CRIMINOLOGY AND THE LAW OF GUILT*

JOHN S. STRAHORN, JR.†

RECIDIVISM AND MENS REA

The third type of theory of the ethics of punishment is the one called herein recidivism. Under such heading the concern is neither with the achieved criminal result nor with the type of conduct which the offender has committed. Rather it is with the personality of the offender, particularly with reference to the prospects of future criminality from him. The legal requirement of criminal intent is correlated to this theory. It furnishes a device by which it is provided that one shall not be punished, even if he has actually caused a stated criminal result, unless further he has thereby manifested sufficient anti-social tendency or likelihood of recidivism.48

Herein the law has not been particularly concerned with the penological question of the internal nature of societal treatment, i.e., whether it should seek to frighten, reform, educate, segregate, or despatch the offender.49 Rather, in the present recidivistic vein, the law of guilt has assumed the object to be a constant and has dealt more closely with the matter of the necessity and quantity of such treatment. Thus the problem has been to determine whether the instant offender needs to be frightened, reformed, educated, segregated, or despatched, i.e., whether he manifests a likelihood of future criminality. If so, he must be punished. If not, he may go free.

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† A. B., 1922, St. John's College; LL. B., 1925, Washington and Lee University; S. J. D., 1926, Harvard University; J. S. D., 1931, Yale University; Professor of Law, University of Maryland School of Law; author of The Effect of Impossibility on Criminal Attempts (1930) 78 U. of PA. L. REV. 962; Extra-Legal Materials and the Law of Evidence (1934) 29 ILL. L. REV. 300, and other articles in legal periodicals.

48. To the effect that the legal requirement of mens rea is a device for the ascertainment of the personal dangerousness of the offender, see Levitt, Extent and Function of the Doctrine of Mens Rea (1923) 17 ILL. L. REV. 578, 580: "When the offender does that which is forbidden he indicates that he may be, or might become, a menace to the security of that social organization. . . . Yet, the intent may be an index to the character of the offender. It may show whether the offender will be a continuing menace to society or whether the act was unique and would not be likely to occur again. The treatment given the offender should depend, inter alia, upon this likelihood." Id. at 594: "The mental state indicates the dangerousness of the offender, or the absence of such dangerousness. The intention to perform the act may mean that the offender may intend to perform such acts again. This intent is an index to future action. Such action the criminal law wishes to prevent. The intent is therefore an index as to what kind of treatment is to be given to the offender. It is an index, but not a final determinant. . . . The intent is an index to the treatment the offender is to receive because it is a possible index to other mental states the existence of which go to make the offender dangerous to society."

49. See Michael and Adler, Crime, Law, and Social Science (1933) 361: "The question of what behavior should be made criminal is thus answerable without reference to the question how should offenders be treated. The most important consequence of the independence of these two problems is the elimination from the behavior content of the criminal law of the penal gradation of offenses and the concept of responsibility."
An exclusive application of the recidivism theory of criminology to
criminal law and procedure would result in an investigation into the instant
defendant’s potentialities for future social damage and in no further inquiry.
Thus penal treatment would be administered only to those whose personal
anti-social tendency was sufficiently dangerous to merit the law’s attention.
The length and type of this treatment would vary according to the degree of
this anti-social tendency or likelihood of recidivism. Each case would then
require a very careful and very personal investigation.

But the legal principles of guilt finding do not concern themselves alone
with personal dangerousness or anti-social tendency. Consideration of this
is but one of the three problems of the legal elements of guilt. Juries do not
have the time for such a very careful personal inquiry. To the extent to
which it is both possible and desirable to investigate the defendant’s likelihood
of recidivism in the trial before the jury the law provides a device therefor
in the form of the third of the elements, the requirement of criminal intent
or mens rea. This element is variable between different crimes both in the
statement of nominal operative facts and in the degree or sort of anti-social
tendency demanded to be proven by these different facts. The former vari-
ation is due to differences in the type of conduct in question, which call for
varying word-devices, and the latter is due to varying considerations of
corpus delicti-vengeance and causation-deterrence which call for a varying
degree and sort of anti-social tendency as an element of guilt.

The function of the device of mens rea is to give effect, as far as may
be possible in a jury trial, other demands being considered, to the desire to
incarcerate only those who possess a personal anti-social tendency calling for
some treatment, and to free those who do not possess a sufficiently serious
one.

Other agencies of criminal procedure and other legal principles than
those of narrow guilt-finding also purport to function on a basis of the per-
sonal anti-social tendency of the defendant. Thus suspended sentence, pro-
bation, parole, pardon, indeterminate sentence, judicial discretion as to length
of sentence, the Baumes laws,50 the juvenile court system, the classification
and separate treatment of separate types of convicts all present to us devices
which while not concerned solely with guilt or innocence likewise function on
the basis of likelihood of recidivism.51

50. I. e., the laws providing for more severe penalties for recidivists than for first
offenders.
51. The now historical device of benefit of clergy must be considered as another prin-
ciple functioning in terms of the anti-social tendency of the offender. As this device de-
veloped, and before its eventual abolition, it provided to apply as a means for making the pun-
ishment less severe for first offenders. The branding on the thumb of those who were
granted clergy made it impossible for recidivists to escape the capital punishment for their
later felonies. The term “malice aforethought” in murder came into our law by virtue of
the test set up in the time of Henry VIII for removing such murders from benefit of clergy.
Many other felonies were similarly removed from benefit of clergy. On the topic see KENNY,
OUTLINES OF CRIMINAL LAW (10th ed. 1920) 124, 480-1.
The obvious awkwardness of the separate handling of the single problem of recidivism would seem to suggest that the whole problem of anti-social tendency should largely be merged into one and that handled otherwise than by the jury, leaving to them only the function of finding the social damage and the defendant's causation thereof. The writer does not plan to go further into this than to say that he approves it on theory. As he is dubious of any early adoption of it, he plans to concern himself immediately with an attempt at understanding what the law is actually trying to do by its present requirement of mens rea as one of the jury-trial elements of guilt-finding.

The legal requirement of criminal intent or mens rea is a matter of the jury's handling a certain portion of the problem of the personal dangerousness of the defendant, *viz.*, those aspects of recidivism as can be discerned from the manner of committing the crime and can be measured by jury-trial rules of guilt. The instant question is how well the various nominal operative facts have performed their function of making likelihood of recidivism an element of legal guilt.

The problem of recidivism in the law of guilt has not only the question of the general considerations involving it, but two specific aspects which must be differentiated. First is that of the extent to which the prosecution must prove operative facts tending to show that the defendant does possess such an anti-social tendency as to justify punishment. Is it sufficient for the prosecution merely to show the causation of the social damage, on the theory that the anti-social tendency is implicit therein, or must it go further and demonstrate the likelihood of recidivism by additional subjective facts? Second, to what extent may the defendant secure acquittal by proving certain criminal defenses the nub of which is to show that actually he does not possess the anti-social tendency apparently proven by the case against him? The respective headings will be general principles, the requirement of mens rea, and the mens rea defenses.

**General Principles**

A fundamental proposition which cannot be emphasized too much is that there is not necessarily involved in any or all of the nominal operative facts in crimes which serve this requirement any actual state of mind or guilty intent on the part of the offender. Fundamentally mens rea or crim-
inal intent is an abstract quality of the offender's personality as shown by the totality of his conduct. His actual state of mind may for certain crimes or on certain occasions, serve as an evidential fact of the separate (if conceptual) fact of mens rea. Thus the legal propositions mingle mentalist and behaviorist concepts. This accords with the dictionary definition of intent which is in the alternative (1) a turning of the mind, design or purpose, and, (2) meaning or import. Some operative facts of mens rea are nominally states of mind, to be proven by conduct, while others, nominally in terms of conduct, can be proven by conduct appearing through a state of mind or on its own behalf.

The term mens rea as used herein has several synonyms which will be used interchangeably. All of them serve to express the abstract quality of the offender's conduct which reflects his personality and potentialities. This quality is required as an element of guilt in pursuance of the recidivism theory. It is sought after by the particular operative facts in the definitions of specific crimes which in general form the subject of this immediate treatment. These synonyms are anti-social tendency, personal dangerousness, likelihood of recidivism, criminal intent, and manifestation of non-detrarrability.

The last of these synonyms—manifestation of non-deterrability—calls for some extended discussion which will serve to show the relation between the causation-deterrence and intent-recidivism problems, and at the same time serve to justify the recidivism approach and the requirement of mens rea in criminal law. The object of deterrent punishment is to lessen the number of future crimes by using the spectacle of present punishment to frighten potential offenders. A further assumption is that some few members of the human race are not thus frightened. These persons, who are not deterred, are themselves potential offenders. The state of not being deterred by the punishment of others is, ipso facto, the state of having the personal anti-social tendency concerned in the recidivism theory. But society must have some objective way of ascertaining who is in this class. It must wait till the members thereof tangibly manifest their non-deterrability and correlative anti-social tendency by the causation of social damage. When this happens, punishment follows, both to frighten other possible offenders and to handle the potential danger from the very individual. The mens rea requirement is a device for ascertaining what persons are not deterrable and hence are too dangerous to be at large.

Before analyzing any of the individual problems of the extent to which the prosecution must make proof of the accused's anti-social tendency, or how far he may be allowed to disprove it, it is proposed to make a cursory and comparative statement of certain general assumptions about human conduct which seem to be implicit in various of the specific legal rules.
The most fundamental assumption made by the rules of criminal intent is that one possesses a tendency to do whatever one has already done ("repetition of conduct"). Further it is assumed that one possesses a greater tendency to do those things which human beings frequently engage in than to do those things which are usually but sporadic ("normality of conduct"). This also involves the assumption that there is a greater human tendency to do that which is forbidden by the law alone than that which is also forbidden by religion, public opinion, and the other agencies of social control.

An important assumption is that if human conduct is a reaction to a definite stimulating factor, the likelihood of recurrence of the conduct depends on the likelihood of recurrence of the factor ("stimulating factor"). Two other assumptions are dependent each on the other. One is that the likelihood of future performance of conduct, however manifested, indicates a greater or lesser anti-social tendency to the extent to which the happening of such conduct entails the probability of resultant social damage ("intrinsic dangerousness"). The other is that a likelihood of future conduct, however manifested, indicates a tendency to cause whatever social damage is naturally and probably consequent to such conduct ("natural and probable consequences").

An important assumption which is implicit in many of the crimes calling for specific intent is that the existence of a desire, plan, or expectation on the part of a human being for a definite result shows that he possesses more of a tendency to commit the conduct thus desired, planned, or expected, than if

53. The statements in parentheses are meant to be brief, descriptive titles concerning the subject matter of the particular assumption made by the rules of criminal intent about human conduct. For the following ones it is planned to give footnote examples of specific rules of criminal intent which seem to be based on the respective principles of conduct. The present one—"repetition of conduct"—seems to be so fundamental to the whole field of criminal intent that no particular example is necessary. In such crimes as rape and sodomy, for instance, the law implies from the bare doing of such acts a tendency to repeat them.

54. Thus the intent will the sooner be held implicit in the causative conduct for a violation of the pure food laws than for bigamy. This is because the causative conduct of selling food in the former case is itself so much more likely of being repeated, due to its normality, than is the causative conduct of getting married.

55. Thus one who kills in reaction to the stimulating factor of personal hatred, a frequent stimulus, is deemed to have a greater anti-social tendency—that of a murderer—than is one who reacts similarly to the relatively less frequent stimulus of sight of wife's adultery, which indicates less anti-social tendency—that for manslaughter. Further, one who reacts to the very infrequent stimulus of mistaken belief in necessity for self-defense, which negates any anti-social tendency of a degree sufficient for societal treatment goes totally free.

56. Thus he who while engaged in an act dangerous to life accidentally kills is thought to have more of an anti-social tendency—that of a murderer—than is the one who accidentally kills while engaged in the negligent operation of an automobile and who is thought to have but the lesser tendency requisite for manslaughter. The relative intrinsic dangerousness of the other conduct which furnishes the intent element in murder and manslaughter, respectively, provides the difference between these two crimes in terms of anti-social tendency.

57. The rule is frequently stated, in rationalizing cases involving the intent element in homicide, that "one is presumed to intend the natural and probable consequences of his conduct." This merely means that the doing of an act which naturally and probably tends to a given anti-social result sufficiently shows, by virtue of the tendency to repeat the original conduct, a tendency to create the probable and consequential result so as to call for whatever punishment is assessed against those who do have such latter tendencies.
he did not have the desire, plan, or expectation ("desire, plan, or expectation").

The remaining three assumptions are related. One is that an actor who is aware of his immediate conduct shows more of a tendency to repeat the conduct than if he is not aware ("awareness of conduct"). Likewise, one who is aware of the probability of certain physical consequences from his conduct shows by the doing of the conduct more of a tendency to create the consequences than if he is not aware of the probability ("awareness of physical consequences"). Finally there is the matter of "awareness of societal consequences." One who has not yet engaged in criminal conduct is assumed to have less of an anti-social tendency to the extent to which he has refrained because of his awareness (and fear) that punishment might follow. On the other hand, one who has actually engaged in anti-social conduct is assumed to show more of an anti-social tendency to the extent to which he was then aware that such consequences might follow. He has not been deterred by the spectacle of the punishment of others.

These principles are not here asserted necessarily to have any psychological validity. They are here collected merely to make a comparative statement of the divers assumptions which the law-makers seem to have made in working out the specific rules of mens rea. They are human assumptions about the significance of human conduct as indicative of human anti-social tendencies.

**The Requirement of Mens Rea**

The first principal problem under this heading is whether for a given crime the requisite anti-social tendency or mens rea is sufficiently indicated by the bare fact of the defendant's causation of the social damage or must be proven by the showing of additional subjective operative facts specifically directed at the issue of likelihood of recidivism under the name of criminal

58. Thus a man who breaks and enters a house with the "intent to commit a felony therein" is held to have sufficient anti-social tendency for the more serious crime of burglary, whereas without that "intent" he is, at most, but a trespasser. The existence of his "desire, plan, or expectation" to commit a felony, when concurrent with his causing the stated criminal result of housebreaking, shows that his personality is of the more dangerous sort than if he lacked such a mental state.

59. Thus it is understood that the sleepwalker who while unaware of what he is then doing kills another person, must go free because his unawareness makes it less likely that his external conduct indicates a settled tendency to do such things with sufficient frequency to make him a dangerous offender. One branch of the insanity defense, perhaps with less functional justification, acquits the one who from mental defect is unable to know the nature and consequences of his act.

60. Many criminal definitions involve the use of such words as "knowingly," "knowledge," etc. Thus one who receives the goods of another with knowledge that they are stolen goods is thought thereby to show more of an anti-social tendency than if he receives them without an awareness of the physical consequence of interfering with the possession of the true owner.

61. This concept underlies the problems of ignorance of law, infancy, and the insanity defense. As we shall see, general unawareness of societal consequences is not defensive because, still, the offender is thought to show sufficient anti-social tendency for treatment. On the other hand, the fact of unawareness of societal consequences is expressly made the test for the functioning of the infancy and the insanity defenses.
intent. For those crimes in the latter class the second problem thus becomes that of the significance of those words and phrases which are inserted in criminal definitions designedly to require extrinsic proof on the issue of the offender’s personal dangerousness. What type or degree of anti-social tendency or how much proof thereof is requisite, as the operative facts are worded?

Intrinsic or minimum intent

This first problem of whether the requisite criminal intent is intrinsic to the bare causative conduct could be stated and treated in three different ways. One would be the way in which it will be presently handled, as a matter of the extent to which extrinsic facts must be shown to establish the anti-social tendency requisite for conviction. It is also a matter of the extent to which mistake of fact is permitted as a defense. For in those crimes in which mistake is not allowed the rule is, in effect, that the criminal intent is manifested by the doing of the causative conduct alone. For most crimes, particularly those where the intent must be shown extrinsically, a reasonable mistaken belief as to the existence of a justifying fact is itself defensive. Finally one could treat the problem as one of the crimes of omission. In those crimes where one “acts at his peril” as to his creation of a socially damaging result he has, in effect, omitted to ascertain the facts the ascertainment of which would have enabled him to avoid criminality. Thus he is punished for his omission by being punished for the “morally” innocent causation.

In certain types of crime the law works guilt without requiring any further proof of criminal intent than is incidental to the doing of the bare causative conduct. For the remainder of crimes the intent element must be specifically demonstrated in the name of certain extrinsic facts which are included in the criminal definition solely to establish the anti-social tendency. In working out general principles applicable to this situation it is proposed to use for examples typical cases of these separate crimes.

Thus it has been held that if a man has intercourse with a girl below the age of consent he is guilty of carnal abuse even though he lacks awareness of her nonage and reasonably believes her above the age.\(^{62}\)

Likewise it has been held that if one sells hard cider mistakenly believed not to be fermented he is guilty of violating the liquor law.\(^{63}\) On the other

\(^{62}\) Perhaps the leading case on this doctrine is Reg. v. Prince, 13 Cox. C. C. 138 (1875). This was a case of taking an unmarried female under age out of the custody of her father. The court held it not a valid defense that the defendant reasonably believed her to be above age. While this was not a case of carnal abuse, yet the cases on carnal abuse are in accord on this point in the analogous situation. The court intimated, however, that a mistake as to the fact of the father’s consent would have been a valid defense. This is a sound distinction on a recidivistic basis. A mistaken belief as to the father’s consent does show less tendency to abduct females. A mistaken belief as to the girl’s age does not show any lesser tendency to abduct or carnally know girls.

hand the famous case of *Regina v. Tolson* allowed the defendant, accused of bigamy, to assert in defense her reasonable but mistaken belief that her first husband was dead. What is there about carnal abuse and cider selling that makes it appropriate that one act at his peril as to the creation of that social damage which does not hold for the social damage of bigamy resulting from marrying? The intent is held to be intrinsic to the conduct in the former two cases but not in the latter.

The writer suggests that the determination of the question depends on the following variables. First is the principle of "intrinsic dangerousness" adverted to above. Second is the normality of the causative conduct. Third is a separate question of the equivocality of the particular conduct.

Equivocality has reference to several features of a typical crime. To the extent to which it is impossible to state verbal definitions of the causative conduct which will cover only situations agreed to be socially damaging, the conduct can be said to be equivocal: Hence it is necessary to add subjective elements of criminal intent to avoid injustice in convicting. Then there may be lack of human agreement that all cases of the same objective social damage deserve the same or any punishment. This doubt, too, can be resolved by further subjective operative facts. Finally there may be lack of human agreement that social damage always follows from the initial conduct. This doubt, too, is resolved by further subjective facts. Whenever there is equivocality of the conduct, it cannot be said that it alone demonstrates the requisite intent and the latter must be shown by further facts.

The rule of the *Tolson* case that the intent is not intrinsic to the conduct alone, can be justified by such principles. The causative conduct—getting married—is equivocal, i.e., it is conduct sufficiently desirous of being encouraged generally that it would be socially undesirable to have one act at his peril in engaging in it. Then, even when done by the average person, it does not intrinsically involve a high likelihood of social damage. Very few marriages are bigamous. Finally, it is conduct rarely repeated by the same individual. Under the "normality of conduct" principle there is less likelihood of its being repeated than is more normal conduct.

On the other hand, in the carnal abuse case the conduct is not equivocal. There is nothing desirable of being encouraged in extra-marital relations. Then, too, there is more intrinsic dangerousness in the conduct itself. There is more likelihood that extra-marital connection with a girl of the borderline age will involve carnal abuse than there is that a marriage will be a bigamous one. Finally, the average seducer repeats the act of extra-marital intercourse far more frequently than does any bigamist repeat the marriage ceremony.

64. 23 Q. B. D. 168 (1889). The writer is not unaware that the *Tolson* case is in the numerical minority on the point and that probably the majority of courts would reject the defense of mistaken belief of the spouse's death. The writer feels, however, that the doctrine of the *Tolson* case represents the better view and for this reason, and because it affords an excellent example of a case for applying the recidivism analysis, it is used herein.
("normality of conduct"). On a relative basis one can differentiate between the bigamy and carnal abuse situations. All in all, doing the bare causative conduct of seducing a girl shows more likelihood of future carnal abuse of too-young girls than does one marriage show a tendency to future bigamy. Hence, by this rule the mens rea is not intrinsic in bigamy.

The cider case demands more analysis. Selling cider is an equivocal occupation, desirable of being encouraged in some events. This alone would seem to call for extrinsic proof of intent. But it is outweighed by considerations along the other two lines. Cider is very likely to get hard ("intrinsic dangerousness"). There is even more probability of cider being hard cider than of extra-marital intercourse being with a too-young girl. And it is conduct much more likely of being repeated by individuals generally ("normality of conduct"). These latter considerations serve to demonstrate that there is implicit in the act of selling cider a high probability of future sales of hard cider by this person.

Professor Sayre considers that the determining factors are to be found in the severity of the penalty and whether the crime is a "public welfare offense." He considers that public welfare crimes, or police regulations, entailing small penalties, are those wherein the intent is intrinsic whereas for crimes which are morally wrong and have severe penalties, there can be no punishment without a guilty mind.

The writer does not agree with this distinction, although the difference may be only one of terminology. Rape and sodomy are hardly "public welfare offenses" and the punishment is severe, yet they are crimes of intrinsic intent. The severity of the penalty is but one of the items in the broader issue of equivocality. The more severe the penalty, the less likely it will be that all can agree that given conduct deserves punishment and the more necessary it is to appease the squeamish ones by requiring additional proof that the offender deserves punishment, i. e., further subjective proof of criminal intent.

The ultimate test is whether the causative conduct in the given crime itself shows such a high likelihood of repetition of such conduct as to indicate that sufficient anti-social tendency is thereby demonstrated. This the writer believes is to be found in terms of the equivocality of the conduct, its normality, and its potential dangerousness. Conduct which is less equivocal, more normal and more dangerous is likely to be sufficient in and of itself, while conduct more equivocal, less normal and less dangerous probably should entail additional operative facts before the intent is held to be established.

The physical conduct of parking by a fire plug, human conduct considered, shows more likelihood of future traffic violations than does the physical conduct of picking up a friend's watch show a future tendency to steal. The

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65. Sayre, Public Welfare Offenses (1933) 33 Col. L. Rev. 55.
concept of the former's being a public welfare offense, punished by the law alone, while stealing is a moral offense or true crime, forbidden by law, church, and public opinion, helps in deciding which conduct alone shows the most dangerousness. But the writer feels that correct analysis of the situation should go deeper than a mere classification into true crimes and public welfare offenses.

**Extrinsically proven intent**

We have seen that for some crimes, those of intrinsic intent, the requisite anti-social tendency is held to be indicated by the bare doing of the causative conduct. Now we deal with those which are not in this class but for which the likelihood of recidivism must be evidenced by proof of other operative facts expressly added to criminal definitions in order to require subjective proof of the mens rea issue. We have already dealt with the reasons for requiring these additional operative facts. Our present problem will be to analyze them as such. But we shall find that the same principles which rationalize the law's separation of crimes into those of intrinsic and extrinsic intent are also valuable in dividing the latter into groups according to the extent of the requirement of extrinsically proven intent. For we shall see that certain of these extrinsically required facts are really but nominal, doing little more than to allow the defense of mistake of fact, if any. Others do require definite extrinsic proof of the mens rea element, but vary in the extent of the proof, the degree of anti-social tendency, or the sort of tendency.

In these crimes of extrinsic intent not only does the law apply the recidivism theory by acquitting for lack of this extrinsically demanded proof, even where there is causation of a corpus delicti, but frequently, for one and the same causation and corpus delicti, the punishment is scaled according to the extent of the mens rea. The classic example of this, which will be the first topic, is the gradation of criminal homicide into degrees according to the extent of the offender's likelihood of recidivism.

In homicide we see that constant causation and corpus delicti factors may, according to the intent, run the whole gamut of criminality from complete acquittal to the extreme of capital punishment. Homicide is never a crime of intrinsic intent, although to be sure, one form of the lowest degree—manslaughter by the negligent omission of custodial or employment duties—involves at most a nominal operative fact of extrinsic intent. But largely it

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66. Professor Glueck describes the gradation of criminal homicide, along with the setting up of degrees of other crimes as crude individualizations of treatment. Glueck, *Principles of a Rational Penal Code* (1928) 41 HARV. L. REV. 453, 465. See also Michael and Adler, *Crime, Law, and Social Science* (1933) 358-9. The latter writers consider the gradation of murder and larceny as matters of retribution. The present writer cannot agree with this in the case of murder. The distinction between grand and petit larceny is, of course, a matter of retribution or vengeance, as it involves a difference in the occurred criminal result. But the present writer feels that the gradation of criminal homicide involves a constant criminal result with a constant demand for vengeance, with the difference taken in terms of the anti-social tendency of the offender.
is considered that the typical causative conduct for homicide does not by itself and in all cases show sufficient anti-social tendency to justify punishment. And this is so despite the fact that the extreme social damage involved in homicide allows for punishment on the slightest showing of anti-social tendency—and that slighter than is allowed for most other crimes of extrinsic intent. But still it must be demonstrated extrinsically. This is because the typical causative conduct is equivocal, i. e., death may result from conduct desirable of being encouraged on certain occasions—driving automobiles, hunting, or target practice.

These considerations outweigh the fact that death frequently results from such activity when engaged in by the average person. Then, the extreme punishment given for some homicides further shows the equivocality and demands the firmest proof of mens rea before it be imposed.

Thus the extreme punishment for first degree murder is given only for the highest manifestations of likelihood of recidivism. It is thought that one who premeditates or kills accidentally in the course of the execution of the most serious crimes shows this high anti-social tendency and a higher one than he who merely kills intentionally on the spur of the moment or kills accidentally while engaging in the middle group of other crimes. The latter person is punished only for second degree murder. The person who kills intentionally, but under the stimulus of a legally recognized provoking factor, which occurs but infrequently, or the person who kills accidentally while engaged in a very minor crime, or while negligent, or while omitting custodial or employment duties is thought to show but a minimum of anti-social tendency. But this is sufficient in view of the great social damage he has caused. He is punished for voluntary or involuntary manslaughter as the case may be.

Thus the whole gradation of criminal homicide is seen to be in terms of likelihood of recidivism or anti-social tendency. The purely accidental killing is non-criminal. Intentional killings are divided according to the mentalist concepts of premeditation, malice, and provocation. Non-intentional but criminal killings are graded according to the other conduct factors present at the time of the actual causation. Engaging in the worst crimes is thought to show the most about conduct, the middle class is felt to equal malice without premeditation, and the minor class, along with negligence and omission of duty is thought similar to desired killing on provocation. Some of the nominal operative facts are mentalist in derivation, some frankly behavioristic. All of them are merely ways of measuring the significance of the offender's conduct with a view to ascertaining his personal tendencies and of assessing societal treatment according to the degree of his likelihood of causing future deaths. One cannot understand the words written into these definitions without thinking of the reason for their being there. The writer
submits that the reason for their existence and the rationale of their interpretation is a measurement of anti-social tendency.

When one turns to a general consideration of the crimes requiring extrinsic proof of intent, one finds that the same words of criminal intent or the same principles of recidivism are used in various crimes with different meanings or emphasis. Thus the principle of constructive intent which recognizes the proposition that one is presumed to intend the natural and probable consequences of his acts, is followed for second degree murder but not for certain other crimes where, as stated, the extrinsic operative facts of intent are calculated to require proof of a very specific anti-social tendency or a very high degree thereof. Normally the act of doing a certain thing is thought to show a tendency to do that thing and likewise to create whatever consequences normally follow from the doing of that thing. But the degree of tendency to cause the latter consequences is one of a limited extent only and wherever the policy is to require more tendency or more proof thereof, or a tendency of a certain sort, the doctrine of constructive intent will not do.

Thus in *Rex v. Williams* 67 the act of cutting a woman dressed in silk, for the purpose of wounding her body, was held not to show sufficient "malice" to make the offender guilty of violating the statute against the cutting of garments, even though the prisoner intended to cut through the garments to the body. This decision can be rationalized in the light of the purpose of the statute. It was passed to curb the practice of disgruntled silk-weavers in slashing imported silk garments. Obviously it was intended to punish only those who cut silk for the sake of cutting silk, i. e., those who had the tendency to cut silk in the future. To be sure, one who shows a tendency to stab women obviously shows some tendency to cut their garments. It, however, is not sufficient to prove the high degree of anti-social tendency which the court felt was called for by the statute in the light of the severe punishment, the equivocality of the conduct of cutting silk, and the evil aimed at.

Likewise one who maliciously threw a stone at another, intending a battery, but missed the victim and broke a window was held in *Regina v. Pembliton* 68 not to have violated the malicious mischief statute even though it provided to apply whether the malice should be against the owner of the property or otherwise. The court here too interpreted the intent requirement as demanding proof of a tendency to break window panes as such, which was not shown by an accidental breaking in the course of an act which merely showed a tendency to battery. The degree of the proof of the

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67. 2 Leach 597 (1789).
68. 12 Cox C. C. 607 (1874).
relevant tendency is higher in these cases than it is in second degree murder, in view of the fact that the resultant social damage is not so serious.

Then, too, these early decisions which gave a trend to judicial interpretation of these various intent requirements are to be explained, as is much of the detail of criminal law, as judicial reactions to extreme punishments provided for minor offenses at the behest of powerful groups. But the problem is still before us. Our war-time espionage laws, the "life for a pint" and the "five and ten" laws present as sordid a chapter in penal law as did the calendar of capital offenses under the first four Georges and the latest William.

Then, for that matter, interpretation of the subjective intent elements has not always been used as a way of contracting the application of criminal prohibitions. The late Professor Tulin has pointed out how some courts, in states where there is no apt legislative penalty for the crime of reckless driving of an automobile, have applied to reckless driving the penalty for the aggravated assault with intent to kill in order to develop a sufficient punishment. They have ruled that the requisite "intent to kill or murder" can be worked out constructively from the act of extreme recklessness in driving a car. This does not seem a far development from working out criminality as for a battery, but the majority view is otherwise and holds that the aggravated assault requires a specific actual intent to kill or murder. The majority of states, as a rule, do have a sufficient statutory penalty for reckless driving in its own right and so there is no need for twisting the meaning of specific intent. These courts refuse to apply—because they do not have to—the doctrine of constructive intent to the aggravated assault.

The writer feels that it is equally justifiable for a court either to expand or contract the meaning of a word of extrinsic intent in order to meet social needs. He feels further that this is just what the courts have been doing and that their actions are to be understood in terms of their demanding greater or lesser showings of the element of criminality concerned with likelihood of recidivism. The existence of other penalties in the Williams and Pembliton cases, viz., for battery and assault respectively, probably motivated the courts in being strict as to the showing of the requisite intents for the crimes actually proceeded under. In view of the fact that so many of the intent words used by legislatures in defining crimes are mentalist in nature, the courts are usually forced to work out their meaning. This, so the writer believes, has been and should be done on a basis of determining the degree, sort, and extent of proof of the anti-social tendency of the offender to create the evil aimed at by the statute.

70. See Sayre, Mens rea (1932) 45 Harv. L. Rev. 974, 989, 998, 1003-4, 1016, 1021, concerning the extent to which the meaning of criminal intent has varied throughout the ages.
This difference in the degree, sort, or proof of the likelihood of recidivism can be discerned by comparing certain related crimes. Thus for forgery there is required only an "intent to defraud" while for uttering there must be this plus a knowledge that the instrument is forged. The mere act of writing another's name is not thought indicative of anti-social tendency. But writing it under circumstances calculated to defraud shows the almost nominal "intent to defraud." But to be guilty of circulating an instrument forged by another one must realize that it is forged, i.e., have an awareness of the physical consequences of his conduct. This is because circulating instruments is very equivocal conduct which is normally desirable of being encouraged. It is quite likely that very law-abiding persons will accidentally circulate forged instruments, and so persons are not punished unless they actually do something which does more certainly show the requisite anti-social tendency.

So it is with larceny and receiving. Merely handling the property of another does not show itself any anti-social tendency. But it is very easy to prove the "animus furandi" which, when it accompanies the act of asporation, shows that the actor tends to be a thief. But non-criminal persons may stumble into the handling of the stolen property of another, and so a more specific element must be shown, i.e., knowledge that the goods are stolen. Only this sufficiently shows a tendency to be a "fence" so as to justify punishment for receiving stolen goods. The tendencies to pass counterfeit money or to receive stolen goods are not so easily demonstrated as the tendencies to forge and steal. The law recognizes this by its stricter rules of extrinsic intent. These distinctions probably are on a basis of relative equivocality, i.e., one type of conduct the more clearly shows the requisite tendency than the other.

Then, differences in the nominal and substantial requirements of intent may be explained in terms of differences in the extent of the corpus delicti or social damage involved in the instant crimes. There seems to be a definite sliding scale in the criminal law. For extreme examples of social damage, the law seems willing to convict on but a slight showing of likelihood of recidivism, as witness manslaughter. On the other hand, where the occurred social damage is but slight, and especially where the punishment is great in proportion thereto, very high degrees or proof of anti-social tendencies are required.

Thus one cannot be convicted for the slight social damage involved in attempts save on a showing of a specific intent, i.e., desire, for the result involved in the crime attempted. And where for the aggravated assaults the punishment is made even greater than it was at common law for the relative criminal attempt, the intent must even be more specific.
Burglary is another example of a crime where, because of the slight damage of the corpus delicti, the proof of intent must be of the highest order. The objective result consists in being on the premises of another. This alone is not enough but, if accompanied by the specific intent to commit a felony thereon, it makes the burglar worthy of societal treatment. The existence of the desire, plan, or expectation of the intended felony is thought to show such a likelihood of recidivism as to justify incarceration despite the creation of but a slight actual corpus delicti.

Criminal definitions are full of words calculated to require extrinsic proof of the mens rea element. Such “mentalist” words and phrases as malice, knowledge, intent, purpose, wilful, wanton, negligent, felonious, and their derivatives are encountered frequently. Other types are words more realistically descriptive of conduct or surrounding facts. But regardless of the nature of these facts, the conclusion remains that in order to be applied to the run of specific situations they have to be interpreted.

The writer submits that the significance of all these varying operative facts of extrinsic intent is to enable the courts to apply punishment to those who, having caused the requisite social damage, also manifest such an anti-social tendency as is contemplated by the instant prohibition. It is possible to rationalize and understand the judicial rulings of the past on this basis and, so the writer feels, the future application of the intent element of various criminal prohibitions should be made on the same basis.

**The Mens Rea Defenses**

If the prosecution fails to prove beyond all reasonable doubt any one of the three elements of guilt of any crime, *viz.*, the corpus delicti, defendant’s causation, and requisite mens rea, the defendant is entitled to be acquitted. We have just been discussing the extent to which subjective proof must be made of the third element. We have seen that for some crimes the mens rea is sufficiently shown by the causative conduct and need not further be demonstrated. For others, for reasons of policy, additional and special proof directed at the intent element alone is required. Now we deal with a group of criminal defenses which the defendant is allowed to interpose in order to offer even more specific proof on the question of his anti-social tendency or likelihood of recidivism. The purport of these is to demonstrate that the defendant *actually does not* possess the anti-social tendency *apparently* indicated by the required proof for the prosecution. Where the jury is convinced of the existence of facts raising any one of these relevant defenses the defendant is similarly entitled to an acquittal. This is because it is believed that he does not possess the requisite and anti-social tendency calling for societal treatment in his case. Just as the absence of sufficient proof of the prosecution’s case on the mens rea element
calls for an acquittal, so does the proof of affirmative facts in defense which reach the same end as the lack of the prosecution's case. Implicit in either is the idea that societal treatment is administered to those who have caused criminal results only when, further, it is indicated that the offender is possessed of the requisite likelihood of recidivism. If this likelihood is lacking, either because the state cannot show facts apparently indicating it, or if so, because the defendant can offer more specific proof about it, there is no need for frightening, reforming, segregating, or despatching the defendant and he may safely be trusted at large.

The various intent defenses will now be treated in two groups according to the principles of recidivism which seem to be involved in them. One group is concerned with the principle of human conduct that the tendency to create social damage varies according to the likelihood of the recurrence of the stimulating factor which motivates the conduct of the instant individual. The other group is concerned with certain defenses which revolve around the significance of one's awareness of one's conduct, its physical and its societal consequences.

Reaction to a stimulating factor

It was suggested above that one of the general principles of recidivism found occasionally reflected in the mens rea requirement or its defenses was that of "stimulating factor." This is stated to the effect that if it can be discerned that defendant's instant creation of social damage is a definite reaction to a specific stimulating factor, then it can be said that his tendency to repeat the causation of such social damage varies according to the likelihood of the recurrence of the factor. Thus if it be a frequent factor, he possesses a high tendency but if it be a very sporadic one, his likelihood of recidivism is small. Certain of the intent defenses function on this basis and recognize the existence of certain factors and their infrequent recurrence and call for the acquittal of those whose conduct is definitely a reaction to them and nothing more. The theory is that the presence of these very subjective factors outweighs the significance of the proof by the prosecution of the intent requirement to the end that the instant defendant does not possess the requisite anti-social tendency even though the state has proven those facts, which in the case of the average man, do indicate that. The intent defenses which function on this basis are: entrapment, coercion, compulsion, necessity, self-defense, defense of another, defense of property, prevention of crime, prevention of escape, lawful arrest, domestic and public authority, provocation, and mistake of fact.

We have seen how the consent defense involves the negation of the corpus delicti. Entrapment, on the other hand, is a matter of a criminal defense demonstrating a subjective lack of anti-social tendency. It is an
excellent example of a non-intent defense. For, as the legal rule is worded when the operative facts for this narrowly interpreted defense are present, it is clearly indicated that the entrapped person does not possess the anti-social tendency apparently indicated by the bare doing of the causative conduct for the instant crime. To be defensive it must be shown that it was very unlikely that the entrapped person would have violated the particular law but for the blandishments of the entrapping officer. These blandishments provide the sporadic stimulating factor. Because of the infrequency of their recurrence it can be postulated that defendant's conduct will be of similar infrequent recurrence and hence he may safely be trusted at large.

So it is with coercion and compulsion and, incidentally, necessity, which, with varying emphasis, are allowed as defenses to non-capital crimes. If one commits the crime only because of the duress, it is believed that he shows a tendency to react only to the sporadic stimulating factor of the duress and so does not show a sufficiently ingrained personal tendency to commit crime to justify treatment by the recidivism theory.

Likewise does the stimulating factor principle justify the group of criminal defenses which include defense of self, another, property, and the exercise of public authority involved in prevention of crime, prevention of escape, and lawful arrest. The specific limitations on the exercise of these privileges also emphasize considerations of recidivism. He who uses only necessary force in defending his person, for instance, does not show sufficient anti-social tendency to be dangerous, but he who uses unnecessary force in such an event does show that tendency and so must be incarcerated. He who creates the need for self-defense, i.e., the aggressor, does show a tendency to kill, and so he is not permitted the defense.

The reduction of second degree murder to manslaughter upon proof of adequate provocation has already been mentioned. To a certain extent it involves a non-intent defense to second degree murder although the result is not absolute acquittal but only conviction of a lesser crime. This proposition also involves the stimulating factor principle. It is believed that one who kills only on the stimulus of provocation, including sight of wife's adultery, sudden assault, unlawful arrest and mutual combat, shows only a tendency to react to that type of factor which, while it recurs frequently enough to indicate some tendency—especially in view of the extreme social damage—yet does not do so frequently enough to make the crime murder.

Likewise the general defense of mistake of fact, already mentioned in connection with intrinsic intent, is a manifestation of the stimulating factor principle. A reasonable mistaken belief in the existence of a fact which, if true, would be defensive, is itself defensive. It is believed that—in cases of crimes where mistake is allowed, i.e., where the intent is not intrinsic
—the mistake which motivates the action is of such infrequent recurrence that it can safely be said that the defendant does not possess a general anti-social tendency but only a tendency to react to a sporadic stimulus. Hence he is acquitted for lack of a sufficient anti-social tendency. If he reacts to an unreasonable mistake, or to a mistaken belief in a non-justifying factor, he shows a tendency to react too often and so is sufficiently dangerous for societal treatment.

**Awareness of conduct and of its physical and societal consequences**

Certain criminal defenses involve the matter of the extent to which one’s awareness of his immediate conduct, or of its physical or societal consequences, indicates a greater or lesser anti-social tendency on his part. The particular problems are intoxication, ignorance of law, infancy, and insanity.

Intoxication actually indicates a lack of awareness of one’s immediate conduct. But in law it is never defensive save to crimes involving a specific intent and then only if it actually prevents the existence of the requisite specific intent. The writer submits that the rule and its exception are both sound on a recidivistic basis. One who gets drunk and kills or rapes probably shows a tendency to get drunk and kill or rape again, and that sufficiently for the fairly low level of anti-social tendency involved in those crimes. Where the level of intent required is but low, non-awareness of conduct does not negative likelihood of recidivism. On the other hand, where it is high, as for larceny and for attempt crimes, involving specific intent, the fact of drunkenness probably does negative the very specific tendency, or very aggravated tendency, or high degree of proof demanded so that it is safe to acquit. The drunken person who takes a “no-parking” sign, or who breaks in a window, or who goes too far in a “necking” party, probably does not show the same specific tendency to steal, commit burglary, or rape as would a sober man who did exactly the same physical conduct.\(^7\)

Another example of non-awareness of immediate conduct is the sleep-walker. It seems agreed that one is not guilty of a crime committed while asleep. But this is different from the drunken person who murders or rapes. Sleep-walkers have not been a social problem. The recurrence

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\(^7\) Usually the crimes of specific intent require either a knowledge of some facts independent of the present conduct of the offender or a desire or plan to do something other than that which he actually achieves. Thus the crime of receiving requires a knowledge of the independent fact of the stolen quality of the goods. The crime of burglary requires, in addition to actual breaking of a house, a desire or plan for an independent felony within it. The attempt crimes require, in addition to the presence of the corpus delicti of the attempt, a desire or plan for the separate corpus delicti of the major crime. Where the required intent is but a factor of the very conduct which the offender is doing, the fact of drunkenness does not negative sufficient tendency from that conduct. But where the required intent involves an awareness of some fact extrinsic to the conduct, or a desire or plan for some other conduct than that actually engaged in, the fact of drunkenness does negative both the tendency to do those extrinsic things and the requisite mental state which is the nominal operative fact.
of social damage from them has not been so evident as it has been from drunken persons. Hence it is safe to assume a lack of anti-social tendency for them, but not for the drunken person.

Ignorance of law, i.e., a non-awareness of societal consequences on the part of a mentally normal adult, is not defensive, although, like intoxication, mistaken application of law may negative a requisite specific intent. On the other hand, we shall see that ignorance of law is the very test for the ensuing defenses of infancy and insanity. We have already suggested that when one does commit a crime, he shows a lesser anti-social tendency if he be ignorant of the societal consequences therefor than if he be aware. But the law postulates that even then he shows sufficient tendency to call for treatment. Hence the rule that ignorance of the law generally is no defense. The exception for specific intent is but analogous to the similar one for intoxication. Where the proof of intent must be very high, then the relative lesser tendency is relevant. The main rule itself is based on the idea that one who has not been deterred by the punishment of others equally indicates an anti-social tendency regardless of whether his not being deterred results from his unawareness of the punishment of others or from his not being influenced thereby when he is aware. In either event he is a dangerous individual to have at large. Whether it is because he was never "vaccinated" by observing previous punishment or his actual "vaccination" did not "take," he is a social problem. If his present anti-social conduct proves the point, deterrence must then seek to work on him individually by bringing to his attention more vividly—by punishing him—societal demands about conduct. The exception for specific intent is but another manifestation of the "stimulating factor" principle. Reaction to a mistaken application of law to fact is a reaction to a very sporadic stimulating factor which indicates a very slight anti-social tendency. Reaction to a general ignorance of the main prohibition itself is a reaction to a very frequent stimulus which indicates a high anti-social tendency.

In the infancy defense as it exists at common law ignorance of law is the very test for applying the defense and rightly so. For where for the mentally normal adult ignorance of law shows an anti-social tendency, i.e., lack of reaction to previous punishment of others, in the case of the infant it merely shows that the infant has not yet learned societal demands about conduct. But it is proper to suppose that he will soon learn. Thus an infant under seven can never be convicted of crime. It is believed impossible that he has learned and yet believed probable that he will. Hence his conduct can never indicate anti-social tend-

72. The lack of treatment of the Juvenile Court is not meant to convey any impression of the insignificance of that institution which does, of course, function on a basis of the recidivism theory. The scope of the present treatment is limited to a discussion of the legal principles of guilt-finding alone.
encies. On the other hand, between seven and fourteen, the approximate limits of the basic public school education, the question for the application of the defense is whether the infant has actually learned of societal demands concerning his conduct. The presumption is that he has not. The rule is stated that an infant between seven and fourteen is presumed not to know right from wrong and may be convicted only if the prosecution can show that actually he does know right from wrong. Infants in the transition stage are said to indicate anti-social tendencies only when they react anti-socially after learning of societal demands. If they have not yet learned, it is believed that their conduct results from the lack of learning which itself will occur so soon that they can safely be trusted at large. If they have learned as much as society can teach them and still react anti-socially, they possess the same tendencies as would be indicated by an adult. Children who have not yet learned will grow out of their immediate tendencies which are, hence, not permanent. Children who have learned, and all adults, will not grow out of such tendencies which are, therefore, permanent enough to demand punishment on a recidivistic basis. On the other hand, the infancy defense does not extend to low mental age of a chronological adult, short of the insanity defense. This is correct. Low mental age merely indicates a permanent inability ever to learn societal demands and hence indicates more, rather than less anti-social tendency. It is but a matter of the insanity defense next to be considered, but not of the infancy defense as such.

The insanity defense, perhaps with far less functional justification, also acquits one who, because of mental defect, is unaware of the societal consequences of his conduct. Thus the MacNaghten case 73 stated, as one of the types of situation which would acquit one for mental defect, the inability to know right from wrong concerning the act. In the alternative, the same case recognized unawareness of immediate conduct as defensive by its other rule that if from mental defect one was unable to be aware of what he was then doing he should be acquitted. Save for the further rejection of irresistible impulse as a defense, which is the rule in the majority of jurisdictions, it is hard to rationalize the insanity defenses in terms of the recidivism theory although they are usually classified as involving a negation of mens rea. The further ramification in the insane delusion test seems to be a substantial expression of the right and wrong test itself in terms nominally similar to the mistake of fact defense, i. e., to the effect that the delusion, like the mistake, must be as to a factor which would be defensive itself if true. It would seem that the right and wrong test is functionally invalid, due to the fact that it is safe to assume that mental disorder indicates more of a likelihood of recurrence of anti-social conduct

73. 10 Clark & Fin. 200 (1843).
rather than less. Rather we must rationalize the right and wrong test in terms other than of recidivism. The acquittal of the insane criminal results from a public feeling of sympathy for him. We sympathize with the one who, from mental defect, cannot know right from wrong, and this feeling of sympathy suppresses the normal demand for vengeance and swings the pendulum to the other side, with the result of acquittal. Or it may be a human idea that it is improper to punish one who is unable personally to be deterred by punishment. Further it may be explained by a human feeling that the punishment of one unable to choose right from wrong may disgust, rather than frighten and deter, his fellow men.

There is not space at present for a detailed functional critique of the insanity defenses nor of the proposals for the reform thereof. Suffice it to say that the present legal tests for acquittal for mental defect do not accord with recidivistic ideas, but rather with ideas of vengeance and deterrence. Ignorance of the law, while a satisfactory enough test for infants, because for them it does indicate a lack of anti-social tendency, is not a satisfactory test for mentally deficient adults who, because of their mental defect, cannot ever learn sufficiently to avoid being offenders in the future. The insanity defense is one spot where a proposition of criminal intent cannot be rationalized in terms of the recidivism approach to the policy of punishment. Rather, considerations of vengeance and deterrence have influenced this alleged matter of criminal intent. Where elsewhere rules of criminal intent take their differences in terms of relative anti-social tendency, here the line is drawn in another manner.

CONCLUSION

For any specific crime, under the law of guilt, there must concur three abstract elements, first, a stated socially damaging occurrence, or criminal result, or corpus delicti; second, legally causative conduct engaged in by the accused offender, of a sort which is socially dangerous when committed by any person; and, third, an indication that the offender possesses the requisite anti-social tendency or likelihood of recidivism, i. e., a criminal intent or mens rea. All of these must concur to have guilt. The lack of any one of them will prevent a conviction even though there be sufficient proof of the other two. Problems of the substantive criminal law thus resolve themselves into problems of the elements of guilt as they appear in specific crimes. The rationalization of past decisions and the prediction as to future ones should be made in terms of the legal interpretation of these three respective elements of the given type of crime.

These three elements of criminality are correlated to the three separable types of theory concerning the purpose of criminal punishment and represent, respectively, the influence of these varying theories on the legal rules.
The vengeance theory expresses a human attitude that criminal punishment should be a quid pro quo, compensating for that which has already occurred, and thus emphasizing the criminal result or corpus delicti. The deterrence theory consists of a human attitude that criminal punishment should be administered for the purpose of discouraging future causative conduct by punishing present conduct which has been causative or is very likely to be so. The recidivism theory presents a belief that punishment should be assessed as a way of preventing future criminality by the present offender. Thus it should be imposed only if by his conduct he manifests a likelihood of such future criminality. The law follows all three theories with varying emphasis by its requirement of the concurrence of three elements of criminality the functions of which are to require, respectively, a stated criminal result for which vengeance is demanded, the socially dangerous causative conduct which is in need of deterrence, and some manifestation of the offender's socially dangerous personality which indicates that he is possessed of an anti-social tendency or likelihood of recidivism. All of these human demands concerning the purpose of punishment must be satisfied before a human being can be punished for a given crime.

This classification of the elements of criminality furnishes an apt outline of the whole body of the substantive criminal law. General principles of criminality underlying all specific crimes can thus be classified according to the particular element of criminality involved in their application and according to the correlative theory of criminology which seems to underly them. Specific crimes can be dissected and their particular elements discussed in their proper place in the outline of result, conduct, and intent.

Thus, under the heading of “vengeance and the corpus delicti” we have seen that the attempt device and consent defense involve particularly the question of the presence of the requisite corpus delicti. Unless there is a sufficient criminal result of the kind involved in the crime attempted, there is no criminal attempt even though there be intent and socially dangerous conduct. Likewise consent may be defensive only when it does actually negative the presence of a corpus delicti of the instant crime.

Under the heading of “deterrence and causation” we have seen that there are properly classified the general principles of solicitation, conspiracy, vicarious guilt of accomplices and employers, and crimes of omission. The immediate question in all these is whether there has happened causative conduct, i.e., conduct which ought to be prevented from happening in the future. The objective is to single out such conduct so that the spectacle of the present punishment of it may frighten potential offenders from doing the same thing. The test for the application of punishment to such conduct is whether it is so potentially dangerous as to make it desirable of being discouraged in such a manner.
When we turn to the third topic, *i.e.*, "recidivism and mens rea," we find that the only positive general principle therein is the conceptual requirement of some proof of anti-social tendency in all crimes. But this differs from crime to crime, both in the nominal wording of the intent element, and in the extent and sort of anti-social tendency demanded to be proved. On the other hand, the criminal defenses involving the absence of intent are matters of the general principles underlying all crimes. These criminal defenses—and they represent *all* of the criminal defenses save consent—are matters of the negation of criminal intent, or of the absence of the requisite anti-social tendency or likelihood of recidivism. Many of these defenses give recognition to the principle that if one's conduct is definitely a reaction to a given stimulating factor, the conduct will recur only so often as the factor does, so that if the latter is but sporadic, so is the former. Other of these defenses recognize that one's lack of awareness of his conduct or of its physical or societal consequences may show that his physical conduct does not indicate sufficient anti-social tendency. The objective of all these defenses is to carry forward the recidivism policy of punishing only those who, in addition to the causation of a criminal result, actually manifest a dangerous personality, *i.e.*, a likelihood of recidivism.

When we look at the details of the specific crimes themselves, we find that it is opportune to dissect them and classify their components under the three headings of result, conduct, and intent. It so happens that, save for homicide and its question of proximate cause, the debatable details of the specific crimes fall only under the two headings of the corpus delicti and the criminal intent.

It leads to clearer thinking about the details of specific crimes to dissect them into their components and to think of the resultant elements as separate entities. Usually, in a given case, the debatable problem involves either the corpus delicti, or the intent, but not both. But should there be debatable problems of both, it is even more important to dissect the two propositions so that thinking about one shall not be confused by irrelevant considerations about the other.

Paradoxical though it may seem, the "general principles" approach to criminal law is really more specific than the "specific crimes" approach. The proper application of the general principles analysis requires more than merely treating of each specific crime by itself as would the specific crimes approach. The general principles approach calls for a finer dissection of each specific type of crime into its components.

When we speak of "general principles" we mean one of two things. One refers to those propositions of the substantive criminal law which apply equally to two or more different specific crimes. In that sense the attempt device, the consent defense, the principles of solicitation, conspiracy, vica-
rious guilt, crimes of omission, and the whole calendar of mens rea defenses are "general principles." In the other sense general principles are those fundamental considerations of criminology which underlie the component elements of the specific details of the separate specific crimes. Thus underlying the corpus delicti element in all specific crimes is the general principle that there cannot be conviction for any crime save where there has occurred the stated socially damaging occurrence for which public vengeance is demanded. The rationalization of specific decisions about the corpus delicti element of that or other crimes may aid in developing a technique for the prediction of the future solution of unsolved problems of the corpus delicti. Save for the proximate cause problem in homicide, the causation element of the various specific crimes presents no difficult problem. The required element of causation is present in all crimes, but there can rarely be a debatable problem about its application.

It is on the third element, that of mens rea, that the use of the general principles approach in understanding specific crimes comes best into play. The writer feels that it is impossible to understand the differing and confusing words inserted into criminal definitions on the intent issue without going back to the underlying principles of the whole topic of criminal intent. The general principles of recidivism are worked out in terms of punishing the one who does possess an anti-social tendency or likelihood of recidivism, of freeing the one who does not, and of scaling the punishment in terms of the relative degree of tendency. Thus understood, these principles aid in interpreting the nominal elements written into criminal definitions for the purpose of requiring some proof of intent, and in deciding whether for the given crime there must be proven any specific element of extrinsically proven intent.

It seems to the writer that the "specific crimes" approach of considering each separate crime by itself without respect to its inter-relation to the whole system of criminal law is a mistake. For while it is true, for instance, that a case deciding a point of attempted rape is hardly a precedent on another point of attempted larceny, yet an analysis of why the former case was decided on the basis of the particular element in question may help in developing a technique for predicting the decision on the latter point—so long as the element of guilt happens to be the same. Thus when criminal attempts are rationalized in terms of the extent to which there has happened a requisite corpus delicti, the relation between cases of attempted rape and attempted larceny seems more apparent.

The "general principles" approach, properly applied, i.e., the dissection of each crime into its component elements and a consideration of each of the particular elements in terms of the criminological theory underlying it, seems to lead to the better understanding of difficult problems of rationalizing decided cases and predicting the solution of novel situations. A proper con-
sideration of the elements of criminality in terms of their functional nature seems to aid in this process.

To avenge a past offense, to prevent future similar offenses by any person, and to prevent future criminality of any kind by the present offender, the law takes the step of punishment. The various detailed rules of criminal law have as their function the enforcing of these various attitudes toward societal treatment for crime. It is desirable that courts in interpreting the legal details should apply them in terms of the policy immediately sought to be served rather than in terms of legalistic logic or word-definition. The principal argument for the "general principles" approach is that it facilitates the integration of these functional considerations with the legal rules of guilt.