# THE SHIFTING BASIS OF CRIMINAL LAW

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## I

*Actus non facit reum nisi mens rea sit* has a stirring, if slightly incomprehensible ring, but we all know that it really does not mean what it purports to say. Innocence is not the same as blamelessness and guilt is not the same as culpability, nor can criminal responsibility be equated with criminal intent. Intent is a concept which permeates the whole of the criminal law and yet remains incapable of providing any certain or simple key to criminal liability. If one intends to do an act, one may intend it in the sense that one's mind is directed towards the performance of the physical act, but one may not intend the consequences which flow from the commission of that act. Alternatively, when one talks about an intentional act, one may mean that not only the physical act but also the ensuing consequences are intended.

For example, if one has sexual intercourse with a girl under the age of fourteen years, one may (and doubtless does) intend the act of intercourse, but one may not intend the intercourse to take place with a girl under the age of fourteen. The act is sexual intercourse, but the consequences are sexual intercourse with an under-age girl. To say that intention is a requisite part of such an offence[1] means nothing unless one has determined to what the intention applies. In this particular case, of course, the Code solves the problem by expressly providing that ignorance of the age of the girl is not a defence. Similarly, one may intend the act of selling a novel or a periodical, but not intend that this should be the selling of obscene matter.[2] Again, the Code provides that ignorance of the fact that the matter is obscene is not a defence.

In these cases the offender is blameless as far as desiring the consequences of his act is concerned, but the act itself is voluntary in the sense that he fully intends to commit the actual physical act in question. His "innocence" lies in his being unware of a salient factor which affects the consequences of his act, knowledge of which would, one may posit, have deterred him from committing the act. It only confuses the problem to say that his act is "intended".

Such cases are very different from those in which the will of the accused is not even directed toward the physical act at all. For example, a person may possess a packet of narcotic drugs[3] which, unknown to him, has been slipped into his pocket, or he may have an unregistered firearm[4] in his house without

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[1]Criminal Code s. 138.

[2]C.C. s. 150(6).

[3]*Narcotic Control Act*, 9 – 10 Eliz. II, S.C. 1961, c. 35.

[4]C.C. s. 90.

knowing that it is there at all. Different, again, are those circumstances in which a person does not intend the particular consequences of his act which actually ensue, but does intend other consequences which are criminal in nature. Liability may attach regardless of intent. For example, the person who aids and abets another to commit one offence may be responsible for acts completely unintended by him[5] or a person causing death in the commission of robbery may be guilty of murder although death was unintended and undesired.[6]

The tendency to equate, in criminal law, the principle of intent with the principle of responsibility is natural. It is difficult to envisage that the criminal law serves any useful purpose in inflicting criminal sanctions upon unintended acts, for if its ultimate purpose is deterrence (by whatever means this might be achieved) one is only deterred by an appreciation of the acts which are proscribed. But this, as is apparent, is an oversimplification of the problem. The punishing of acts of sexual intercourse with girls under the age of fourteen deters at least in the sense that one is aware of the risk involved in having sexual intercourse with any young girl, whether one actually knows her to be under fourteen or not. To be found guilty of selling obscene matter without knowing that the matter is obscene, at least makes one more careful in offering for sale dubious literature. On the same level, it is not pointless to punish criminally certain types of negligence,[7] for negligence necessarily implies that one could have been more careful.[8] Whilst, therefore, one may agree that the criminal law would appear to serve no purpose in punishing acts which are *involuntary*, one does not necessarily have to agree that it serves no purpose in punishing acts with *unintended* consequences. Indeed, there is no other rationale behind the concept of constructive murder,[9] except that certain types of offenders assume liability for death which occurs in the course of one of the circumstances listed under the Code, whether death is intended or not. Section 202(d) is, indeed, the only example which I can find in the Code of liability attaching to even an *involuntary* act, where, it would appear, a person is guilty of murder if death ensues as a consequence of a person merely having a weapon on his person during the commission of one of the listed offences. But even there, one assumes that the having of the weapon on one's person is a voluntary act, even if the death is not.

There have been a number of recent decisions both in England and Canada where the problem of the "intentional" and "voluntary" nature of the act

[5]C.C. s. 21.

[6]C.C. s. 202.

[7]Hart, "Negligence, Mens Rea and Criminal Responsibility", in *Oxford Essays in Jurisprudence*, (Guest ed., 1961), p. 28; Williams, *Criminal Law* (1953), p. 100; Hall, *Criminal Law* (1960), p. 105. *Contra*, Turner, "The Mental Element in Crimes at Common Law," in *Modern Approach to Criminal Law* (1945), p. 195.

[8]Hart, *op. cit.*

[9]C.C. s. 202.

has arisen. The facts of *Smith v. D.P.P.*[10] are probably well-known. The accused was charged with the murder of a policeman who had attempted to stop his small car in which were some stolen goods. Smith, instead of stopping, speeded up, with the policeman hanging on to the car, his legs trailing on the ground. The accused drove through traffic at an increasing speed, bumping the policeman against oncoming cars, wishing, as he stated in his defence, only to knock the policeman off. Eventually, the officer was dislodged, run over by another car, and killed. One would have thought that there would be little difficulty in finding Smith guilty of murder on these facts, but to meet the defence that the accused did not intend any grievous bodily harm to the policeman, the jury were instructed as follows:[11]

> If you are satisfied that when he drove his car erratically up the street, close to the traffic on the other side, he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder . . .

Such a direction could, and perhaps did,[12] mean only that if the jury did not believe Smith's story that he did not intend grievous bodily harm (because it was unreasonable to suppose that he could not have intended such harm), it could find him guilty of murder. The Court of Criminal Appeal held, however, that, reasonably interpreted, the direction meant that the jury were to find the intent of the accused not from what he actually intended but from what a reasonable man in his position would have intended.[13]

The conviction for murder was restored in the House of Lords on what appears to be the ground that the determination of intent is, indeed, an objective application of the standard of the reasonable man:

> The jury must, of course, in such a case 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 for his actions, that is, was a man . . . not insane within the M'Naghten rules . . . 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 grievous 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.[14]

Such a view has nothing, of course, to do with any presumption that a man is presumed to intend the natural consequences of his act. That is a mere evidentiary presumption, and may have been what the trial judge meant by his direction. The view of the House of Lords is that one is liable not for what one does intend but for what the reasonable man would have intended.[15]

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[10][1961] A.C. 290; [1960] 3. All E.R. 161.

[11]*Ibid.*, p. 325.

[12]See note by Professor H. R. S. Ryan in (1959-60) 3 Cr.L.Q. 305.

[13][1961] A.C. p. 297.

[14][1961] A.C. 290, at p. 327, per Kilmuir, L. C.

[15]Whether this is what the House meant is not clear, but it is certainly what their Lordships said. See Denning, *Responsibility Before the Law* (1961).

In the case of *A.G. for Northern Ireland v. Gallagher*,[16] the accused was charged with the murder of his wife. He was of a psychopathic disposition which was quiescent, only manifesting itself after the consumption of alcohol. The evidence appeared to support the view that the accused formed the intention of killing his wife, buying for that purpose the necessary apparatus, and then proceeded to drink himself into a drunken state which produced a consequential insanity within the McNaughten Rules (regarding the facts in the light most favorable to the accused). The trial judge instructed the jury, in effect, that the defendant could not rely upon his self-induced drunkenness as a defence and that the test for insanity had to be applied at the time of consuming the alcohol, not at the time of killing the woman. The House of Lords upheld this direction. Furthermore, Lord Denning, in the course of his speech elaborated on the defence of drunkenness:[17]

> . . . the case falls to be decided by the general principle of English law that, subject to very limited exceptions, drunkenness is no defence to a criminal charge, nor is a defect of reason produced by drunkenness.

And further:[18]

> My Lords, I think the law on this point should take a clear stand. If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughrer.

One further recent decision of the House of Lords which should, perhaps, be mentioned is that in *Bratty v. A.G. for Northern Ireland*[19] in which the accused was charged with the murder of a young woman. The accused stated that at the time of the act, "a sort of blackness" had come over him and he raised three defences: first, that he was in a state of automatism at the time of the act and should therefore be found not guilty, second, that he lacked the intent necessary for murder and should therefore be found guilty of manslaughter only and, third, that he was insane at the time of the act and should therefore be found guilty but insane. The jury found the accused not insane, so the last defence failed. The trial judge refused to leave the first two defences to the jury and his decision was upheld by the House of Lords. The manslaughter argument was disposed of on the simple grounds that, in view of the circumstances of the case, there was no evidence to be left to the jury that the accused lacked the intent necessary for murder. Finally all the members of the House of Lords agreed that where the only evidence of automatism arose out of some defect of reason (in this case psychomotor epilepsy), the

[16][1961] 3 W.L.R. 619; [1961] 3 All E.R. 299.

[17]*Ibid.*, at p. 639.

[18]*Ibid.*, at p. 641.

[19][1961] 3 W.L.R. 965; [1961] 3 All E.R. 523.

defence must stand or fall on the question of insanity. Viscount Kilmuir stated:[20]

> Where the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind within the M'Naghten Rules, a rejection by the jury of this defence of insanity necessarily implies that they reject the possibility.

Automatism is thus reaffirmed as a defence only in limited circumstances. It is for the prosecution to prove every element of the offence, including the state of mind of the accused.[21] As Lord Kilmuir points out, "normally the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily and the prosecution need go no further".[22] The accused may then, subject to what was said in *Bratty*,[23] plead automatism as a defence.

Presumably, it must follow, that if the accused chooses not to plead insanity, but to rely on the defence of automatism only, he is entitled to have this defence left to the jury, whether or not the automatism springs from a defect of reason. Does this mean, therefore, that a person who acted clearly under a defect of reason which produced automatism may escape all criminal liability by pleading not insanity but the defence of automatism? Lord Denning suggested[24] that since automatism is a defence involving the state of mind of the accused, once it has been raised, "the prosecution are entitled to raise [the defence of insanity], and it is their duty to do so rather than allow a dangerous person to be at large". It is doubtful whether this view represents the law either in England or in Canada.[25]

In this country, also, there have been several recent decisions of importance in this enquiry, beginning with the case of *R. v. Rees*,[26] in which the accused was charged with "knowingly and wilfully" contributing to juvenile delinquency in that he had sexual intercourse with a girl under the age of eighteen years with her consent. At the time of the act, he reasonably believed the girl to be over that age. The majority of the Supreme Court of Canada held that the accused could not be convicted on the grounds that the phrase "knowingly and wilfully" applied to all the elements of the offence including the fact that the girl was under the age of eighteen years. Fauteux, J. dissented on the grounds that the phrase applied only to the act — in this case sexual intercourse — and not to the consequences — in this case that the girl was only sixteen. He said:[27]

> A person contributing to the delinquency of a juvenile assumes the risk that the opinion he forms from appearance as to the age be not the one taken by the trial Judge. Under the Act,

[20] *Ibid.*, at p. 973.

[21] *Woolmington v. D.P.P.* [1935] A.C. 462.

[22] *Ibid.*, at p. 977.

[23] [1961] 3 W.L.R. 965.

[24] *Ibid.*, at p. 980.

[25] R. *v. Dixon* [1961] 1 W.L.R. 337; *R. v. Price* [1962] 3 All E.R. 957; *Felstead v. R.* [1914] A.C. 534.

[26] [1956] S.C.R. 640.

[27] *Ibid.*, at p. 658.

> knowledge of the actual age is not of the essence of the offence; appearance is sufficient, failing the best evidence as to the age. In any respectful view, Parliament did not intend that the operation of the section be dependent upon the views an accused might form from appearance. What Parliament clearly intended is the protection of children.

A similar divergence of views is to be found in the later case of *R. v. Beaver*[28] where the accused was charged with the possession of a narcotic drug. His defence was that he thought the substance to be harmless. Again, the majority of the Supreme Court held that the accused was not guilty of possessing a narcotic drug, if he did not know that what he was possessing was a drug. Fauteux and Abbott, JJ. dissented:[29]

> [The Act] is indicative of the intent of Parliament to deal adequately with the methods, which are used in the unlawful traffic of drugs to defeat the purpose of the Act, ingenious as they may be. That the enforcement of the provision of the Act may, in exceptional cases, lead to some injustice, is not an impossibility . . .

More recently, the Supreme Court decided the case of *R. v. King*[30] where the accused was charged with the offence of driving while impaired by drugs. He had visited a dentist and been given an injection of sodium pentothal. He stated that his head was clear when he left the dentist's office, although he became unconscious soon after and had a slight accident with another car. He was warned not to drive "until head clears", and sat in the recovery room for some time. The majority, concurring with a judgment of Ritchie, J. held that the accused could not be convicted on the grounds that the section requires *mens rea*, and that the accused had shown that he lacked the *mens rea* necessary;

> The existence of *mens rea* as an essential ingredient of an offence and the method of proving the existence of that ingredient are two different things, and I am of the opinion that when it has been proved that a driver was driving a motor vehicle while his ability to do so was impaired by alcohol or a drug, then a rebuttable presumption arises that his condition was voluntarily induced and that he is guilty of the offence created by s.223 and must be convicted unless other evidence is adduced which raises a reasonable doubt as to whether he was, through no fault of his own, disabled when he undertook to drive and drove, from being able to appreciate and know that he was or might become impaired.[31]

Locke and Judson, JJ. were in favour of dismissing the appeal but held that, on the finding of fact made by the trial judge, the accused had been properly convicted, inasmuch as there was ample evidence to indicate that he was aware of the risk involved in driving a car after the injection. Since, however, the Court of Appeal had quashed the conviction in spite of this finding of fact and since the Crown had not appealed on that ground, both judges agreed that the appeal should be dismissed. In the Court of Appeal, MacKay, J., who dissented, had held that s.223 is an offence of strict liability and, even if it were not, the accused had not proved "that on reasonable grounds he had an

[28][1957] S.C.R. 531.

[29]*Ibid.*, at p. 554.

[30](1962) 35 D.L.R. (2d) 386.

[31]*Ibid.*, at p. 400.

honest belief in a state of facts which if true would entitle him to an acquittal".[32] This was the view which found favour with Locke and Judson, JJ. in the Supreme Court.

## II

The thesis I now wish to put forward is this. Whatever language is being used by the courts, the result of these, and other recent cases, is that in England there has been a marked move away from any traditional concept of *mens rea* as the basic element of a criminal offence, while in Canada most judges appear to be clinging to the traditional concept. In *D.P.P. v. Smith*,[33] the House of Lords found the accused guilty of an act which he did not, in fact, intend (again, interpreting the facts most favourably to the accused) because a reasonable man would have intended the act had he done the same thing. *Gallagher*[34] appears to stand for the, at first sight, startling proposition that if a person ever intends the consequences of an act, he is guilty of those consequences even though he did not intend them at the time he actually committed the act. At exactly the same time as these cases were being decided, the Supreme Court of Canada, by a majority in every case, has been reaffirming a precise and definite necessity of proof of *mens rea* in the sense of a subjective intention of achieving the consequences of one's act.

The choice lies between accepting the difficult, often inappropriate and frequently misunderstood principle of "intent" as the basis of criminal responsibility or developing what the House of Lords and the dissenting judges in Canada are moving towards, namely a principle of "risk", a concept which would fix criminal liability upon an accused, not where he intends the consequences of his act, but where the consequences of his act can fairly and reasonably be said to be within the risk involved in his act.

To say that one is raising the defence of lack of *mens rea* does not, in itself, mean very much. It may mean that there has been no requisite *actus reus*, as where the accused is in a state of automatism,[35] or at the other extreme, it may mean that there has been an *actus* and intent but the accused should not be held responsible, as where he is acting under duress.[36] The following are some examples of situations which may be embraced by the defence of no *mens rea*. They show the difficulties inherent in attempting to subsume so many diverse defences under the one head.

**1. Automatism.** The concept that a person may act in circumstances in which his mind is a complete blank does give rise to considerable difficulties in the criminal law. The opinions in *Bratty* are not entirely satisfactory if only for the reason that they leave so many questions unanswered, but, as Lord Denning

[32][1961] O.W.N. 37, at p. 52.

[33][1961] A.C. 290.

[34][1961] 3 W.L.R. 619.

[35]*R. v. King* (1962) 35 D.L.R. (2d) 386, at p. 387 per Taschereau, J.

[36]*R. v. Steane* [1947] K.B. 997; [1947] 1 All E.R. 813.

pointed out,[37] automatism is not the defence of merely saying, "I do not remember what happened". It is a defence which must necessarily posit that there was no mind at all at the time when the act was committed. If the House of Lords is right in withdrawing from instances of automatism those cases where the mind is a complete blank through insanity or drunkenness, we are left with the relatively unusual cases of sleepwalking, hypnotic trances, concussions, and the like. Why should the sleepwalker who kills someone not be held criminally responsible for his act? One can say that he lacked the *mens rea* or one can say that there was no *actus reus*. Suppose, however, that it happens three, four or five times, should he still be held not responsible? One can, by merely extending slightly the principle enunciated in *Gallagher*,[38] reply that if he knew such actions were likely when he was asleep, then he should not sleep, or, to put it on a more sensible level, he should not sleep without taking precautions adequate to meet the risk.

The consequences which result from a state of automatism may occur when the actor's mind is a complete blank, yet these consequences may be desired (as in *Gallagher* or as in a case of voluntarily induced hypnotism). Indeed, the state of automatism itself may be desired or self-induced with knowledge that such consequences will or will probably ensue. If one's enquiry into the existence of *mens rea* is directed solely to the time of the consequences, as it must be directed if *mens rea* means anything at all, a person accused under such circumstances should be not guilty. If one's concern, however, is with the risk which arises by virtue of the original act, such a person is guilty of any offence committed during the automatism, if the factor which induces automatism is voluntarily undertaken without due precautions being taken to prevent those consequences occurring.

**2. Drunkenness.** The cases on drunkenness as a defence are most unsatisfactory,[39] principally because, on the one hand, a person in a drunken state does not "intend" acts in the same way as a sober person, but, on the other hand, there is some thing undesirable in allowing a person to escape liability because of his own self-induced intoxication. To say that drunkenness may be a defence to offences requiring a "specific" intent (whatever that might mean) but not to offences where no specific intent is required might be a good excuse for reducing a charge of murder to one of manslaughter, but it hardly gives any adequate guide to the extent of such a defence.[40] *Gallagher*[41] is now good authority for the proposition set out in *Glanville Williams* that:

> Of course, the exempting rule would not help a man who deliberately gets drunk in order to commit a crime. He may get drunk in order to give himself "Dutch courage" to do the deed,

[37][1961] 3 W.L.R. 978.

[38][1961] 3 W.L.R. 619.

[39]Some are reviewed in *D.P.P. v. Beard* [1920] A.C. 479.

[40]Williams, *Criminal Law* (1953), p. 570.

[41][1961] 3 W.L.R. 619.

> or to fuddle his senses in the hope that he will not be held responsible. If he had the requisite intent at the time when he got drunk he can be properly convicted, even if he did not have it at the time of committing the act.[42]

Neither Dr. Williams nor the House of Lords explains why self-induced drunkenness for such a reason should not be a defence. The "specific intent" is as lacking at the time of the commission of the act in this case as it is under any other circumstances of drunkenness. Again, however, putting drunkenness upon a different footing leads to an intelligible result. If one voluntarily becomes drunk, one must assume the risk of committing all acts which drunken men are likely to commit, regardless of the circumstances surrounding the actual commission of that act.

**3. Duress.** An acquittal on the grounds of duress is difficult to support on any theory of *mens rea*. Lord Goddard in the case of *R. v. Steane*[43] attempted to put the defence on such grounds, where the accused was charged with doing an act likely to assist the enemy with intent to assist the enemy. His defence was that it was the only means he had of saving his wife and children from a concentration camp. While it is true that he "intended" to save his family, he knew perfectly well that his act would assist the enemy. This he "intended" even though he did not "desire" those consequences. Duress is an excuse and the reason why it is an excuse lies not in the fact that there is no intention but in the fact that there is no responsibility in spite of the intention. In view of the statutory limitations of the Code,[44] perhaps it is better not to search for any juridical basis for the defence of compulsion but to base it purely upon sentiment — a sentiment which excuses certain intended acts, provided that they are not too serious.

**4. Mistake.** Most examples of lack of *mens rea* being a defence come under cases of mistake, of the accused being ignorant of a matter of fact, knowledge of which would have made him act differently. This is said to be a defence if the mistake is reasonable and if the offence is one which requires *mens rea*. If the mistake has to be reasonable only because no jury will believe a person who alleges that he was labouring under an unreasonable mistake, then this limitation does not need to be stated. If there is some juridical reason why the mistake has to be reasonable, it can have nothing to do with a subjective *mens rea*, since the intention is equally lacking whether the mistake is reasonable or unreasonable. Furthermore, whether or not the offence is one which requires *mens rea* depends solely upon whether it is one to which the ordinary principles of mistake apply or not. The principle, I would suggest, is this: one is criminally liable for all the consequences of one's act which are within the area of the risk created by that act. What is within the area of the risk is determined

[42]Williams, *op. cit.*, p. 379.

[43][1947] K.B. 997.

[44]C.C. s. 17.

by standards of reasonableness, but if the reasonable man were to have been labouring under a mistake so as to think that the consequences are not within the risk, then the accused is entitled to be acquitted. There are, however, some instances in which the consequences are always within the area of risk created by a certain act. In such cases, it is no defence for the accused, however reasonably he acted, to assert that he did not contemplate such consequences. To put it another way, in these cases, the risk of criminal consequences ensuing is always upon the accused.[45]

**5. Vicarious liability.** This may be considered as essentially the same problem as the one just considered. There are not many instances of vicarious liability in the criminal law, but they do exist. Where one is responsible for an act being committed by others, it may, in some circumstances, be desirable that one becomes criminally liable for the consequences of that act, even though one does not act by oneself. This principle should, it is submitted, be very limited, but is not, in itself, undesirable.

**6. Negligence.**[46] There is, of course, the gravest difficulty in ascribing any coherent traditional concept of *mens rea* to criminal offences liability for which is based upon some idea of negligence.[47] It is possible to talk about "advertent negligence" or "recklessness" but it is impossible to talk about "intent" in this context. In any case, the notion of advertent-negligence exists only to squeeze a difficult concept into a pre-existing principle. Negligence consists merely in committing an act without reasonable regard for the risks involved. If the consequences which follow are within the risk, there is nothing illogical in fixing criminal liability upon the actor. Generally speaking, civil sanctions are sufficient to prevent negligent damage, but if they are not, criminal sanctions may well be desirable.[48] If criminal negligence is any different from ordinary civil negligence, the difference lies in the fact that the risks involved are greater —that is to say, the consequences will almost certainly result—whereas in the latter, the consequences may result. Neither contains any element of "advertence" or intent, but both involve the commission of an act in such a way as not to safeguard adequately against the risk of certain consequences.

**7. Insanity.** Why insanity should ever be a defence to any criminal charge is a simple question which is not so easy to answer. While the reason may have originated in feelings of sentiment alone—the feeling that it is not fair to hang or imprison a lunatic—the McNaughten Rules base the defence upon the concept of *mens rea*, inasmuch as the Rules themselves are directed solely to the accused's knowledge or appreciation[49] either of the act or of the conse-

[45]See the judgment of MacKay, J. in *R. v. King* [1961] O.W.N. 37.

[46]For general discussions, see the references in note 7, *supra*.

[47]See Turner, *loc. cit.*, *supra*, n. 7.

[48]*Cf.* Hart, *loc. cit.*, *supra*, n. 7.

[49]C.C. s. 16.

quences of the act, implying that there is no room for sentiment merely because the accused was insane. That it should be all right to hang or imprison someone who was insane but knew what he was doing but not someone who was insane and did not know what he was doing is getting very close to saying that it is not the insanity which is the defence, but the lack of *mens rea* (if, that is, we can translate *mens rea*, in this context, as knowledge). This again, is no different from saying that if the accused is labouring under a reasonable mistake or under an unreasonable mistake and is insane, then he is not criminally liable, but if he is labouring under an unreasonable mistake and is not insane or is under no mistake but is insane, criminal liability does attach. Once more, it is difficult to see how this can be supported on any coherent theory of *mens rea*.

## III

What is happening in England, and what will happen in Canada, is that the whole basis of criminal responsibility is shifting from a traditional (or, at any rate, nineteenth century) concept of subjective fault, moral blame, or *mens rea*, to a concept of the objective standards of a risk created by an act. What I have set forth above, may not in fact, of course, be the law. But neither is *actus non facit reum nisi mens rea sit*. It is difficult to perceive, at the moment, any rational basis of criminal liability, because we are about to enter, I suggest, a period of extreme confusion. A number of influences may be responsible for this, of which I would suggest the following:

1. The increasing number of "statutory offences";
2. Chaotic interpretations of the nature and function of the criminal law;
3. Inconsistent theories on the purpose of punishment or treatment;
4. The introduction, in England, of the concept of diminished responsibility[50]; and
5. The powers granted to the courts, in England, under the *Mental Health Act*.[51]

If the purpose of the criminal law can be explicitly stated as the punishing of the wicked, criminal responsibility has to be based upon a concept of blame for which *mens rea* might be a perfectly adequate term. If the criminal law is to serve a wider purpose in society, such a concept, while it is workable, is nearly always irrelevent. It is not possible to pursue the argument on what is the proper purpose of the criminal law[52] but I hope it is agreed that, at least, it is not just to punish the wicked. If it is to prevent acts which are socially

[50]*The Homicide Act*, 5-6 Eliz. II, (U.K.) 1957, c. 11.

[51]7-8 Eliz. II, (U.K.) 1959, c. 72.

[52]See the report of the Canadian Conference on Criminal Law in (1959-60) 3 Cr. L.Q. 327.

harmful in some way, such acts may be committed by persons who are not wicked but who produce just as harmful consequences as if they were. "I didn't mean to do it" may absolve the actor from "blame", but if the act could have been prevented nevertheless, the infliction of punishment may make him and others more careful another time.

Statutory offences are good examples of criminal liability being imposed irrespective of blame. Some acts we do at our own risk whether it be selling produce which is, in fact, unfit for human consumption[53] or possessing a suspicious powder which might be a narcotic drug.[54] These have always been considered as rather exceptional types of offences and both the courts and writers have traditionally taken great pains to limit the operation of such statutes. And yet MacKay, J. in *Regina v. King*,[55] in his dissenting judgment, was prepared to accept such liability in statutory offences as being the rule rather than the exception, on some very good authority. The effect of the recent decisions of the House of Lords has been to apply somewhat similar principles to the general criminal law. "I did not intend to do it" is not a defence unless, on ordinary reasonable standards, what the accused did not intend was also not within the area of risk created by the act he was doing.

I am aware that such a view has been generally condemned and very effectively met.[56] But in England, I suggest, the introduction of the concept of diminished responsibility and, more important, the provisions of the *Mental Health Act*[57] have been responsible for a radical but, as yet, barely perceived change in the criminal law in that country. The change has been from what might be called the moralistic approach to the totalitarian approach. The criminal law is no longer an instrument for the punishing of the wicked but an instrument for the enforcing of standards of conduct. Smith[58] was guilty because his act gave rise to prohibited consequences which he should have foreseen; Gallagher[59] was guilty because he knew what would happen if he drank; Bratty[60] because his defence stood or fell solely on the question of insanity.

This is a perfectly valid basis of criminal law,[61] but its dangers must be recognized before the opinions of the members of the House of Lords are adopted in Canada. The Criminal Code is a nineteenth century document

[53]As in *Watson v. Coupland* [1945] 1 All E.R. 217.

[54]*R. v. Beaver* [1957] S.C.R. 531, although, of course, the Supreme Court took the opposite view.

[55][1961] O.W.N. 37, at p. 46.

[56]By Jerome Hall, Dr. Glanville Williams and others.

[57]*Supra*, note 50. See Edwards, "Diminished Responsibility", in *Essays in Criminal Science*.

[58][1961] A.C. 290.

[59][1961] 3 W.L.R. 965.

[60][1961] 3 W.L.R. 619.

[61]As in the Russian Criminal Code. See M.S. Strogovich, "New Laws on the Judicial System" in (1961) 1 Soviet Law and Government 33.

based upon moralistic precepts; the system of criminal sanctions is similarly based; so are our prisons and penitentiaries. What does the criminal law expect to do with offenders who are not wicked but are thoughtless or stupid? If the criminal law is an instrument of the Church, there is no room for statutory offences, for the illogical limitations of the McNaughten Rules, for offences of negligence, for punishing any save the wicked. The criminal sanction is perfectly properly based solely upon punishment. If the criminal law is an instrument of the state, many people must be convicted who are not morally blameworthy; many acts give rise to the risk of socially harmful consequences whether they are intended or not. "I didn't mean to do it" is perfectly well met by the reply, "Be more careful next time".

But if this is the attitude which is to be adopted, the criminal sanction cannot remain a moralistic one. It, too, must change to accord with the new approach to criminal law. The reason why the criminal law has changed in England is because the courts have so much more power than those in this country. Why should insanity, for example, ever be a defence to a criminal charge, if, after a verdict of guilty there is some adequate (or as adequate as we presently know) method of dealing with the offender? Or even if the verdict is *not* guilty? Why should King[62] have not been found guilty, if, after the verdict he could have been discharged? After all, King was no danger to society, but he might have been, and the next one might be. If Gallagher and Bratty receive treatment, instead of being hanged by the neck until dead, has any injustice been done?

For the views of MacKay,[63] Locke,[64] Fauteux[65] and Abbott, JJ.,[66] I have the greatest respect, but the criminal law is a complete entity. One cannot divorce the substance, the fundamental basis, from the sanction, from what happens afterwards. The Canadian criminal law is totally unequipped to meet a new approach to the basis of criminal liability. The traditional concept of *mens rea* has its counterpart in the whole of the penological process. All fixed sentences, whether it be death or the suspension of a driving license, presuppose an objective gravity of the offence. All minimum sentences presuppose a minimum wickedness of the offence. Absurd limitations on the power to award probation exist not because the court feels that this particular offender will not benefit from probation but because the legislature has deemed that all such offenders are too bad to respond to probation. Our prison facilities are perfect for the incarceration of "wicked men" but they will break down—indeed, they have broken down—if "wicked men" only constitute a part of the inmate population. We have virtually no therapeutic institutions or even

[62](1962) 35 D.L.R. (2d) 386.

[63][1961] O.W.N. 37.

[64][1962] 35 D.L.R. (2d) 386.

[65][1956] S.C.R. 640.

[66][1957] S.C.R. 531.

therapeutic facilities for the mentally ill—a class which is forming a larger and larger proportion of offenders. Most important of all we must have sentencers who are aware that the process of the criminal law does not end with the verdict.

There can be no sole purpose in the criminal law or in penology. Therapy may be suitable for one offender, but incarceration for the protection of the public may be the only way of handling another offender. An absolute discharge with no penalty may be proper—or imprisonment for life. Perhaps even death. But a new approach to the basis of criminal law must be accompanied by a new approach to the whole criminal law. I personally believe that the judgments of the House of Lords and the dissenting judgments in the Canadian cases referred to above are wrong—wrong for Canada at present. But I just as firmly believe that the doctrine of *mens rea* has served its useful function and that it is inappropriate to a criminal law of a modern society with all its complexities. If an offence is one which requires "intent" or "will", then the statute should say so; if the statute, any statute including the Criminal Code, is silent, then no purpose is served by adhering to a Latin maxim which has never meant very much anyway.

Finally, it will become of increasingly more importance that we revise our thinking on the content of the substantive criminal law. The doctrine of *mens rea* is, of course, an ameliorating influence upon the harshness of any Criminal Code. Were it to be replaced by a doctrine of risk, criminal liability attaches more easily. In addition to the need to make criminal sanctions appropriate to the offender, there is the need to ensure that acts are never criminal unless the consequences are, or may be, inimical to the state.