[63] He also contrasted such concepts as "headlessness," "rashness," and "temerity." [64] Holmes did not deal with the distinctive aspects of negligence,[65] nor did Stephen give a theoretical discussion of the concept.[66]

Some writers like Bigelow, Salmond, Wharton, Thompson, and Barrows consider negligence as a state or condition of the mind; while others like Terry, Pollock, Edgerton, Moreland, and the Reporters of the *Restatement of Tort* consider it to be nothing different from a conduct adjuged by social standards as unreasonably dangerous. Perhaps neither is accurate. Negligence is not as definite a state of mind as intention because its cognitive and volitional scopes do not show concrete and certain adherence to a particular teleological orientation to circumstances and the undesirable consequence. More than anything, negligence presupposes an error on the cognitive or volitional premise of the conduct. For this reason, it is necessarily conditioned by the circumstances and the undesirable consequence. On the other hand, to say that negligence is a conduct which is socially dangerous is to say too much and too little. Intentional offenses are also definitely socially dangerous conducts. To conclude that negligence is conduct, however, ignores the essence of negligence as relational concept, one ascertainable only in relation to the mental orientation of the actor to the attendant circumstances and the undesirable consequence. At any rate, there seems

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[60] Hall 114.

[61] See Edgerton, *Negligence, Inadvertence, and Indifference, The Relation of Mental State to Negligence*, 39 Harv. L. Rev. 849 (1926); Hall 114; Moreland, Rationale of Criminal Negligence 25-31 (1944).

[62] Austin 439.

[63] Plucknett, Concise History of the Common Law 469 (1956).

[64] Austin 440.

[65] See The Common Law 77-129; Commonwealth v. Pierce, 138 Mass. 165, 52 Am. Rep. 264 (1884).

[66] 2 Stephen, History of Criminal Law in England 122-3 (1883).

to be an agreement, at least in criminal law, that the species of negligence called "recklessness" is a form of *mens rea*.[67] There is, however, no agreement as to the nature of "recklessness."

Salmond, who was familiar with the theory of negligence in the continent [68] made some useful analysis of negligence. He starts from the proposition that negligence is a form of *mens rea* "standing side by side with wrongful intention as a formal ground of responsibility." [69] He swept away the empty verbal dispute between the conduct theory and mental theory of negligence by showing that negligence signifies conduct in a certain sense, but it is a form of *mens rea* in the real sense. Phrasing it differently, negligence as conduct is only *mens rea* manifested in conduct.[70] He rejected also the view that the distinction of negligence from intention is thoughtlessness or inadvertence.[71] There is such thing as advertent negligence in which the harm is foreseen as possible or probable, but it is not willed.[72] He found that "the essence of negligence is not inadvertence but indifference." [73] As a mental attitude, negligence "consists of undue indifference with respect to one's conduct and its consequence." [74] In his opinion, negligence differs from intention in that in the former, the actor is careless whether harm will be realized or not, while in the latter, the actor "desires" the harmful consequence.[75] He also noted the distinction of advertent (reckless) negligence and inadvertent (simple) negligence, one which is the same line of distinction maintained by modern writers and in the case-law.[76] In advertent negligence, the actor knows and foresees the possible or probable realization of harm, while in inadvertent negligence, the actor did not advert to the dangerous nature of his act, or foolishly believed that there was no danger.[77]

On the other hand, modern writers like Hall,[78] Williams,[79] Turner,[80] and Smith [81] cannot perceive the distinctive features of negligence as a general concept. They reject simple negligence as a form of *mens rea* because of the lack of "awareness" as an element

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[67] See Hall Chapter IV; Williams 30-4, 53-8.
[68] See Jurisprudence 537, n. 6 (9th ed. Parker, 1937).
[69] *Id.* at 535, 538.
[70] *Id.* at 535.
[71] *Id.* at 536.
[72] *Ibid.*
[73] *Id.* at 537.
[74] *Ibid.*
[75] *Ibid.*
[76] See Hall 119-21; Williams 53-9, and the cases cited in Hall 122-33.
[77] Salmond, *op. cit. supra* note 68, at 356.
[78] Hall 120.
[79] Williams 102-3.
[80] Turner, *Mental Element in Crime at Common Law*, Modern Approach to Criminal Law 195, at 208 (Ed. Radzinowicz & Turner, 1945).
[81] Smith, *The Guilty Mind and Criminal Law*, 76 L.Q. Rev. 78 (1960).

to elevate it to a category satisfying the requirements of a *mens rea*.[82] Although they do not furnish enlightening elaboration, they seem to require an "awareness" or some cognitive nexus of the mind with the undesirable consequence. It is relevant to point out that the great mass of negligent conducts consists of an error on the cognitive premise, that is, a reproachable error or fact. The "awareness" of the actor is not real, but merely potential, or at least, exigible of the actor. It is for this reason that the "psychological theory" of *Schuld* in German criminal law theory had been abandoned since the early years of the current century. Some generalizations have also been formulated where reckless negligence and intention are practically indistinguishable. As Turner points out, "The difficulty would be particularly acute if it were necessary to distinguish between intention and recklessness. . . So far as liability is concerned . . . our law does not distinguish between the two states of mind."[83] This view, in great degree, accounts for the absence of literature on the theory of negligence. In the opinion of the writer, useful insights could be gained if the theory of negligence is elucidated in reference to the theory of criminal conduct. In this context, the position of some authorities that simple negligence could be a postulate of criminal liability might be found defensible.[84]

The first significant distinction to be observed refers to the methodology of our analysis of conduct. We must observe that conduct is, firstly, a universal, an ontological concept, which we shall here term as "final," and secondly, it is a legally evaluated concept, a criminal conduct. Conduct in its finalistic structure is essentially purposive behaviour. It has an end towards whose realization the physical commitment in conduct is directed.[85] Ontologically, conduct is basically *intentional, i.e.*, to the actor the conduct is not a meaningless causal process, but is pursued according to a resolution to realize a certain consequence or end. The end to which the conduct is directed may or may not be relevant in criminal law.

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[82] See however, Chisolm v. Doulton, (1889) 22 Q.B.D. 736 at 741; Stephen, J., in R. v. Tolson, (1889) 23 Q.B.D. 168, at 185; Lee v. Dangar, Grant & Co., (1892) 2 Q.B.D. 337, at 350; Model Penal Code. § 2.02 (2) (d) (Tent. Draft No. 4, 1955).

[83] Turner, *op. cit. supra* note 80, at 208. See also R. v. Welch, (1875) 1 Q.B.D. 23; R. v. Pembleton, (1874) L.R. 2 C.C.C. 119; R. v. Faulkner, (1877) 11 Ir. Rep. C.L. 8), "There is little distinction except in degree between a will to do a wrongful thing and an indifference whether it is done or not. Therefore carelessness is criminal, and within limits supplies the place of the affimative criminal intent." 1 Bishop, Criminal Law 22, § 313 (9th ed. 1923). See further, Fitzgerald v. State, 112 Ala. 341, 20 So. 966 (1895).

[84] See note 82.

[85] For complete discussion of the finalistic theory of conduct, see Welzel, Das Deutsche Strafrecht 28-40 (7th ed. 1960); Welzel, Das neue Bild des Strafrechtsystems (1961); Welzel, Aktuelle Strafrechtsprobleme im Rahmen der finalen Handlungslehre (1953).

A criminal conduct, on the other hand, is a final conduct evaluated by the legal order as possessing a disvalue element. The frame of reference in the evaluation of the legal order is a legally protected value. A final conduct becomes criminal conduct, and thus attached with punishment, if, upon evaluation, the criminal law believes it possesses a disvalue-quality. The disvalue-quality of a criminal conduct is its potentiality to realize the negation of the protected legal value, namely, the realization of an undesirable consequence.

The disvalue-quality of a criminal conduct may appear in two possible categories. Firstly, in the resolution to realize the end of the final conduct, the realization of the undesirable consequence is necessarily involved, either as the primary end itself to be realized, or secondarily, the realization of the undesirable consequence is involved in the realization of the end of the final conduct. This disvalue-quality is called, in criminal law, intention. To cite a few examples to illustrate the various forms of this disvalue-quality: (1) A shoots B, his enemy. Intention is here clear and direct. (2) A sets on fire B's house to kill B, then asleep. Both the arson and the homicide are intentional. The secondary consequence of arson is, to A, involved in the realization of the final end—the death of B. (3) A adopts an elaborate plan to kill B to collect the insurance upon B's life. To cause fire, he tampered the electric wiring of B's house, and the fire to kill B in his sleep. The tampering of the electric wire, if penalized, is an intentional offense; so also with the arson, homicide, and the fraud upon the insurance company. In all these operations, there exist a *knowledge* and a *resolution* to realize the circumstances indicative of the constituents of a type-situation defined as offense. Secondly, in the resolution to realize the end of the final conduct, the realization of the undesirable consequence is not necessarily involved, but by avoidable and unjustifiable or reproachable error, either in cognition or volition, the physical commitment of the final conduct has initiated the causality of nature, which by the sequence of causation, realized the undesirable consequence. This disvalue-quality of the conduct is called negligence.

Negligence as a disvalue-quality needs elaboration. Involved in this concept are numerous relative and indefinite concepts which are necessary presuppositions. The concept of error is probably reasonably determinate, and is immediately assumed upon the realization of an undesirable consequence not otherwise intentionally brought about. However, some value-judgments are involved in the determination whether the error is avoidable, and whether it is un-

justified or reproachable. Some defensible criterion in this determination is necessary. It is in this stage of analysis that the concept of the standard of care may operate. The determination of this standard is, itself, a value-judgment, an approximation referrable to many circumstanial variables. Furthermore, approximations could be defined from different centers of determination, such as the individual actor himself, the society, the judge, or jury. A consistent point of departure must be adopted, with due consideration to the function of the standard of care. Then the problem of causation is another complex concept. If it is to be defined in terms of the mechanistic "sine qua non" maxim, it might acquire an unduly extended meaning to refer all phenomena back to the First Cause; if it were defined in terms of some relative concepts such as "common sense," "policy," "means-end," "social adequacy," and others, the determination of variables is necessarily aggravated. Also the adoption of these concepts presupposes another process of value-determination, and the commitment to a definite center of determination. Causation must, therefore, be adequately elucidated, and a consistent concept must be adopted with due consideration of the function of the concept. These are intricate problems which we cannot conveniently discuss here.

We turn to the problem which led modern writers in criminal law to deny the distinctive element of negligence, whether reckless or simple. The realization of the undesirable consequence in a negligent offense comes about due to the error on the cognitive or volitional assumptions of the conduct. The physical commitment, as we indicated, was not initiated in pursuance to a resolution to realize the undesirable consequence. Human conduct is pursued on the premise of what is known, *i.e.*, comprehended, thought about, and believed. By the process of believing, the actor impresses or assigns or refuses the impression or assignment, of an objective representation to the thing or event which he experiences. The alternative of assignment or non-assignment of the objective representation assumes the probability of error in the process of believing and thus in the cognitive premise of the physical commitment. In the event of such error, the direction of the whole conduct is vitiated. For instance, A, a hunter, saw a figure behind a bush, and believing it to be a bear, shot at it and killed it. The object, however, turned out to be a man. Although at times, man cannot control what he may experience, he is the absolute master of the inpression or withholding of the impression of the objective representation upon the things or events which he experiences. So if A's error in believing the object to be a "bear" is avoidable and unjustified, he is negligent.

He could have withheld the representation of a "bear," and acted accordingly. The error on the volitional aspect of the conduct concerns the process of deciding upon the initiation of the physical commitment to realize the end of the final conduct. The error in the process of volition assumes the objective rightness of the essential cognitive premises of the process of deciding. The physical commitment decided upon, however, has the potentiality to initiate the causality of nature, which by the sequence of causation, would realize any undesirable consequence. The actor, however, erroneously decided to initiate the physical commitment, thus realizing an unintended undesirable consequence. If he could have decided otherwise, and a rightful decision could have been justly demanded of the actor, he is negligent. Although there is no error in the cognitive premise of the physical commitment, there was an erroneous execution of the physical commitment. For instance, A shot at a dog standing beside B, and instead he hit B. If this erroneous shooting could have been avoided, or exercised differently, and is unjustified, he is negligent.

The degree of intensity of the legal repudiation of a negligent conduct does not depend upon the absence or presence of knowledge as generally assumed. Whether a conduct is qualified with reckless or simple negligence depends upon the evaluation whether, considering the relevant factors involved in the actor's erroneous conduct, his disregard of the pursuit of a rightful conduct is more or less reproachable. It is, however, true that error upon the presence of relevant knowledge is often more reproachable than in the absence of such knowledge.. This is because usually an error on volition is more corrigible than an error on cognition. Occasionally, however, an error in cognition might be more corrigible than an error in volition. There is thus also a corrigible ignorance. In proportion to the censure upon the actor's conduct, as it is evaluated in reference to the circumstantial variables which allowed the actor an opportunity to determine a rightful conduct, the legal order ascertains whether the negligence involved is reckless or simple. Accordingly, recklessness may occur in a negligent conduct arising from an error on a cognitive premise, just as it may from an error on volition. In our example of the hunter, by altering the circumstantial variables of time, place, and person, his negligent conduct could be either reckless or simple.

It is clearly demonstrated that there is no criminal conduct which is intentional or negligent by itself in the definition of criminal law. Ontologically, all conducts are with final intentionality, which is not, however, the relevant postulate of criminal liability.

Finality is the basic foundation of criminal law as a normative system. Teleologically, the criminal law is designed to regulate human behaviour; it must, therefore, assume that the human behaviour is a determined or directed, not blind or purely casual, phenomenon. It is within this fundamental assumption that criminal law can influence human behaviour, that is, by creating an "ought" of behaviour. The "ought" of behaviour, or the norm of criminal law, presupposes the concept of finality.

Intention and negligence are relational concepts whose articulation in criminal law must start from an undesirable consequence in reference to which we ascertain the attitude of the will in its realization. It is for this reason that a change of the consequence as a frame of reference in our articulation of the disvalue-element of the conduct would mean a corresponding alteration of our evaluation of the conduct. Hence, conduct could be said to be intentional and negligent at the same time, depending upon the viewpoint of the consequence from which we critically assess its disvalue-element. Our example of A burning the house which killed B will illustrate this point. As we have noted, if the arson was pursued under a resolution to realize the death of B, the arson and homicide are intentional. If, however, A resolved to burn the house without a resolution to realize the death of B, or in case of his ignorance of B's presence in the house, A's conduct is, from the viewpoint of the arson intentional, but from the viewpoint of the death of B, it might be negligent.[86]

It is for this reason that there are variations of criminal liability for the same conduct where several undesirable consequences have been realized. In reference to one undesirable consequence, the conduct might be justified or excused, and in reference to another punishable. For example, A shot and killed B in self-defense. The same bullet, however, also killed C, an innocent bystander. In reference to the death of B, A's conduct is justified. In reference, however, to the death of C, A might be liable for negligent homicide (manslaughter), if, consistent with the effective exercise of defense, he could have avoided realizing the death of C, and his failure to do so is unjustified. However, if to do so would render his right of self-defense ineffective, or that he was not at fault, he might be excused on the ground of necessity or accident.

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[86] The question whether he is guilty of murder or not under the felony-murder rule is not here in point. The assumption of the felony-murder rule is that the death was realized unintentionally.

The Standard of Care

The whole theory of negligence presupposes a criterion in reference to which conduct is evaluated in the ascertainment of its disvalue-quality. The observance of this criterion of evaluation negates the presence of negligence. This is the so-called standard of care.

The standard care, as we said, is a value-judgment, an approximation referrable to an infinitely numerous indeterminate variables. Its formulation is an attempt to articulate a workable and acceptable conception which would enable us to conveniently determine the disvalue-element in conduct. Since it is a positive normative conception, it is difficult to categorize independently from the numerous variations of time, person, place, and things upon which it is designed to operate. Legal systems based on codification have created a mythical entity called "the good father of the family," leaving, however, the definition open to the judicial determination as cases require. In the common law, the room of tolerance for flexibility and creativity of judical law-making is tremendously greater. Nonetheless, some guidance of a criterion has been felt, and a fictitious creature, who has never existed, nor will ever exist on earth, was postulated as a reference of a rightful conduct. He is the so-called "reasonable man of ordinary prudence." [87]

The function of the "reasonable man" has not been clearly defined. Holmes, for example, utilized the "reasonable man" to construct his theory of objective liability.[88] Hall, on the other hand, insists that it is only a method of inquiry.[89] It has never been suggested that it is a reference of evaluation in the determination of the disvalue-quality of negligence in the structure of conduct. It is not unlikely that because of the absence of well-defined function of the concept, it has seen difficulties in articulation. Its application has often led to the hardship of many blameless actors. As relevantly described, he is "an excellent but odious character [who] stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example." [90]

There have been attempts to work out the essential qualities of the reasonable man. Some writers believe that the reasonable man is an objective concept, by which is meant that the individual judgment and personal character of the particular actor are to be dis-

[87] This was first mentioned in Vaughan v. Menlove, 3 Bing. N. C. 468 (1837).
[88] See *infra*.
[89] See *infra*.
[90] See Herbert, Misleading Cases in the Common Law 16 (1930).

regarded, and that the standard of care must be uniform for all persons.[91] Others, however, maintain that the concept is partly objective and partly subjective.[92]

The courts have taken unusual pain to create a clear definition. They have always emphasized that variations of individuals have no account in the determination of the standard of care.[93] Holmes had clearly indicated this judicial inclination. "The law takes no account of the infinite variations of temperament, intellect, and education which makes the internal character of a given act so different in different men. It does not attempt to see man as God sees them, for more than one sufficient reason." [94] He is, unlike any man who may occasionally err, always up to the standard and never behaves unreasonably.[95] He is so elevated from human frailities, and his noblest thought is for all. "The Reasonable Man is always thinking of others, prudence is his guide, and 'Safety First' . . . is his rule of life. All solid virtues are his, save only that peculiar quality by which the affection of other men is won."[96] This view has been strongly justified on utilitarian grounds.[97]

This rigid objectivity, however, is, neither in legal scholarship nor in judicial practice, unqualified.[98] As desirable aims are attempted, numbers of exceptions, such as those founded on age, physical qualities, impairment of the senses, mental capacity, are introduced to tone down the rigidity of the reasonable man.[99] On the other hand, personal characters which are indicative of a higher skill, intelligence, or experience are considered to raise the standard of care.[100]

In some way, however, the usefulness of the standard of care may be of doubtful degree in the present system of the common law criminal law. The general inclination to require "reckless" negligence to qualify a conduct to be cognizable in criminal law leaves little room for the application of the standard of care. Further-

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[91] Edgerton, *Negligence, Inadvertence, and Indifference, The Relation of Mental States to Negligence*, 39 Harv. L. Rev. 849, at 849-50 (1926); Moreland, Rationale of Criminal Negligence 33-40 (1944); Prosser, Torts 124 (2nd ed. 1955).

[92] Seavey, *Negligence, Subjective or Objective?* 41 Harv. L. Rev. 1 (1927); Green, *The Negligence Issue*, 37 Yale L.J. 1029 (1928); James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo.L.Rev. 1 (1951).

[93] See Moreland, *op. cit. supra* note 91, 69-101.

[94] Common Law 108.

[95] Hennesey v. Chicago & N.W.R. Co., 99 Wis. 74 N.W. 554 (1898); Austin & N.W.R. Co. v. Beatty, 73 Tex. 592, 11 S. W. 858 (1889).

[96] Herbert, *op. cit. supra* note 90, at 14.

[97] See Holmes, Common Law 108..

[98] See James, *op. cit. supra* note 92.

[99] See Green, Judge and Jury 178-80 (1930).

[100] James, *op. cit. supra* note 92, 5-26.

more, the determination of negligence in crimes is generally left to the jury which acts upon the standard of care in a more apparent than real way.

Holmes Theory of Objective Liability and the Concept of Negligence

Mr. Justice Oliver Wendell Holmes raised a challenge to the validity of the ethical *mens rea* as a traditional basis of penal liability.[101] In his book, *The Common Law*, he developed a theory by which liability becomes the necessary consequence of the realization of the objective indications of the constituents of a crime. He believes that the historical movement of liability from ancent law to modern times is towards this direction.[102] "While the law does still retained, and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continously transmuting these moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated." [103]

The basic presupposition of Holmes' theory can be found in his realistic philosophy.[104] To Holmes the elementary aim of punishment, and thus of criminal law, is expediency. One could distinctly recognize the voice of Bentham, when Holmes said that, "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threat may continue to be believed." [105] The criminal law treats the individual as means to an end, and uses him as a tool to increase the general welfare at his own expense.[106] The general welfare, however, is defined in terms of the outward order, the absence of an open and observable conflict. The reliable indications of these clashes or engagements that disturb the general welfare are the objective, sensible or material circumstances. Thus, to achieve the end of law, all that it demands is external conformity to its commands. In the words of Holmes, "For the most part the purpose of the criminal law is only to induce external conformity to rule. All law is directed to

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[101] Public welfare offenses shall not be discussed in relation to Holmes theory of objevtive liability.

[102] In reference to statutory offenses, Holmes is correct.

[103] Common Law 37-8.

[104] Caution must be observed in studying Holmes as a thinker. His penetrating scholarship cannot probably be doubted, but he is not a systematic philosopher. As Hall says: "The greatest error regarding Holmes is to treat him as a systematic philosopher." at 157, n. 43. One could, without too much mental strain, see from his The Common Law these shortcomings.

[105] Common Law 46.

[106] *Id.* at 46-7.

conditions of things manifest to the senses . . . its object is . . . an external results." [107] In the law of robbery for example, the purpose of the law is to put a stop to "actual physical taking and keeping of other men's goods," and in murder the "actual poisoning, shooting, stabbing, and otherwise putting to death of other men." [108] If these things are not done, the law prohibiting them is equally satisfied, whatever the motive.[109] Conversely, if these are done, the law prohibiting them is equally trangressed, whatever the reason.

In Holmes' exposition, one does not need the requirement of *mens rea.* Indeed, all references to the conditions of the mind are abandoned. In the theory of objective liability this is "wholly unnecessary, and all references to the state of his consciousness is misleading." [110] With the banishment of *mens rea* in crime, the prac tical utility of the distinctive elements of intention and negligence went with it. There are no ethical evaluations which are focused to the mental attitude of the actor. If *mens rea* has any meaning or substance in criminal law, it must be a concept which is a category of the mind of the actor. Thus, Holmes opened the wide frontiers of formalism in criminal law theory.

It seems, however, to have occurred to Holmes that the logical implications of his theory is nothing short of abandoning the orientation of criminal law to justice. Thus he wrote:

> "It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such denial would shock the moral sense of any civilized community, or to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for the community to bear."[111]

This is, however, nothing but a formalism, or a lip-service to blameworthiness. His concept of blameworthiness is not an evaluation of the actor, but an objective blameworthiness, "a blameworthiness of the reasonable man." This curious twist in the argument of Holmes follows:

> "The reconciliation of the doctrine that liability is founded on blameworthiness with the existence of liability where the party is not to blame . . . is found in the conception of the average man, the man of ordinary intelligence and reasonable prudence. Liability is said to rise out of such conduct as would be blameworthy to him. But he is an ideal being . . . and his conduct is an external and objective standard when applied to any given individual. That individual may be morally without stain,

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[107] *Id.* at 49.
[108] *Ibid.*
[109] *Ibid.*
[110] *Id.* at 75.
[111] *Id.* at 50.

> because he was less the ordinary intelligence or prudence. But he is required to have these qualities at his peril . . . ." [112]

His elucidation of the subjective elements of mitigation and culpability in crime shows clearly the difficulties of Holmes to obtain consistency and logic in his theory. He said that the concept of provocation in manslaughter "does not come from the fact that the defendant was beside himself with rage. . . . There must be provocation sufficient to justify passion, and the law decides on general considerations what provocations are sufficient." [113] The malice aforethought in murder is objective, and does not "mean a state of defendant's mind" [114] The "intent" in criminal attempt also should be judged by their tendency under the known circumstances, not by the actual intent which accompanies the conduct.[115] The same could be said in theft and burglary. In all these cases, Holmes attempts to demonstrate that the importance of "intent" in these crimes is not to show that the conduct was reproachabble in some degree, but to show that it was "likely to be followed by hurtful consequences." [116] In other words, he thinks that rather than the analysis proceeding to the discovery of the state of mind from the existing objective circumstances, it is these processes of the mind from which we find indications of these objective circumstances. Thus, he argues that in theft, the intent to deprive the owner of his property is "an index to the external event which would have happened . . . . that the thief would have retained, or would not have taken steps to restore, the stolen goods." [117] The same is true in burglary, the "intent to commit a felony" is merely an "index to the probability of certain future acts which the law seeks to prevent." [118]

Utilitarian ethics adopts a strongly objective premise in the evaluation of human conduct. To postulate it as the foundation of legal liability necessarily leads to the articulation of crime in terms of its external circumstances; its undesirable consequence is the determinative element in the ethical notion of crime. The exaggeration of the ethical antinomies, *i.e.* the "ethics of ultimate ends" and the "ethics of responsibility," compelled Holmes to identify himself with that which he believes would assure to society a greater security and welfare. In the opinion of the writer, the polarity in the criminal conduct is being viewed in a one-sided relation, that is,

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[112] *Id.* at 51; see also his opinion in Commonwealth v. Pierce, 138 Mass. 165, 5 Am. Rep. 264 (1884).
[113] *Id.* at 61.
[114] *Id.* at 62.
[115] *Id.* at 65-6.
[116] *Id.* at 68.
[117] *Id.* at 72.
[118] *Id.* at 74.

of repugnance, inconsistency, and denial. It must be realized that the polarities do not only oppose each other to be conceivable, they also complement each other.[119] Thus the function of criminal law cannot be determined only in terms of social welfare, *i.e.* expediency; it should also be determined in terms of individual security, *i.e.* certainty. There is no legitimate order in a society where individual freedom and security are ignored, just as no legitimate order is possible where anarchy prevails. Society and the individual are correlative concepts; neither is complete without the other. In the individual's consciousness, the society is constituted, just as the individaul finds his personality in soceity. Crime should not be defined only in terms of what is repudiated by soceity, it should also be defined in terms of the subjective orientation of the individual actor. This is the basic assumption of criminal law. To think otherwise would render impossible the explanation of self-defense, necessity, coercion, provocation, and even insanity.

His conception of "objective blameworthiness" is no less objectionable, and is as much a myth as his "reasonable man." His adherence to the convenience of form led him to obscure the search for the substance. Blameworthiness, if it has any meaning, must be an evaluation of the person of the actor as an author of a conduct. It is his conduct as a will determination that is blameworthy, not that of a reasonable man. Blameworthiness must take account of the personal peculiarities of the actor which are relevant in the evaluation of his conduct. The social attitude toward the realization of an undesirable consequence by an idiot, a child, an ignoramus, or a moron must be clearly distinguishable from the realization of a like undesirable consequence by one who had the benefit of a sophisticated education if intelligence is relevant in the evaluation of the conduct. To argue otherwise is to penalize people due to their having been born stupid. It is not to tax the mind much to articulate the relevant distinction on which considerations of mitigation or culpability could be established. To the writer, it seems odd that Holmes recognizes the faculty of a dog to discriminate its being kicked at, or stumbled upon, yet he denies to society of human beings the recognition of a faculty to make the same distinction.

Holmes' analysis of the subjective elements of mitigation and culpability in crime indicates his inadequate comprehension of the

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[119] Max Weber, *Politik als Beruf*, Gesammelte Schriften 396-450 (1921). A translation in English is available in Gerth and Mills (eds.), From Max Weber: Essays in Sociology 77-128 (1946). This work has not been given the attention it is worth in Legal Philosophy, except by Radbruch, Rechtsphilosophie 148 (5 ed. Erik Wolf, 1956).

epistemology involved in crime.[120] He did not realize that evidences or "indeces" are symbols or perceptible manifestations of the substance. The process of cognition is not the appreciation of substance through the symbols. The "intent" in conduct is that which is creative, that manipulates and directs the movements and alterations in the state of existence. The circumstances are nothing but external reflection in nature of the activities of the determining force in the actor's mind. We do not ascertain "intent" by direct perception but by deduction from events, facts, utterances, and other relevant directly knowable circumstances. It is not a cognizable reality which we could directly appreciate by the penertation of experience or sensation. We deduce, or assume its existence from the presence of knowable realities which, by prior experience, we have invariably realized are the unmistakable indications of its existence. Holmes, however, had turned the process of thought inside out.

IV. THE ROLE OF THE UNDESIRABLE CONSEQUENCE IN A NEGLIGENT OFFENSE

The elucidation of the concept of undesirable consequence or "harm is important in the theory of criminal law.It embodies the aspect of sociality, just as blameworthiness recognizes the aspect of individuality in the structure of crime. Some writers in the United States and England have attempted to demonstrate the conceptual distinction of intention and reckless negligence as the affective notion of "desire" is related to the undesirable consequence;[121] and others equate intention with the element of foreseeability of the undesirable consequence.[122] In negligent offenses and in tort, it is sometimes said that the extension of liability is limited by the existence of a nexus provided by the concept of foreseeability between the conduct and the "caused" undesirable consequence. The criminal attempt, conspiracy, and incitement cannot be clearly explained without a theoretical postulate of undesirable consequence. The notion of causation in law, and ultimately the criminal conduct, derive their meanings from the concept of undesirable consequence. As correctly noted by Hall, "Harm, in sum, is the fulcrum between criminal con-

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[120] This is in spite of the comment of Hall that, "In sum, his [Holmes'] theory challenges the ethics of penal law, not its epistemology." Criminal Law 156.

[121] E.g. Salmond, see *infra;* Williams 34, 53; Markby, Elements of Law 118-119 Secs. 217, 220 (6th ed. 1905); Cook, *Act, Motive, and Intention,* 26 Yale L.J. 645 (1917).

[122] *E.g.* Holmes, Common Law 53, 56; Director of Public Prosecution v. Smith, (1960) 3 All E.R. 161, at 167-172; R. v. Cummingham, (1957) 2 Q.B. 396.

duct and the punitive sanction; and the elucidation of these interrelationships is a principal task of penal theory." [123]

The Concept of Undesirable Consequence

The concept undesirable consequence or "harm" has been discussed by many writers in varying senses. Austin made a short reference to consequence in a rather broad meaning. In the activity of shooting to kill, he believes that the contact of the flint and steel, the ignition of the powder, the flight of the ball towards the target, the wound and subsequent death, with the numberless incidents in these, are "consequences" of the "act" which one "wills." [124] He did not, however, articulate the relevant consequence which is necessary in criminal or tort liability. The contact of the flint and steels, the ignition of the powder, and the flight of the ball are, abstractly seen, insignificant consequences, and are without disvalue-qualities.

The discussion of Holmes of the theory of "act" and of objective liability did not have systematic reference to the concept of undesirable consequence. He proceeded to expound his theory, however, with the basic presupposition that the law forbids some undesirable consequence. Indeed, this assumption is inescapable and important in Holmes' theory because liability in criminal law, as well as in tort, is not in reference to a moral element, but by reason of the causation of "harm".[125] This is clear from the utilitarian orientation of criminal law. "The reason for punishing the act," he said, "must be generally to prevent some harm which is foreseen or likely to follow that act under the circumstances in which it is done." [126]

Holmes seems to conceive of "harm" as something material, perceptible or concrete alteration of the objective state of existence which is suggestive of sensual disvalue. This is because *"All law is directed to conditions of things manifest to the senses."* [127] It is the prevention of these sensibly external results which is the primary aim of punishment. The theory of value in utilitarianism is equated with pain and pleasure. Thus in Holmes, only those that are painful to the sensibility are harms and those that satisfy the human appetite are values. In Holmes' theory, the highest good of life, such as justice, truth, honor, peace of mind, national security, and liberty are not accommodated, and their negations are not harms. We do not need to argue to show the error of this position. Admit-

[123] Hall 213.
[124] Austin 427-8.
[125] See *supra;* also Common Law 144.
[126] *Id.* at 67.
[127] *Id.* at 49. (Emphasis supplied).

ting that criminal law has a utilitarian aspect, it certainly is not its catalogue of values protected by the concept of punishment.

We need, however, to demonstrate in Holmes own analysis the weakness of his position. In the analysis of impossible criminal attempt,[128] there is no perceptibly sensible harm. When Holmes was confronted, however, with the old rule on impossible criminal attempt as enunciated in *Regina v. McPherson*,[129] he wavered in his faith to his theory. In this case the conviction was quashed because of the factual impossibility to complete the attempt to steal the article specified in the indictment.[130] Holmes, not very enthusiastically, approved the doctrine because, "At some point, or other, . . . the law must adopt this conclusion, unless it goes on the theory of retribution for guilt, and not prevention of harm." [131] But he was forced, at least impliedly, by a feeling of necessity to impose punishment in these instances, thus confronting him with the logical necessity of qualifying his notion of harm. Torn between two incompatible positions, he said:

> "But even to prevent harm effectually it will not do to be too exact . . . . If a man fires at a block, no harm can possibly ensue, and no theft can be committed in an empty pocket, besides that the harm of successful theft is less than that of murder. Yet it might be said that even such things as these should be punished, in order to make discouragement broad enough and easy to understand." [132]

Salmond's conception of "harm" took the same materialistic tone,[133] Unlike Holmes, however, he distinguished harms into "actual harm or consequence" and "anticipated consequence." The first

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[128] In Anglo-American law, what is defined as impossible crime in the Revised Penal Code, is treated as attempt which is "impossible". The same is true in German Criminal Law theory, where it is called "untauglicher Versuch."

[129] (1857) Dearsly & Bells', Cro. Cases 197, 169 Eng. Rep. 975.

[130] This rule was affirmed in *R. v. Collins*, (1865) 9 Cox C.C. 497, 169 Eng. Rep. 1477. Bramwell, B. in this case said:

"The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first possible; but suppose a man who was his deadly enemy, struck it a blow intending to murder, can he be convicted of attempting to murder the man he took it to be?" at 201. He voted to quash the conviction.

Pollock, C.B. in *R. v. Gaylor*, (1857) 7 Cox C.C. 253, said:

"If I suppose that there is a person in an adjoining room and I fire a pistol through the doorway with the intention of killing him, and nobody is there, I have committed no crime. Morally, I should be just as guilty as if I had shot the man but I should have done no act cognizable by the criminal law." at 255.

See also 2 Stephen, History of Criminal law in England 225 (1883). *Cf. R. v. Brown* (1889) 24 Q.B. 357, and Draft Code of the Royal Commission on the Law Relating to Indictable Offenses, § 74 (1879) which rejected the above

[131] Common Law 69.

[132] *Ibid.* See also his opinion in Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897); Hyde v. United States, 225 U.S. 347, 56 L. Ed. 1114 (1912).

[133] Jurisprudence 370-71 (Williams ed. 10 th., 1947).

refers to "actual results" in which the act is wrongful only by reason of an accomplished harm which ensues from it; while the second refers to "tendencies" in which the act is wrongful by reason of its mischievous tendencies, as recognized by law irrespective of the actual issues.[134] This analysis is again shrouded with the notions of procedure, and the failure of Salmond to establish a classification of values. Like Holmes, he believes that actual results or harms mean concrete tangible injury. He believes that this is illustrated in slender or negligence in driving where proof of actual loss is essential to liability. However, in breach of contract, trespass or libel, no proof of actual harm is necessary.[135] These wrongs belong to the class of acts which are judged wrongful in respect of their tendencies, and not merely in respect of their results.[136]

A more systematic treatment was developed by Hall. Unlike Austin, Holmes, and Salmond, Hall realized the essential interrelationship of value and harm. Harm, in his view, signifies the loss of value.[137] This brings us, however, to the more complicated analysis of the theory of value. In its essence, an undesirable consequence is a negative concept. Its elucidation is only possible in reference to the positive concept to which it is referred, which is value. Unfortunately, Hall did not have a theory of value which is significant fronted Holmes and Salmond in equating harm with tangible or corporal injury.[139] He seems to think that harm is a complex of fact, valuation and interpersonal relations—not an observable thing or effect, as assumed by Holmes and Salmond,[140]

The determination of value, and so of harm, must proceed from a specific subject as center of evaluation. It is thus necessary to ascertain whose notion of value is accomodated in criminal law. Here Hall is apparently undecided, and naturally attributable to the lack of any systematic theory of value. In one part, he seems to incline to society, thus defining harm as a social disvalue.[141] At other parts, he treats harm as sufficiently determined from the view point of an ideal individual, or that of the victim, thus defining it

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[134] *Id.* at 371.
[135] *Ibid.*
[136] *Ibid.*
[137] Hall 217.
[138] He referred, however, in passing to the theories of value of Bentham, Jhering, Pound, Laswell, and McDougal, and Parsons and Shil. at 215-16.
[139] "Only if the incorporeality of penal harm is born in mind, can the more difficult questions regarding the so-called 'inchoate' or 'formal' crimes be elucidated." *Id.* at 217.
[140] *Ibid.*
[141] Hall 216.

as a personal disvalue.[142] In articulating the disvalue-element of the inchoate offenses, he said:

> "The quality of daily life is impaired by such conduct; and one need only ask whether he would want to live in a community where attempts to kill and to commit robberies and arsons were frequent, to indicate that there are harmful effects of such conduct only in the apprehension aroused but also in the increased danger of becoming the victim of a more serious crime." [143]

In a great degree, such vacillation from one extreme to another impairs the adequacy and consistency of a theory. That not only personal values challenge each other, but also social values is illustrated in crime itself. A theory must assume completeness of organization and singularity of basic orientation; a numereity of perspective of evaluation accommodated in criminal law such as social group, religious sect, private association, the individual, or the state would lead to a catastrophic anarchy upon which no adequate and consistent theory could be established.

The relationship of value and harm in Hall's theory is expressed in the notion of negation. "[I]n a more advanced view, a harm is a negation, a disvalue, the lack of natural condition, and the like." [144] This relationship is invariably present in all offenses.[145] In Hall's view, all offenses involve the *actual* negation of value, *i.e.* they are realizations of undesirable consequence or harm.

Hall's discussion of inchoate offenses will demonstrate to what extent his concept of harm is valid. His concept of harm must be broad enough to accomodate these offenses, and he must verify the existence of value and its negation in them. With the incorporeality of harm already established, he attempted to extract from earlier conflicting authorities some relevant generalizations. He said that the "common thought underlying these estimates is that in criminal attempts and other relational crimes the harm consists of apprehension and of a dangerous conditions in which the probability of still greater harm is substantially increased." [146] He also supported his view by saying that "any conduct has at least two references or dimensions: It originates in an actor and, to some extent, by the mere fact of its presence, it alters pre-existing conditions. . . . For example, the taking of possession of a burglar's tools or narcotics

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[142] "Regardless of the materiality of any object, its value always involves personal appraisal of, and attitudes towards, that object, *i.e.* people value things, it self." *Id.* at 217.

[143] *Id.* at 219.

[144] *Id.* at 215.

[145] *Id.* at 213-15, 219-20.

[146] *Id.* at 218; see also n. 18 for various conceptions of harm in criminal attempts in earlier authorities.

by persons who intend to use them illegally alters the previous condition of affairs." [147] Even in preparatory conduct, Hall believes that "in logic and theory a harm has been committed." [148]

This view returns to the proposition we have earlier discussed, that is, that the disvalue-quality of criminal conduct inheres in the "harm" which is the objective correlation of *mens rea*.[149] In inchoate offenses, however, their definition is not self-contained or adequate. They have to be defined in relation to a substantive crime which must be described elsewhere by the criminal law with reasonable particularity. For this reason, criminal attempt, for example, as such, cannot satisfy the principle of Legality. As relational crime, it must be referred to the more specific offenses such as murder, robbery, larceny or burglary. Attempt, incitement, and conspiracy are conducts directed to the realization of undesirable consequence proscribed within the definition of the substantive crime attempted, incited, or conspired to be committed. These conducts are directed to the negation of the legal values implied in the definition of the substantive offense. Hence, the inchoate offenses are derivative offenses, their disvalue-quality is ultimately referrable to the undesirable consequence to which they are directed. Inchoate offenses, as such, cannot be relevant; it must have its relevance only by reference. It is for this reason that not all specific offenses could be attempted, incited, or conspired *e.g.* the negligent offenses. They are not actual negations of legal value, but attempt, incitement, or conspiracy to negate some legally relevant value encompassed within the definition of the substantive offense to which they are directed. The view of Hall, therefore, that every crime, or even preparatory conduct, presupposes a realized harm cannot be supported in theory.

Hall's view that as conducts in themselves, the inchoate offenses are alterations of the external affairs is not to be doubted, but is not entirely relevant. The external alteration in these offenses, if any, is not indicative of disvalue. We cannot, therefore, deduce the concept of crime from the bare presence of conduct as an external phenomenon embodying perceptible alterations of the external world. The view becomes less plausible in the cases of attempted omissions where there exist no external alteration of affairs attributable to the actor.

The imperative conclusion resulting from these observations points out that criminal conduct should be conceived as possessing a disvalue-quality in itself, distinct and separate from the undesira-

[147] *Id.* at 219.
[148] *Id.* at 220.
[149] *Id.* at 219-20.

ble consequence realized. The disvalue-quality in crime is a conduct-disvalue (Aktunwert). This is the foundation of criminal liability. The disvalue-quality in the actual negation of a legal value involved in completed offenses is a consequence-disvalue (Erfolgsunwert). This is the normative reference of all criminal conduct and the conduct-disvalue inhering in them. It is the primordial point of evaluation in the criminal law, but is not a necessary element of liability.

The Concept of Foreseeability of the Undesirable Consequence and the Negligent Offense.

Generally, negligent offenses are completed offenses. The actual realization of an undesirable consequence is one of their necessary and distinctive elements. The determination of negligence is not possible except in reference to an undesirable consequence actually realized. Thus, there cannot be a negligent inchoate offense.

There are numerous intricate problems implied in this postulate: The ascertainment that the realization of a particular undesirable consequence is attributable to negligence is a crucial problem. In cases where a number of undesirable consequences is "causally" realized, the determination of the scope of liability of the actor is often a difficult problem. The whole analysis of this problem in the Anglo-American law is referred to the concept of foreseeability. In tort, some courts have held that the concept of foreseeability defines the limits of liability;[150] while other courts have imposed liability upon the defendant even for unforeseeable consequences.[151] In criminal law, however, due to the inclination to limit liability to reckless negligence,[152] the problem seems less uncertain among scholars.

It seems, however, that in the analysis of liability in cases of manslaughter some difficulties have been met. The rule of *versari in re illicita* seems to have rendered the concept without practical utility in many cases. However, where the courts feel that the application of the rule becomes unduly harsh, they have tempered the liability of the actor by applying the concept of foreseeability in their analysis.[153] In proceeding to this technique of solving the problem,

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[150] *E.g.* Greenland v. Chapin, (1850) 5 Ex. 243; Mauney v. Gulf Refining Co., 193 Mass. 421, 9 So. 2nd 780 (1942); Shideler v. Habiger, 172 Kan. 718, 243 P. 2nd (1952).

[151] See Prosser, Tort 260-2 (2nd ed. 1955); Restatement of Torts sec. 435 (1934); Bohlen, *The Probable or Natural Consequence Test of Liability in Negligence*, 1901 Am. L. Reg. 79, 148; Myers, *Causation and Common Sense*, 5 Miami L.Q. 238 (1951); Carpenter, *Workable Rules for Determining Proximate Cause*, 20 Cal. L. Rev. 229 (1932).

[152] See Hall 122-40; Williams 122; The Model Penal Code, However, includes simple negligence. Model Penal Code Sec. 2.02, comment 126-7 (Tent. Draft No. 4, 1955).

[153] See *infra*.

the courts often get involved with the hardship of distinguishing a *mala in se* and *mala prohibita.*

There had been attempts to formulate an easily manageable criterion to take care of this problem. The rule of the year and a day was one of the early answers. The conclusive presumption that there can be no homicide after the lapse of a year and a day from the infliction of the injury or other cause of death was designed to define in terms of time the desirable limitations of liability. It finds its rationale from the logic of probability that after such an interval of time, no fatal consequence could be foreseen to have originated from the conduct.[154]

We shall consider this problem in two fundamental points of departure. First, we shall examine the basic structure of this concept as discussed by authorities, and point out its constitutive elements; and second, we shall determine the subject from whose perspective of reference the concept is oriented towards the concept of harm.[155]

There seems to be a view among scholars that foreseeability involves some element of cognition or knowledge. Holmes says that foresight of consequence "is a picture of a future state of things called up by knowledge of the present state of things, the future being viewed as standing to the present in relation of effect to cause." [156] Holmes considers in this context as "effect" the consequence, and "cause" is the conduct. This relation of cause and effect, or causation, presupposes a knowledge of the circumstances where the conduct was pursued, and presumably, of the causality of nature. In Hall's view, foreseeability must be assumed as a necessary element of causation in criminal law. Legal causation is a conscious (voluntary) harm doing expressed in terms of *mens rea.*[157] He believes, like Holmes, that knowledge of the surrounding circumstances and the causal relation of the conduct and undesirable consequence are elements of foreseeability. For example, he considers the knowledge of the personal condition of the victim, such as health or physical weakness, an element of liability for homicide where the death resulted from failure of health. In *Commonwealth v.*

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[154] See Stroud, Mens Rea 133 (1914).

[155] A research in case law and professional literature has given little relief in this discussion. It seems to be the general assumption among scholars and the courts that the concept has a well established meaning.

[156] Common Law 53. It must be noted, as somewhere shown, that Holmes considered "foresight of the consequence" as equivalent of intention.

[157] Hall 247-95, especially 257-61. But he also says, "It may therefore be suggested that *mens rea* does not include foresight of consequences in a restricted sense, but that it connotes the full co-presence of relevant knowledge." at 107.

Fox,[158] the deceased had a serious lung disease. It was said that the "death occurred and would not have happened but for the assault and battery." In discussing this case, Hall argues that, although the facts show that the battery satisfies the requirement of *sine qua non*, there was no means-end causation because the defendant reasonably believed that the person assaulted was of normal health.[159]

The courts, however, are less stable in their doctrines. Sometimes to reach a desirable judgment, they reason out that the "consequence was not natural or probable consequence," although the defendant's conduct satisfies the requirements of *sine qua non*. It seems to be implied that where the element of actual or potential knowledge of the circumstances in foreseeability is not established, the undesirable consequence becomes "too remote." If the evidence shows a remoteness of the consequence from the facts known to the defendant, or when he has little anticipation of the probability of the realization of the undesirable consequence, it was said that he could not be supposed to have expected it in any considerable degree." [160] In such cases, it is held that there is no manslaughter although the death of the victim may have resulted from the defendant's conduct.[161] In a case [162] the deceased, sick with high blood pressure, was choked by the defendant. He suffered cerebral hemorrhage, and thereafter became sick with paralysis and pneumonia from which he died. It was held that the choking was not "an effective agency to the death." Also in *United States v. Freeman*,[163] the court said that if the circumstances of the case show that there was gross heedlessness, want of due caution, and unreasonable exercise of authority by a ship captain, and that he ought "to have known, and could not but have known" that the deceased was unfit to go aloft the ship and that there was probable and immediate danger to his life in his so doing, then the offense is, at least, manslaughter. In England, there seems to be authority also along this rule.[164]

There is, however, an equally strong authority to the contrary. In such cases it is said that foreseeability is immaterial, and the ignorance of the defendant of the attending circumstances and of the causal relation of his conduct and the harm does not relieve him

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[158] 7 Gray 585 (Mass.) (1856).
[159] Hall 257-8; see also Williams 113-15.
[160] Stroud, Mens Rea 133 (1914).
[161] *Ibid*, citing cases.
[162] Fine v. State, 193 Tenn. 422, 246 S.W. 2nd. 70 (1952).
[163] 25 Fed. Cases 1208, 4 Mason 505 (Mass. Cir.) (1827).
[164] Andrews v. Director of Public Prosecution, (1937) A. C. 576 (T.A.C.), 2 All E. R. 552; see on this regard Kenny, Outline of Criminal Law 171-72 (ed. Turner, 1958).

from liability. In *State v. Frazier*,[165] the deceased, "a bleeder," died of hemorrhage when struck by the defendant at the mouth. The contention of the defendant that he did not know the deceased to be a hemophiliac was rejected. It was further held that it was immaterial for liability that the defendant did not know that the deceased was feeble in condition or that he did not reasonably anticipate that his act would cause death. So also in *Cummingham v. People*,[166] the deceased died of syncope when lightly struck at the head by the defendant. The court ruled that a person could be liable of either murder or manslaughter, as the case may be, when death of the enfeebled person assaulted would ensue, although the assailant did not know of the enfeebled condition of the person assaulted.

In cases where the death arose out of fright or shock due to a prior condition of the deceased, the courts have held the defendant liable.[167] Stephen has limited liability to killing by fright or shock to cases where the defendant knew of the physical condition of the deceased, and had intended the realization of death.[168] The courts, however, have carried this doctrine to cases of manslaughter and have applied it even in the absence of knowledge by defendant of the physical condition of the deceased. In *Regina v. Towers*,[169] a four month old baby was frightened when its nurse screamed loudly upon being assaulted by the prisoner. It had convulsions since that day up to its death. Denman, J. was reported to have said that; "[E]ven though the teething might have had something to do with it [death], yet if the man's act brought on the convulsions or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter." [170] The wife of the defendant in *Rex v. Hayward*[171] was terrified after an altercation with him, and died of cardiac inhibition because she was suffering from a persistent thymus gland at the base of her heart. The

[165] 339 Mo. 966, 98 S.W. 2nd 707 (1936).

[166] 195 Ill. 550, 63 N.E. 517 (1902).

[167] The early rule was that no liability would arise in the absence of bodily injury. See 1 Hale, Pleas of the Crown 428 (1st Am. ed. 1947); R. v. Murton, (1962) 3 F. & F. 492; Commonwealth v. Webster, 5 Cush. (Mass.) 295 (1850).

[168] "Suppose a man kills a person *intentionally* by making a loud voice which wakes him when sleep given him a chance of life, or suppose *knowing* that a man has an eurism of the heart, his heirs rushes into his room, and roars in his ears "Your wife is dead" *intending* to kill and killing him why are not these acts murder? They are no more "secret things belonging to God" than the operative of arsenic . . . . It is was, and it was inteded to have that effect, why should it not be murder . . . . " Digest of Criminal Law 217 n. 9 (ed. Sturge, 1947). (Emphasis supplied).

[169] (1874) 12 Cox Cri. Cases 530.

[170] *Id.* at 533-4 Verdict was not guilty. There was an instruction that if the assault were entirely unconnected with the death, it would be an accidental death.

[171] (1908) 21 Cox Cr. Case 692. The prisoner was convicted and sentenced to three months imprisonment.

jury was instructed by Ridley, J. that the abnormal state of deceased's health need not be known to the prisoner. The same rule was enunciated in *Regina v. Dugal*[172] in Canada where the violent words of the defendant resulted in the death of his father of syncope. In the United States the leading case is *In re Heigho.*[173] Heigho and a companion had a fight with Barton, in the latter's house. Barton's mother-in-law, who witnessed the difficulty was frightened and shocked, and thereupon died. The *post mortem* examination shows that she had an aneurism of the ascending aorta, and this has ruptured into the superior vena cava. It was held that Heigho could be tried for manslaughter.[174]

In instances where the defendant knew all the circumstances attending his conduct, sometimes he is not aware of the natural causal relation of his conduct and the realized undesirable consequence. He has not foreseen the succession of events that his conduct would initiate. In a great number of cases, the courts have held the defendant liable. The prisoner in *Rex v. Hickman*[175] struck the deceased with a small stick in a quarrel. Pursued by the prisoner, the deceased rode away and spurred his horse, which being young, was frightened, thereby throwing the deceased from which he died. The prisoner was convicted of manslaughter despite that the conduct of the prisoner could not be reasonably postulated as having known natural causal relation to the death.[176] A defendant may also be convicted of manslaughter when his wife froze to death in the snow after he beat and drove her away from home;[177] or one who played a prank by shooting, without intent to hit, towards the deceased and his companions, who were then crossing a river, if the shooting caused the deceased to jump out of a boat, and the boat capsized and they were drowned.[178] The ruling in *State v. Brown*[179] illustrates how far they have rejected the concept of foreseebility in these cases. The defendant placed obstruction over a railroad track so as to gain impression with the company where he would like to be employed by later giving notice of the obstruction before

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[172] 4 Quebec L. Rep. 350 (1878).

[173] 18 Idaho 566, 110 P. 1029 (1910) (a petition for habeas corpus was denied).

[174] See also Baker v. State, 30 Fla. 41 11 So. 492 (1892).

[175] (1831) 5 Car. & P. 151.

[176] See also Belk v. People, 125 Ill. 584, 17 N.E. 744 (1888), reserved on other grounds. *Cf.* People v. Rockwell, 39 Mich. 503 (1878).

[177] Hendrickson v. Commonwealth, 85 Ky. 281, 3 S.W. 166 (1887), conviction reversed on other grounds; see also Sanders v. Commonwealth, 244 Ky. 77, 50 S.W. 2nd 37 (1932); Jones v. State, 220 Ind. 384, 43 N.E. 2nd 1017 (1942). *Cf.* State v. Myers, 7 N.J. 465, 81 A. 2nd 710 (1951).

[178] Letner v. State, 156 Tenn. 68, 299 S.W. 1049 (1927); see also State v. Leopold, 110 Conn. 55, 147 A. 118 (1929).

[179] 1 Houston Cri. Rep. (Del.) 539 1878).

the scheduled train arrives. A fast through train, however, which he did not know about, was wrecked and an engineer was killed. It appears also that the defendant was weak in mental capacity, indeed some said he was not sane. The defendant was held liable of manslaughter.

The courts have also imposed criminal liability upon a defendant who had done an unlawful conduct, and thereafter the deceased commits suicide. If there is any causal relation between the conduct and the death which the defendant may reasonably foresee, he often has not anticipated the death to be arising out of suicide. For example in *People v. Lewis*,[180] the defendant inflicted on the deceased a mortal wound. The deceased, however, procured a knife, and cut his throat. The conviction of manslaughter was affirmed.[181] A more interesting situation was presented in *Stephenson v. State*,[182] where the conviction for second-degree murder was affirmed. The defendant kidnapped the victim, assaulted and raped her with unexampled viciousness. While still in captivity, the deceased committed suicide by taking a large dose of bichloride of mercury. It appears that the defendant kidnapped the deceased to force her to marry him. If there is any knowable natural causal relation of the conduct of the defendant and the commission of suicide by the deceased, the defendant's purpose to force her to marry him would be unexplained.[183]

The concept of foreseeability must be an orientation to the undesirable consequence from the viewpoint of definite subject, such as the actor or society. In the structure of the negligent offense, it becomes necessary to determine whose concept of foreseeability is accommodated in criminal law. This is one of the sources of great confusion in judicial decisions.

Holmes, consistently with his theory of objective liability, expounds foreseeability in terms of a social defined standard represented by the "reasonable man." He believes that foreseeability is external to the actor. He said that the test of foresight is not what the actor foresaw, but what a man of reasonable prudence would have foreseen.[184] When Holmes speaks of knowledge of attendant

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[180] 124 Cal. 551, 57 P. 470 (1899).

[181] See also Payne v. Commonwealth, 255 Ky. 533, 75 S.W. 2nd 14 (1934). However, in State v. Scates, 5 Jones Rep. 420 (N.C.) (1858), the court said: "If one man inflicts a mortal would, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice." at 423-4.

[182] 205 Ind. 141, 179 N.W. 633 (1932).

[183] See also Comment on this case in 31 Mich. L. Rev. 659 (1933); *cf.* State v. Rounds, 104 Vt. 442, 160 A. 249 (1932).

[184] Common Law 54.

circumstances in foreseeability, he is referring to a knowledge which the actor could have known if he were a reasonable man.[185] The foreseeable consequence is not what the actor actually foresaw, but that which a prudent man could have foreseen. Sometimes, he seems to indicate that the actor is liable for consequences not predicated by common experience, if such consequences were within the legislative apprehension.[186]

This view of Holmes found a strong judical endorsement in *Director of Public Prosecution v. Smith* [187] recently decided by the House of Lords. The question presented was whether foresight of consequence should be subjective, that is, a foresight by the actor, or objective, that is, a foresight by a reasonable man. The Lords said:

> "The jury must of course in such cases as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone . . . . *Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all provided he was in law responsible and accountable for his actions* . . . . On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grevious bodily harm was the natural and probable result. *The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.*" [188]

The opposite view is strongly represented among scholars, notably Hall and Williams. As earlier shown, Hall admits foreseeability within his theory of causation. The voluntary causation of harm is embodied in the two forms of *mens rea*, namely, intention and recklessness. Since these are mental elements, foreseeability is articulated from the viewpoint of the actor. It is thus subjective.[189] The "reasonable man" is admitted as a juridical concept, but not in the sense Holmes understands it. It is merely a technique of inquiry, and must not be confused with the fact to be determined.[190] Hall argues:

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[185] *Id.* at 56.

[186] *Id.* at 59.

[187] (1960) 3 All E. R. 161. This case is closely analysed in the next section of this work, *infra*.

[188] *Id.* at 167. (Emphasis supplied). The Lords also said that this rule enunciated "has always been the law," and they cited Holmes, Common Law 53, 56, and some cases as authorities. See also R. v. Ward, (1956) 1 All E. R. 565.

[189] Hall 281-4; see also Williams, *Constructive Malice* Revived, 23 Mod. L. Rev. 605 (1960).

[190] Hall 163.

> "Recklessness, no less than intention, includes a distinctive state of awareness. To ascertain whether recklessness existed, we must determine the actor's knowledge of the facts and his estimate of his conduct with reference to the increase of risk. In the determination of these questions, the introduction of the 'reasonable man' is not a substitute for the determination of intention, where it is material. It is a *method* used to determine the operative facts in the minds of normal persons . . . ." [191]

The most recent view expressed in the *Model Penal Code* of the American Law Institute seems to approach the problem with cautious indecision. As to the constitutive elements of foreseeability, it adopts a middle-of-the-road view. It does not wholly define foreseeability in terms of knowledge of the circumstances and the natural causal relation of the conduct and the undesirable consequence. However, it is committed to the subjective notion of foreseeability by taking the actor as the appropriate center in the determination of "awareness" of the "risk." [192]

V. THE EXTENSION AND DEGREES OF NEGLIGENCE

The articulation of the degrees and extension of negligence in criminal law presents a major difficulty in criminal theory, not only in Anglo-American criminal law, but also in the continental criminal laws. On one hand, negligence must be properly isolated from the scope of intention, and on the other, it must be clearly distinguished from negligence which is relevant only in tort.

There are many unorganized attempts made by the courts in the United States and England to take care of this difficulty. Because of the absence of clear distinction of tort and crime, the formulae put forward are seldom of any practical utility. For example, there are activities such as assault, battery, and false imprisonment which are classifiable both as tort and crime. The favorite technique adopted by the courts is the use of some repulsive jargons or rubrics such as the words "wilful," [193] "culpable," [194] "gross," [195] or the phrases "gross or wanton carelessness," [196] "wanton or reckless disregard of rights and safety of others," [197] and "reckless heedlessness of consequences," [198] or other similar expressions. Some courts find these formless and uncertain descriptions not of much relief. As

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[191] *Id.* at 120. See also pp. 155, 162-3.
[192] Model Penal Code Sec. 2.03, par. (3) (Tent. Draft No. 4, 1955).
[193] People v. Schwartz, 298 Ill. 218, 131 N.E. 806 (1921).
[194] R. v. Doherty, (1887) 16 Cox Cri. Cases 309; State v. Laster, 127 Minn. 282, 149 N.W. 297 (1914).
[195] R. v. Allen, (1835) 7 C. & P. 153; Jones v. Commonwealth, 213 Ky. 356, 28 S.W. 164 (1926).
[196] State v. Goetz, 83 Conn. 437, 76 A. 1000 (1910).
[197] State v. Dorsey, 118 Ind. 167, 20 N.E. 777 (1888).
[198] People v. Adams, 289 Ill. 339, 124 N.E. 575 (1919).

very well put by Rolfe, B., "I said I could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet." [199] Others, however, insist that these words or phrases indicate the distinctive elements of negligence relevant in criminal law.[200]

Despite the generalizations of modern writers that discount the importance of elucidating the distinctions of negligence and intentions,[201] there are important consequences which would be drawn from a systematic discussion.[202]

The concept intention has not been discussed by scholars outside of writers in Jurisprudence. The first tragic error which obscures articulation of the relevant differences of negligence and intention is the failure to realize that "intention" and "negligence" are relational concepts. There is no consistent and conscious formulation of these concepts from a particular undesirable consequence in reference to which they derive their disvalue-quality. Sometimes, intention is equated with the resolution to pursue a physical commitment (act). Intention is thus postulated as opposed to the absence of volition. This is also involved in the attempts to distinguish intention and motive; [203] while others believe that motive is a species of intent,[204] which is called "ulterior intent." [205] As understood in Anglo-American criminal law, intention has the following meanings illustrated in the following example: A shot at, and killed B, to save C, a stranger, from B's unlawful attack. The activity of shooting is called "intentional," in a meaning opposed to an "involuntary activity." [206] It is in this sense that Austin had used the concept. Thus he said that "[T]he act itself is *intended*, as well as willed. Intentions, therefore, regard acts . . . ." [207] The realization of B's death is also considered intentional. Lastly, the purpose or motive to save C is also called intention.

Another difficulty could be discerned in the lack of a systematic articulation of the constitutive elements of intention and negligence.[208] Austin considers intention nothing more than a mere "ex-

[199] Wilson v. Brett, (1843) 11 M. & W. 113, at 115-6; see also Bailroche, J. in Tinline v. White Cross Ins. Ass. Ltd., (1921) 3 K.B. 327, at 330.

[200] People v. Angelo, 219 App. Div. (N.Y.) 646, 221 N.Y. Supp. 47 (1927).

[201] See *supra*.

[202] This might be encountered in the case of distinguishing murder from manslaughter. See Pollock, C.B., in R. v. Vamplew, (1862) 3 F. & F. 520.

[203] Schmidt v. United States, 133 F. 257 (9th Cir., 1904); People ex rel. Hegeman v. Corrigan, 195 N.Y. 1, 87 N.E. 792 (1909); Hall 98-9.

[204] *E.g.* Hitchler, The Law of Crimes 87 (1939).

[205] Salmond, Jurisprudence 529 (9th ed. Parker, 1937).

[206] See Clayton v. New Dreamland Roller Skating Rink Inc., 14 N.J. Super. 390, 82 A. 2nd 458 (1951).

[207] Austin 434.

[208] For negligence, see *Supra*.

pectation" of consequences. "To expect any of its [act] consequences, is to intend these consequences." [209] Salmond's view is diametrically opposed to Austin.[210] It is not "expectation," but "desire" of the consequence which is determinative in the essence of intention.[211] Sometimes, he seems to incline with the notion of Holmes of foresight of the consequence, but in the sense of a qualification of intention, not its essence.[212]

No other writer, more than Holmes, has contributed to this confusion in Anglo-American criminal law. A careful analysis of his view is imperative because of the adoption of his theory by the House of Lords in *Director of Public Prosecution v. Smith.*[213] Holmes noted that common law murder is qualified with malice, by which is meant, "intention." [214] Intention, he believes, will be found to resolve itself into two things; foresight that certain consequence will follow from an act, and the wish or desire for these consequences working as motive which induces the act.[215] These elements can be "reduced to lowest terms," and after such process of "reduction," the "knowledge that the act will probably cause death, that is, foresight of the consequence of the act is enough in murder as it is in

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[209] Austin 433.

[210] Salmond, *op. cit. supra.* note 205, at 520.

[211] *Id* at 537.

[212] *Id.* at 518, 520.

[213] 3 All E.R. 161 (1960).

[214] In the common law, however, there is a specie of "murder" qualified with reckless negligence. See Hill v. Commonwealth, 239 Ky. 40 S.W. 2nd 216 (1931); Davis v. State, 106 Ter Cri. Rep. 300, 292 S.W. 220 (1926); Model Penal Code Sec. 201.2 (Tent. Draft No. 4, 1955). On the other hand, there are intentional killings which are considered manslaughter, such as those committed under passion or provocation. See State v. Ferguson, 2 Hill (S.C.) 619, 27 Am. Dec. 412 (1835); People v. Harris, 8 Ill. 2nd 431, 134 N.E. 2nd 315 (1956). A lawyer from the continental countries, or whose system is based on codification, would be greatly amazed by these categorizations of murder in the Anglo-American criminal law. In the codified countries, murder is always an intentional killing qualified by some circumstances that indicate a higher degree of socio-ethical culpability, such as treachery, murderous lust, cruelty, evident premeditation, in consideration of a price or reward, or the use of means involving an extensive damage, such as explosion, wreckage of train, etc., and the use of poison. See German Penal Code (Strafgesetzbuch), § 211,222, and Revised Penal Code, Philippines, Art. 248. A "reckless murder" in these systems is a contradiction in terms. It is not murder, but negligent homicide, although it is sometimes provided with a higher penalty. It may be classified with the so-called "conscious" negligence. A killing done under provocation or passion is an intentional killing or homicide attended with these mitigating circumstances. These circumstances are taken to mitigate the culpability of the actor, and his penalty. In the codified systems homicide may be categorize into three groups, (1) Murder, (2) Homicide (simple), (3) Negligent homicide. The "reckless murder" belongs to the last category, while the manslaughter due to passion or provocation belongs to the second category. This classification in the Anglo-American law is based on an unscientific orientation on the distinctive features of intention and negligence, and culpability in homicidal offenses.

[215] Common Law 53.

tort." [216] Thus the concept of "wish or desire", which was distinctive in Salmond's view disappears, and foresight of consequence by a "reasonable man" becomes the definition of intention.

The confusion provoked by this view is best illustrated by its application in *Director of Public Prosecution v. Smith.*[217] Defendant Smith, while driving a car loaded with stolen goods, was stopped by constable Meehan. Meehan noticed the goods, and asked the defendant to draw into his near-side. Defendant, however, accelerated along the street, apparently in an attempt to escape from the constable. The deceased, however, hanged on the car. Smith attempted to shake him off, and after a distance, the deceased was thrown off the car, and was ran over by another car coming from the opposite direction. The defendant was charged of capital murder under the *Homicide Act* of 1957.[218]

It must first be stated that the *Homicide Act* abolished the constructive malice rule, and requires for murder, either an "express or implied malice." [219] Express malice exists if there was an "intention to kill," while implied malice consists of an "intention to do grievous bodily harm, or an act known to be likely to cause death or great bodily harm." [220] The Lords held that there was no express malice, and the question presented was whether the conviction for murder could be sustained on the basis of implied malice. The Lords, through Viscount Kilmuir, L.C., ruled, following Holmes, that intention means foresight of the consequence determined from the perspective of a "reasonable man," and that in this case a reasonable man could have foreseen the consequence of a grievous bodily harm upon the deceased when he was shaken off the car. The conviction of capital murder by the trial court, which was reduced to manslaughter by the Court of Criminal Appeals,[221] was ordered restored.

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[216] *Ibid.*

[217] *Supra.* note 213. For criticism of this decision, see Williams, *Constructive Malice Revived*, 23 Mod. L. Rev. 605 (1960); Travers and Morris, *Imputed Intent in Murder or Smith v. Smyth*, 35 Australian L.J. 154 (1961); *Note*, 77 L.Q.R. 1 (1961); Parker, *The True Meaning of D.P.P. v. Smith*, 59 L. Soc. Gasette 149 (1962).

[218] 5 & 6 Eliz. 2, c. 11, § 5. So far as material, it reads: "Death Penalty for certain murders . . . . the following murders shall be capital murder . . . —any murder of a police officer acting in the execution of his duty . . . ."

[219] § 1. Before the Act, there were three forms of malice aforethought in murder, namely, express malice, implied malice, and constructive malice. See R. v. Vickers, (1957) 2 All E. R. 741; Cross & Jones, Criminal Law § 34 (4th ed. 1959).

[220] *Ibid.*

[221] Director of Public Prosecution v. Smith, (1960) 2 All E.R. 450.

Williams criticized this decision because by its effect the felony-murder rule is reintroduced.[222] He objects to the adoption by the Lords of the "objective test" of foreseeability of the grievous bodily harm,[223] which he believes, if imposed upon the English law, "will be a disaster for English Law of the first magnitude." [224]

In the opinion of the writer, the relevant criticism is more substantial, and concerns the theoretical observation we have already indicated. There is no awareness by the Lords that intention is a relational concept, which must be articulated from the specific undesirable consequence which is the essence of the offense of murder, *i.e., death.* If there is any intention relevant in murder, it must be a resolution directed to the realization of death. The concept of "implied malice" where the "intention to do great bodily harm, or do an act likely to cause death or great bodily harm" starts from an irrelevant and erroneous consequence as a premise of analysis. The intention to realize a physical injury, or the resolution to pursue an "act" evaluated in reference to its probable tendency is not determinative of the consequence-disvalue element of murder. To force these notions into murder is unscientific and liable to create a confused system, and inconsistent doctrines. That this is unsatisfactory is very well demonstrated in the case of attempted murder. Let us suppose that in the facts of *Regina v. Vickers,*[225] Miss Duckett, whom the defendant struck with several blows of moderate degree of violence, did not die. May Vickers be held liable of attempted murder, rather than assault or battery? Or take the case where A, to ruin the career of B as a pianist, mutilated B's fingers. A multilation of fingers is a grievous bodily harm, but it would be absurd to suppose that, if B did not die from the multilation, A is guilty of attempted murder.[226] Thus it results to an absurd conclusion that murder in these cases is always completed, and never attempted. The relevant stages of execution of crimes become obscured. The intention directed to the realization of "grievous bodily harm" or "an act likely to cause death, or grievous bodily harm," on one hand, and the intention to realize death on the other, which is relevant in murder, are distinct attitudes related to distinct consequences. It is no less a fiction as constructive malice to consider "implied malice" as relevant in murder. The efforts to square it with murder is motivated by the desire to imposed a high penalty for such conducts. This is

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[222] See *supra*, note 217.
[223] *Id.* at 611-15, 621-3.
[224] *Id.* at 621.
[225] (1957) 2 All E.R. 741.
[226] An injury was said to be grevious bodily harm if it is such as seriously and greviously to interfere with the health and effort of the victim. *See supra* note 219.

a legitimate and noble aim, and it is possible to achieve this purpose without the adoption of this covert and unrealistic technique, and with due consideration of a more precise classification and distinction.[227] The second obstacle of analysis of the theoretical structure of negligence and intention is also illustrated by this case. The Lords adopted Holmes theory of intention as foresight of consequence from the view point of a reasonable man. It cannot, however, be seriously argued, that in "express malice," the intention to kill is merely foresight of consequence. It is active, and consciously directed to the realization of death, not merely a knowledge deduced from the natural sequence of events that a probability of the realization of death would occur. Intention in this context, is constituted by different elements from that of "implied malice." There is no consistent distinctive element which would isolate intention from other attitudes of the mind. If a criminal law system hopes to build a consistent and just direction its concepts must acquire an established meaning based on systematic organization, classification, and rational discrimination of premises. An oscillation in relevant concepts within a system makes the criminal law unhappily unpredictable, irregular in form and substance, and less just in its application as illustrated by this case.

Modern writers have not attempted any significant definition of the borders of intention and negligence. Williams is not even decided as to the nature of intention.[228] He believes that intention at common law may either be the desire of consequences or the knowledge or foresight that the consequence is certain.[229] But he also says that there is a "foresight that the consequence is certain" which is not intention.[230] Turner thinks that intention denotes a state of mind of the man who not only foresees, but also desires the possible consequences of his conduct; "recklessness" denotes the state of mind of the man who acts or omits to act where it is his legal duty to act, foreseeing the possible consequences of his conduct, but with no desire to bring them about.[231] "Negligence" is distinguished from both "intention" and "recklessness" in that it is a state of mind of a man who pursues a course of conduct without adverting at all to the consequence of that conduct, that is, he does not foresee the consequence, much less desire them.[232] Negligence, he believes, is sufficient basis

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[227] The typical method is to treat the offense as assault and battery qualified with death. See § 226, German Penal Code.

[228] Williams 34-44.

[229] Williams, *The Mental Element in Crime*, 27 Revista Juridica de la Universidad de Puerto Rico 193, at 195 (1957-1958).

[230] Williams 42-43.

[231] Turner, *The Mental Element in Crime at Common Law*, The Modern Approach to Criminal Law 195, at 206 (ed. Radzinowicz and Turner, 1945).

[232] *Id.* at 207.

for civil liability, but not sufficient to amount to *mens rea* in crimes at common law.[233] The great difficulty of defining the concept of intention in the terms of the affective word "desire" is obvious, and we do not need to belabor this point. It is sufficient to point out that intention may still exist even if the actor regrets the realization of the consequence.

In the United States, the great confusion over the concept of intention, its muddled classification into "general" and "specific," and its unsettled judicial usage have led the American Law Institute to create new conceptions of their own. In the draft of the *Model Penal Code*, "intention" was avoided, and it articulated apparently distinct categories of culpability. The actor, to be liable for crime, must have "acted purposely, knowingly, recklessly, or negligently with respect to each material element of the offense."[234] The adoption of these concepts, in the opinion of the writer, is especially unfortunate. Firstly, it is not the function of a code to legislate within its limited possibilities a theory of fundamental concepts. The fundamental concepts such as act, intention, negligence, omission are substantive givens which are implied in the object of legislation, namely, the regulation of human behaviour. The elucidation of these concepts, and more importantly, the expression of their structures must necessarily belong to scholarship. These concepts cannot be created by legislative activity; they are not concepts of positive law. Legislative defini-

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[233] *Id.* at 208.

[234] In particular, it provides:

"*Section 2.02 General Requirements of Culpability.*

(1) Minimum requirements of culpability.

Except as provided in Sections 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of culpability defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(2) if the element involves the attendant circumstances, he knows of the existence of such circumstances.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or the attendant circumstances, he knows that his conduct is of that nature or he knows of the existence of such circumstances; and

(2) if the element involves a result of his conduct, he knows that his conduct will necessarily cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exist or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and pur-

tion is not therefore creative, but merely descriptive, of these concepts, and it is error to consider any definition as the gospel truth of a system. Further, the formulation lacks a theoretically consistent and adequate foundation. This can be best illustrated by inquiring into the meaning of "purposely" as a form of culpability. Wechsler, with others, gave an example where this culpability operates in inchoate offenses. They believe that in a case where A attempted to kill B, an FBI agent, without knowledge of the qualification of B as agent, A is liable of an attempt to kill an FBI agent within the meaning of the *Model Penal Code.*[235] Intention, as we have attempted to show, must have, as basis, a *knowledge* and a *resolution* to realize the legal type-situation circumscribed within the definition of the defense. "Purposely" in the meaning of the *Model Penal Code* does not require that A must know the qualification of B as FBI agent. This would create difficulties in isolating "purposely" from negligence in general. Another illustration of this unsatisfactory theoretical insight could be seen in the attempt of the *Code* to establish the orientation of culpability to irrelevant notion called "each material element of the offense." It fails to consider that the type-situation of an offense is a unity, and the relevant reference of this unity is not the individual material element of the offense, but the type-situation as a whole. For this reason the crime to "kill an FBI agent" does not merely mean "to kill a man." The qualification of the victim as "FBI agent" cannot be excluded. To follow the culpability called "purposely" by the *Code* would result to the absurd conclusion that the especial offense "to kill an FBI agent" is annihilated by the general offense of homicide such as manslaughter or murder. Williams also noted that the concept of culpability accepted does not find harmonious accommodation in the other parts of the *Code.* He

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pose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree. [Alternative: its disregard involves a gross deviation from proper standard of conduct.]

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct, the circumstances known to him and the care that would be exercised by a reasonable person in his situation, involves substantial culpability.[Alternative: considering the nature and purpose of his conduct and the circumstances known to him, involves a substantial deviation from the standard of care that would be exercised by a reasonable man in his situation.]

(?) Culpability required unless otherwise provided.

When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto." Tent Draft No. 4, 1955.

[235] Wechsler, Jones, and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code,* 61 Col. L. Rev. 571 (1961) at 575.

believes that the step of the Reporters in this regard is rarely an improvement of the present system.[236]

Hall made some significant generalization which allow the articulation of intention as contrasted to reckless negligence. He says that intention assumes that the actor chooses, decides, resolves to bring about a proscribe harm, he consciously employs means to that end.[237] In reckless negligence, however, the actor has not made that drastic decision, but he made an ominous one. He has "chosen to increase the existing chances that a proscribed harm will occur."[238] As we have, however, pointed out, simple negligence implies inadvertence, that is, that the defendant was completely unaware of the dangerousness of his behaviour, although actually it was unreasonably increasing the risk of the occurence of an injury.[239] Intention and reckless negligence are similar in that they include a common element, that of voluntary harm doing. Reckless negligence and simple negligence, on the other hand, are also similar in that both share the quality of unreasonable increase in the risk of harm; both fall below the standard of due care.[240]

The problem of establishing the significant distinctions of negligence relevant in criminal law and civil liability is without an indication of acceptable solution.[241] A research of materials does not reveal any possible valid generalizations made. It is not also apparent if there are actually some recognized degrees of negligence in Anglo-American law. The concepts of reckless and simple negligence are not clearly distinguished in a valid theory. The concept of "risk" and "awareness" which are often utilized by writers are not without obscurity, and disputed configurations. Salmond points out that English law recognizes only one standard of care, and thereof only one degree of negligence.[242] The inclination to consider reckless negligence as the only relevant state of mind in criminal liability has provoked the suggestion that simple negligence is not a form of *mens rea*.[243] It is also suggested that simple negligence is the specie of negligence which could be source of civil liability. However, there are others who represent the contrary view. The *Model Penal Code*, for

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[236] See Williams, *op. cit. supra* note 229.
[237] Hall 112.
[238] *Ibid.*
[239] *Id.* at 114.
[240] *Id.* at 115.
[241] *Cf.* Hall, Interrelation of Crime and Tort, 43 Col. L. Rev. 753, 967 (1943).
[242] Jurisprudence 545 (9th ed. Parker, 1937).
[243] Turner, *The Mental Element in Crimes at Common Law*, The Modern Approach to criminal Law 195, at 208 (ed. Radzinowicz and Turner, 1945.)

example, classifies recklessness and simple negligence as forms of culpability.[244] It is therefore difficult to assume that, in Anglo-American law of crime, there are gradations of negligence.[245]

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[244] See *supra* note 234.
[245] Hall 116.