INSTITUTET
FÖR RÄTTSVETENSKAPLIG FORSKNING
[LXXXV]

GILLIS ERENIUS

CRIMINAL NEGLIGENCE AND INDIVIDUALITY

STOCKHOLM
P. A. NORSTEDT & SÖNERS FÖRLAG

Gillis Erenius

Criminal Negligence and Individuality

INSTITUTET
FÖR RÄTTSVETENSKAPLIG FORSKNING
[LXXXV]

GILLIS ERENIUS

CRIMINAL NEGLIGENCE AND INDIVIDUALITY

P A NORSTEDT & SÖNERS FÖRLAG
STOCKHOLM

B

[Oeb-c]

B: jur II
Straff
Bearb

ISBN 91-1-767071-3

Studentlitteratur ab
Lund 1976

To
My Parents

PREFACE

The research that forms the foundation for the present book was carried out primarily in the late 1960s and early 1970s. For various reasons publication has been delayed. Now that, eventually, it is a fact I wish to extend my sincere gratitude to all who have contributed in one way or another. In particular I wish to mention Professor Hans Thornstedt and Mr Richard Cox. Professor Thornstedt's inspiration and valuable advice has meant very much to me. The task of linguistically revising a manuscript not written in the author's mother tongue has naturally been a demanding one. This has been done in an excellent manner by Mr Cox, who has also given invaluable help in the proofreading.

My gratitude also goes to my wife and four children who not only have put up with an absent-minded and heavily engaged husband and father but also have unselfishly encouraged him.

My research has during the years generously been supported by the Swedish Institute for Legal Research (Institutet för rättsvetenskaplig forskning) and the Swedish Council for Social Science Research (Statens råd för samhällsforskning). The latter institution has also contributed liberally to the costs of printing. I gladly take the opportunity to acknowledge my respectful gratitude for this support.

February, 1976

G. E.

CONTENTS

ABBREVIATIONS

A.	Atlantic Reporter
A.B.A.J.	American Bar Association Journal
A. C.	Law Report Appeal Cases (House of Lords)
Ala.	Alabama Reports
All E. R.	All England Law Reports
Allen	Allen (Mass. 1861–1867)
ALR	American Law Reports Annotated
Am. Jur.	American Jurisprudence
Am. Rep.	American Reports
App. Div.	Appellate Division Reports, N. Y. Supreme Court
ARK. L. REV.	Arkansas Law Review
A. T.	Allgemeiner Teil
AUSTR. L. J.	Australian Law Journal
BAYLOR L. REV.	Baylor Law Review
BGB	Bürgerliches Gesetzbuch
BGE	Entscheidungen des schweizerischen Bundesgerichts
BGH	Bundesgerichtshof
BGH St	Entscheidungen des Bundesgerichtshofes in Strafsachen
BGH Z	Entscheidungen des Bundesgerichtshofes in Zivilsachen
Boyce	Boyce (Delaware 1909–1920)
BrB	Brottsbalken
B.R.C.	British Ruling Cases
BUFFALO L. REV.	Buffalo Law Review
Cal. App.	California Appellate Reports
Cal.	California Reports
CALIF. L. REV.	California Law Review
CAMB. L. J.	Cambridge Law Journal
CAN. B. REV.	Canadian Bar Review
Can. Crim. Cas.	Canadian Criminal Cases Annotated
Car. & P.	Carrington's & Payne's English Nisi Prius Reports
C. C. A.	County Court of Appeals
C. C. C.	Canadian Criminal Cases, New Series
Cl. & F.	Clark & Finnelly's Reports
CLEV.-MAR. L. REV.	Cleveland-Marshall Law Review
C. L. R.	Common Law Reports
COLUM. L. REV.	Columbia Law Review
Conn.	Connecticut Reports
Cox C. C.	Cox's Criminal Cases
C. R.	Chancery Reports
Cr. App. R.	Criminal Appeal Reports
Cr. L. Q.	Criminal Law Quarterly

DAR	Deutsches Autorecht
DEFENSE L. J.	Defense Law Journal
DICK. L. REV.	Dickinson Law Review
DJT-Festschrift	Hundert Jahre Deutsches Rechtslebens, Festschrift zum Hundertjährigen Bestehen des Deutschen Juristentages
D.L.R.	Dominion Law Reports
DUKE L. J.	Duke Law Journal
E.	Entwurf
Eng. Rep.	English Reports – Full Reprint
F.	Federal Reporter
F. and F.	Foster and Finlayson's English Nisi Prius Reports
FFR	Försäkringsjuridiska föreningens rättsfallssamling
Fed. Cas.	Federal Cases
Fla.	Florida Reports
FORDHAM L. REV.	Fordham Law Review
F. Supp.	Federal Supplement
Ga.	Georgia Reports
Ga. App.	Georgia Appeals Reports
HARV. L. REV.	Harvard Law Review
HD	Högsta domstolen
HovR	Hovrätt(en)
HR	Häradsrätt(en)
HRR	Höchstrichterliche Rechtsprechung
HRT	Høyesterett, Højesteret
IFRF	Institutet för rättsvetenskaplig forskning
Ill.	Illinois Reports
Ill. App.	Illinois Appellate Court Reports
ILL. L. REV.	Illinois Law Review
Ind.	Indiana Reports
Iowa	Iowa Reports
ISRAEL L. REV.	Israel Law Review
J. C.	Justiciary Cases
J. COMP. LEG.	Journal of Comparative Legislation
J. CRIM. L.	Journal of Criminal Law
J. CRIM. L. C. & P. S.	Journal of Criminal Law, Criminology and Police Science
JD	Juristens Domssamling
JFFT	Tidskrift utgiven av Juridiska föreningen i Finland
JW	Juristische Wochenschrift
JZ	Juristenzeitung

Kan.	Kansas Reports
K. B.	King's Bench
KG	Kammergericht
KrigsR	Krigsrätt(en)
Ky.	Kentucky Reports
KY. L. J.	Kentucky Law Journal
La. Ann.	Louisiana Annual Reports
La. App.	Louisiana Courts of Appeal Reports
LANC. L. REV.	Lancaster Law Review
LAW & SOC. REV.	Law & Society Review
L. R.	Law Reports
L. T.	Law Times
Mass.	Massachusetts Reports
Md.	Maryland Reports
MICH. L. REV.	Michigan Law Review
Minn.	Minnesota Reports
MINN. L. REV.	Minnesota Law Review
Misc.	New York Miscellaneous
Mo. App.	Missouri Appeal Reports
MO. L. REV.	Missouri Law Review
Moody C. C.	Moody's English Crown Cases
MDR	Monatsschrift für deutsches Recht
N. C.	North Carolina Reports
N. E.	North Eastern Reporter
Neb.	Nebraska Reports
NEB. L. REV.	Nebraska Law Review
N. H.	New Hampshire Reports
NJA	Nytt juridiskt arkiv
N. J. L.	New Jersey Law
NJM 1960	Förhandlingarna å det tjugoandra Nordiska Juristmötet i Reykjavik, den 11–13 augusti 1960. København 1963
N. J. Super	New Jersey Superior Court Reports
NJW	Neue Juristische Wochenschrift
N. C. L. REV.	North Carolina Law Review
NTfK	Nordisk Tidsskrift for Kriminalvidenskab
N. W.	North Western Reporter
N. Y.	New York Court of Appeals Reports
N. Y. L. Q. REV.	New York Law Quarterly Review
N. Y. U. L. REV.	New York University Law Review
N. Y. S.	New York Supplement
N. Y. STATE B. J.	New York State Bar Journal
OGH	Deutscher Oberster Gerichtshof für die britische Zone
Ohio App.	Ohio Appelate Reports
OHIO ST. L. J.	Ohio State Law Journal

OKLA. L. REV.	Oklahoma Law Review
OLG	Oberlandesgericht
Or.	Oregon Reports
P.	Pacific Reporter
Pa.	Pennsylvania State Reports
Pa. Super	Pennsylvania Superior Court Reports
PHIL. L. J.	Philippine Law Journal
prop.	proposition
Punishment and Responsibility	H.L.A. Hart, Punishment and Responsibility. Essays in the Philosophy of Law. Oxford 1968
Q. B.	Queen's Bench
RG	Reichsgericht
Rt	Norsk Retstidende
S. C.	South Carolina Reports
SchwZSt	Schweizerische Zeitschrift für Strafrecht
S. D.	South Dakota Reports
S. E.	South Eastern Reporter
sec.	section
S. J. C.	Shaw's Justiciary Cases
So.	Southern Reporter
SOU	Statens Offentliga Utredningar
SSt	Entscheidungen des österreichischen Obersten Gerichtshofes in Strafsachen und Disziplinarangelegenheiten
STAN. L. REV.	Stanford Law Review
StGB	Strafgesetzbuch
S. W.	South Western Reporter
SvJT	Svensk juristtidning
SvJT rf.	Svensk juristtidning rättsfallsavdelningen
SZ	Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen
Tex. Civ. App.	Texas Civil Appeal Reports
TEXAS L. REV.	Texas Law Review
TfR	Tidsskrift for rettsvitenskap
U	Ugeskrift for retsvæsen
U. CHI. L. REV.	University of Chicago Law Review
U. ILL. L. F.	University of Illinois Law Forum
U. PA. L. REV.	University of Pennsylvania Law Review
UTAH L. REV.	Utah Law Review
Va.	Virginia Reports
Wash.	Washington Reports

Wis.	Wisconsin Reports
WIS. L. REV.	Wisconsin Law Review
W. N.	Weekly Notes
VRS	Verkehrsrechts-Sammlung. Entscheidungen aus allen Gebieten des Verkehrsrechts
W. W. R.	Western Weekly Reports, New Series
YALE L. J.	Yale Law Journal
ZfRV	Zeitschrift für Rechtsvergleichung
ZSR	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft
ZVR	Zeitschrift für Verkehrsrecht
Österr. Rechtspr.	Österreichische Rechtsprechung

INTRODUCTION

In the last few decades the rapid development of technology has meant that the negligence issue, formerly a topic of relatively modest significance within criminal law, now occupies a place of great importance in that field. Although, in the majority of the penal codes of Western civilization, negligence is regarded as an exception from the main rule that requires intention on the part of the perpetrator and although, generally speaking, this exception concerns relatively few provisions, it is nevertheless a fact that in terms of numbers crimes of negligence are becoming more and more important. The possibilities of accidents in road traffic, as well as in other manifestations of technological expansion, are constantly increasing. In view of all this and the somewhat limited attention hitherto paid by legal writers to criminal negligence, it is my belief that this sector of criminal law belongs at least as much to the future as it belongs to the present.

In the most important negligence field, that of road traffic, extensive research has shown that 80–90 % of the accidents that occur are due to the human factor and are not caused by external circumstances.[1] It seems all too likely that this proportion will increase. In the modern Western society man is day by day confronted with actions having technical implications. As communications become more and more developed, people with different backgrounds are increasingly facing situations of action that are becoming more and more complicated. This is, I believe, a reason for paying more attention to the issue whether the negligent actor had the possibility of performing in accord with the standards accepted in the community. That the courts pay attention to this issue when meting out the sanction is probable.[2] A more interesting question from the point of view of principle is, however, whether the courts are taking individual elements – e. g. physical or mental disabilities on the part of the actor – into consideration in the negligence evaluation. This last issue is the main subject of this book.

I think it is appropriate at the outset to warn the reader that the analysis of this issue does not probe very deeply. The issue is so complex and complicated that only the principal features can

be outlined in the limited space of this book. This means that from a certain point of view the reader may find misleading generalizations, and in other respects will miss a discussion that in that particular context would have been essential.

Because of the ambiguity and uncertainty as to the terminology in this field in Anglo-American criminal law, it should be stated that when the term "criminal negligence" is used in this work it is only to make clear that the reference is to negligence in the field of criminal law.

In the first chapter I endeavour to give a brief outline of the emergence and development of a negligence concept in criminal law. I believe that a knowledge of the historical background will facilitate a correct understanding of the modern negligence concept. A main thesis put forward in this chapter is that negligence as it has developed in modern criminal law has, so to speak, grown up on the foundation of civil law. It has grown up from "casus" rather than from "dolus" and it has nothing to do with the concept of "Willensschuld".

In the following chapter – "The concept of criminal responsibility" – we are dealing with the analysis of the sentence "A is responsible for x". It is my belief that our understanding of the concept of responsibility in criminal law is apt to "taint" our views concerning the meaning of the subjective requisites intention and negligence. An analysis of the concept of responsibility seems to be basic for an understanding of these requisites. For the following analysis I have chosen to treat the concept as a "*ôû-tû* concept", wholly devoid of semantic references but with a particular function – a function of relation expressing the connection between the conditioning facts and the conditioned consequences. The concept therefore cannot be assigned a material content. This leaves us "free" to determine the content of intention and negligence, considering above all considerations of legal policy. Such a determination will reveal the differences in the character of the requisites. What is common to them is, primarily, only that, systematically speaking, they occupy the same place in the structure of crime. The distinction subjective – objective is of no value in this case. As is shown later in this

book, the negligence requisite, commonly regarded as subjective, is basically "objective".

The relation of criminal negligence to such concepts as *Schuld* and *mens rea* has been widely treated – and often mistreated – in legal writing. The issue of the content of guilt in criminal negligence has long been a matter of controversy in German criminal law. As to Anglo-American law, American courts in particular have tried to "qualify" negligence so as to suit the pattern of *mens rea* (guilty mind). What is sought is a material definition of the "guilty mind" behind negligence. Not infrequently, in their endeavour, the courts have by way of advertent negligence reached the domain of recklessness and thereby left the area of negligence. It therefore seems important to analyse the meaning behind *mens rea* (guilt) and confront the result with the concept of negligence as it has developed in criminal law; this task is undertaken in Chapter III.

In Chapter IV the principle of legal policy called the conformity principle is delineated and the question of the basis for this principle is examined.

Regarding negligence, psychological criteria are moved to the background. Negligence is primarily a normative requisite. It is argued that this does not mean that psychological elements are of no significance in the negligence evaluation. But these elements are of no avail as a basis for the punishability of negligence. Instead, considerations of prevention and regard to the conformity principle are essential ingredients in this respect. The analysis in Chapter V of the concept of negligence ends with arguments for a three-way approach to the evaluation of negligence. This approach is then confronted with continental European and Anglo-American legal writing on this topic.

It is my belief that the concept of negligence must be determined in accordance with phenomena that are in reality of account in legal life. This is the overriding principle when in Chapter VI we examine more closely the three-way approach under the headings of "the comparison", "individualizing elements" and "individual elements". The chief stress is laid upon the last-mentioned category. We here meet a heterogeneous group of elements, the delineation of which calls for fairly extensive

casuistics. With the casuistic decisions as the point of departure I have endeavoured to form principles of a reasonably general scope. In the last chapter – the analysis of case law concerning individual elements – I have therefore systematized the case material so that the cases are arranged in certain groups and a completely casuistic approach is avoided.

1. See *Jescheck*, Aufbau 6.
2. See *Engisch*, Konkretisierung 287–289.

I

in Numæ legibus cautum est, ut si quis imprudens occidisset hominem, pro capite occisi agnatis eius in contione offerret arietem.

Servius Sulpicius in Vergil. ecl. 4,43.

For a correct understanding of the negligence concept and as a basis for its analysis I believe a knowledge of the historical development of the concept to be essential. I therefore propose at the outset to outline the development up to the 19th century of criminal negligence primarily in Roman, Germanic, Medieval Italian, English, German and Scandinavian law. This development is closely related to the historical growth of the guilt (*Schuld*) issue. Since we are thus dealing with a far-reaching question on which a great deal could be said, it is clear that we have to limit the scope of our inquiry. Our aim will be the more restricted one of making a brief survey with the aid of the research that has taken place up to now of the emergence and development of a negligence requisite.

1. There are several indications that in ancient Greece a distinction was made between intentional and unintentional acts. Within the latter group of actions, however, no difference was made between negligence and acts by misadventure.[1] This appears most clearly regarding cases of homicide.[2] The authority of Athenian courts to decide homicide cases depended on whether the act was intentional or not.[3] If the death was caused intentionally, the Areopagus had jurisdiction, whereas in cases where the homicidal act was unintentional, the suspect had to be brought before the court of Palladion.[4] Having regard to this, and not least because the sanction for negligent homicide was considerably milder than that for intentional crime, it might have been expected that a distinct dividing line was drawn between intentional and unintentional acts. This does not, however, seem to be the case in the relevant extant statutes.[5] Some guidance could be found in utterances by *Aristotle*[6] and *Demosthenes* in Ariston's speech *Against Konon.*[7]

Aristotle says: "Whenever a person hits another or kills him or does anything of that sort with no previous deliberation, we say that he did it unintentionally, on the ground that intention lies in deliberation. For instance, it is said that on one occasion a woman gave a man a love philtre to drink, and afterwards he died from the philtre, but she was acquitted on the Areopagus, where they let off the accused woman for no other reason than that she did not do it deliberately. For she gave it to him for love, but she failed to achieve this aim; so they decided it was not intentional, because she did not give him the philtre with the thought of killing him. So here the intentional is classed with the deliberate." 7a

Artistotle's words are of great interest because they indicate that for him the dinstinction between intentional and unintentional acts has nothing to do with vengeance and atonement but that in addition to the perpetrator's act his "psychological" attitude to the crime is to be taken into consideration.[8]

If we are thus able to find evidence that the guilt issue played a not insignificant role in Greek criminal law and a criminal law contrasted with a pure "atonement law"[9] is at least discernible, there is nevertheless nothing to suggest that negligence is treated as an independent subjective requisite in addition to intention.[10]

2. In the earliest Roman law, negligence is not recognized as a part of the criminal law, *crimina publica.* The harm or effect caused by *casus* or *fortuito* was looked upon as a misfortune decreed by the indignant gods. In this case it was a matter of atonement between the man involved and the gods.[11] The development of Roman law from the time of *the Law of the Twelve Tables* to *the Justinian law* is, however, of great interest in this connection, primarily because of the influence this development has exerted on modern criminal law through medieval Italian and Canon law.

The Roman law distinguishes early between "guilt" and "misadventure" (*casus*). In the earliest period the law achieves this division by working with particular, casuistic, descriptions of the unlawful acts.[12] Generally, however, the criminal-law provisions of the Law of the Twelve Tables express what in German legal writing is called "Erfolgshaftung", i. e. that the person responsible stands in a certain, law-given causal relation to the harm in issue, without any requirement of "guilt". This is true without exception regarding the crime of causing injury to another, while concerning homicide and arson the law distinguishes a less blameworthy act. Here we find an influence from the *leges regiae* regarding homicide of the 5th century B. C.[13]

"Si qui hominem liberum *dolo sciens* morti duit paricidas esto", "in Numæ legibus cautum est, ut si quis imprudens occidisset hominem, pro capite occisi agnatis eius in contione offerret arietem".[14]

Homicide was thus divided into intentional and unintentional homicide. The Law of the Twelve Tables does not reach as far as

general consideration of the perpetrator's mind.[15] Any working with the guilt concept and with the concepts of *dolus* and *culpa* is unknown to the code.[16] It is true that the term *culpa* is mentioned in it, but the term serves as a designation for *casus*.[17]

Concerning the civil law of the Law of the Twelve Tables, it does not in this connection go further than to distinguish between common human responsibility and circumstances not conditioned by human action – between *dolus* and *culpa* on the one hand and *casus* on the other. Both in criminal and civil law the determination of the concepts *dolus* and *culpa* did not belong to legislation but to the scholarly interpretation of the law.[18]

In Classical Roman law we find endeavours towards a complete separation of *dolus* and *casus*. The distinction is made with the aid of the concept of will. If an act of volition is turned towards an effect that the law disapproves of, *dolus* is present. Up to the time of the Emperor Hadrian the concept of *dolus* in Roman criminal law is identical with the concept of guilt. In principle, every effect that was not covered by the will was assigned to *casus* and did not incur punishment.[19] This involves a considerable difference as compared with the Law of the Twelve Tables. The development took place under the influence of Roman philosophy, which in its turn was influenced by Greek thought. The Stoics had accepted Aristotle's doctrine of the will as a criterion of the ethical evaluation of the act. In the absence of will, guilt could not be present. This will was called *dolus*. The criminal-law concept of *dolus* was understood as a will directed towards an unlawful effect.

Hence the "guilt concept" of Roman law did not embrace different forms of guilt. Gradually, however, exceptions from this "guilt concept" were made and punishment was meted out even where only *casus* was present. From case to case acts were isolated from *casus* – acts in respect of which freedom from punishment was considered undesirable from a criminal-policy point of view.[20] Cases of punishing of such acts of negligence had the character of exceptions from the main rule and negligence did not acquire anything like as much importance in criminal law as in private law. Punishment was not meted out

within *crimina publica* in Roman law for milder forms of negligence.[21] Only *culpa lata* was criminally relevant.

It is usually maintained that the emergence from *casus* of this form of negligence took place at the time of Hadrian.[22] But this view is not undisputed.[23] In German legal writing there has also been a discussion whether *culpa lata* was a more serious form of inadvertent negligence or was instead advertent negligence.[24] This anachronistic discussion must necessarily be fruitless, simply because the distinction in question, an innovation of German legal writing of the late 18th century and early 19th century, did not appear at all in Roman law.[25] On the contrary it may be discussed whether in late Roman law negligence had ever developed into a form of guilt. In the Digesta expressions concerning *culpa lata* relevant to the criminal law seem to be very rare.[26] Anyhow the concept of *culpa lata* does not cover what is meant by negligence in modern criminal law. And it should be noted that, when relevant to criminal law, negligence in Roman law grew out of *casus* and was not considered a part of *dolus*.

3. "Eine Theorie der Verschuldung (culpa) ist dem germanischen Recht ursprünglich fremd gewesen", says *Wilda* in his work "Geschichte des deutschen Strafrechts".[27] At the time of the conquests and settlement in Roman territory of the Germanic peoples, the stand and development of these peoples was that of the family community. The highly developed culture of the Romans was alien to them. This was certainly the case concerning law. The "guilt doctrine" of the Germanic legal systems had reached a stage of development comparable to that in the Law of the Twelve Tables. It had not left the stage of "Erfolgshaftung".[28] The question whether the act was unintentional was one which Germanic law answered by using "objective" and external criteria. It was presumed that the person who had brought about certain typical delicts had wanted to act in the way he had in reality acted.[29] The law did not ask about will. From the effect, certain inferences were drawn concerning the accused's attitude towards the act. In the harm-doing result the injuring will was hidden.[30] Using this external technique, a difference was made between the intentional and unintentional acts. The latter were

called "Ungefährwerk", a term that included both negligence and misadventure (*culpa* and *casus*) and corresponded to the term *casus* in Roman law. Any distinction between the three concepts *dolus, culpa* and *casus* was then unknown. Such a distinction belonged to a considerably later stage of development.[31]

What we call negligence was thus a part of *casus (Ungefährwerk)*. And as we have seen, the decision concerning what should be counted as *Ungefährwerk* was something that the law tried to express by certain typical external elements. But, similarly to the development in Roman law, we find in the Germanic laws of the 6th and 7th centuries the beginning of a negligence concept. From the usually non-punishable *Ungefährwerk* exceptions were made in particular situations, so that particularly stated acts were punished in spite of their character of *casus*. This development took place under strong influence from Roman law. Hence in the Roman-law-inspired codifications called *Lex Visigothorum* and *Lex Burgundionum* negligent homicide was punished.[32]

4. Knowledge of the heritage of English criminal law from the period before *Bracton* is, it seems, only fragmentary. We shall therefore not attempt to do more than to point out some facts, relevant to the development of a negligence concept in English criminal law.

We must bear in mind that the old Anglo-Saxon community, with its Teutonic heritage, was a "family community" – a community where a state power of modern type was weak or nonexistent. In this "family community", the idea of revenge, materialized in the feud, was deeply rooted.[32a] Because the fact is easily overlooked, it is also necessary to stress that the primitive system of law does not work with technical terms and that it knows no distinction between the law of crime and the law of tort.[33]

In a community where the feud is prevalent, the harmdoing is looked upon from the point of view of the injured person. Liability for the act has nothing to do with the subjective attitude of the harmdoer. It is exclusively founded on the harmdoing act.[34] In principle, the same approach prevails later on when endeavours are made to put a stop to the feud by using

compensation (*bot*) as bringing about an alternative (*wer*) to the feud.

When the main object of the law is to suppress the blood feud by securing compensation to the injured person or his kin, it is to the feelings of the injured person or his kin that attention will be directed, rather than to the conduct of the wrongdoer.[35]

This idea seems to have dominated "criminal law" up to the 12th century.[36] The rule was that a man acts at his peril.

Even if this harsh rule prevailed in the Anglo-Saxon codes, we may find a tendency to pay attention to the culpability of the perpetrator. This was undoubtedly due to ecclesiastical influence. The Church naturally looked primarily to the state of mind of the individual sinner.[37] Thus *Walker*[38] mentions that a manuscript version of the 10th century laws of AEthelred contains this sermonlike passage.

. . . And if it happens that a man commits a misdeed involuntarily or unintentionally, the case is different from that of one who offends of his own free will, voluntarily and intentionally; and likewise he who is an involuntary agent of his misdeeds should always be entitled to clemency and better terms owing to the fact that he acted as an involuntary agent.[39]

AEthelred's successor, Canute, also laid emphasis on the importance of the mental element.

. . . Likewise, in many cases of evildoing, when a man is an involuntary agent, he is more entitled to clemency because he acted as he did from compulsion.

And if anyone does anything unintentionally, the case is entirely different from that of one who acts deliberately.[40]

It must be noted, however, that the laws do not mention circumstances of complete exemption from liability. The circumstances are mentioned as justifying leniency.

5. In northern Italy during the 11th and 12th centuries we find a revival of interest in Roman law. The *Corpus Juris Civils* and particularly the *Digesta* became the object of intensive research. The leading legal scholars of that time in Italy, the so-called *Glossators,* did not interest themselves in the historical development of the *Corpus Juris Civilis* or in applying an historical method in their research. They considered the scholarly task to be scholastic, that is, they wanted to illuminate and clarify the meaning of an authoritative text. The Glossators' work consisted

primarily of an interpretation – a philological-exegetical explanation – of the Roman law. Hence it is no wonder that we find no further development of the negligence concept as a result of their work. So in principle the concept of negligence did not at this stage in criminal law go further than Classical Roman law. Regarding civil law, it seems as if the Glossators adhered to the division of negligence into *culpa lata, levis* and *levissima* of the *lex Aquilia. Culpa lata* was the highest degree of negligence – a kind of "gross negligence".[41]

Not until the later half of the 13th century, through the work of the so-called *Postglossators* (also called Commentators or Conciliators), did a significant development of the negligence concept take place. Their work as arbitrators and advisers resulted in a rich literature. Roman law, as it was interpreted and explained by the Glossators, was supplemented with Italian law in fields where the *Digesta* lacked rules and was also mixed together with Italian rules of law. This was true of criminal law, where the Postglossators aimed at satisfying the actual needs of the community. Thus the method of the Postglossators was far removed from the Glossators' scholastic approach and in their legal writing they treated Roman-law texts fairly liberally. Their importance for the future development is great, for the extensive reception of Roman law that later took place in all Europe began from their works.

Cinus considered acts intentional even if the will did not comprise the bringing about of the unlawful effect; it was sufficient that the perpetrator had knowledge of the risk of the effect.[42] *Baldus* regarded *dolus* as the highest form of guilt, *culpa latior (dolus presumptus)* as an intermediate form, and *culpa lata, levis* and *levissima* as the least serious forms. ("Latior culpa est medium inter haec duo, dolum et latam culpam et de utroque participat").[43] The concept of "culpa latior" that embraced the element of knowledge of *dolus* included the concepts of *dolus eventualis* and *advertent negligence* of modern law. Cases that we regard as advertent negligence were not looked upon as forms of "culpa".[44] *Culpa lata, levis* and *levissima* seem to correspond to modern law's inadvertent negligence.[45] It seems that these three forms of *culpa* were not all sufficient ground for criminal

liability. As a rule the punishability was limited to *culpa lata.*[46] Concerning *culpa levis* and *levissima* Cinus says: "Et his duobis utimis casibus non punitur criminaliter, sed civiliter tantum."[47]

As distinguished from Roman law, the Postglossators, as we have already mentioned, separated from the concept of *casus* certain practical cases that were deemed punishable. Negligence was more leniently punished than an intentional act, and misadventure (*casus*) was free from punishment.[48] This gave rise to a demand for a demarcation of *culpa* from *casus*. The judging whether the accused had acted with sufficient care was done by utilizing an objective standard.[49] In this connection Italian medieval law used practical and illuminating examples but also formulations like "deviatio incircumspecta ab ea diligentia, quam homines diligentes eiusdem conditionis adhibere solent" or "imprudenter et vive proposito facere".[50] Here we discern at an early date the question discussed in German law in modern times whether negligence is "Verstandesschuld" or "Willensschuld". In this connection it is of interest to mention that from Italian medieval law there also emanates the doctrine that negligence is generally punishable, that is to say concerning all acts in a penal code.[51] This doctrine was accepted by *Carpzov*[51a] and exerted a not insignificant influence on German criminal law.[52]

It is important to note that the outline above indicates that the concept of negligence *(culpa)* as it has developed in modern criminal law has, so to speak, *grown up on the foundation of civil law.* The concept has not grown up from *dolus* but rather from *casus.* It has nothing to do with the concept of "Willensschuld".

When mentioning the great influence of the Postglossators on European law, Canon law should not be forgotten in this connection. During the Middle Ages, Canon law was so influential that its importance for the Western European legal systems surpassed that of Roman law.[53] Among the judicial innovations that should be assigned to Canon law we find the guilt concept in criminal law.[54] For the development of the negligence concept the doctrine "versari in re licita et illicita"[55] of Canon law was also of great importance.[56]

6. It is true that medieval German criminal law is a public criminal law. The state is, however, too weak to meet the need

for a "subjective" penal sanction. We can still trace the "feud justice" of bygone times. *Löffler* calls the medieval criminal law a "verstaatliches Racherecht".[57] It is true that just as little as in the laws of the Germanic tribes is it a question of unrestricted revenge.[58] But through the influence of Christianity the Mosaic principle of talion was beginning to make itself felt. This is, of course, most strikingly the fact regarding sanctions. But this development, which undoubtedly must be regarded as a serious backward step, is certainly important also for the development of the negligence concept. On the whole, the criminal law during the centuries before the reception of Roman law had the impress of uncertainty and contradiction. The concept of "Ungefährwerk" in the form we have met it in the laws of the Germanic tribes is in principle unchanged. The following discrimination, which is mentioned by *His*[59] and taken from *Groninger Stadtbuch* of 1425 illustrates this: "If, while a man is sitting on the draught hourse or walking by the side of the cart, the cart runs over another person, the deed is considered as *Ungefährwerk*: but, if he be sitting or standing in the cart, he must expiate the deed as an intentional act."[60]

In German law the "codes" *Sachsenspiegel,*[61] *Schwabenspiegel*[62] and *Klagspiegel*[63] are important and must be given attention. The term "Schuld" first appears in German law in Sachsenspiegel as meaning the mental attitude of the perpetrator.[64] It is here mentioned that the actor has "ane sine scult" brought about the effect.[65] Schuld here contrasts Zufall (casus): "von ungelucke unde ane sine scult".[66] Of particular interest is the concept of "warlose" that is a part of the code's "Zufall". "Warlose" is often interpreted to mean inadvertent negligence.[67] As is the case with *Zufall,* the "warlose" actor is not punished but damages are imposed.[68]

Like the Sachsenspiegel, the Schwabenspiegel[69] does not penetrate into the issue of the mental attitude to crime. A distinction between advertent and inadvertent negligence is alien to the codes. To some extent the Schwabenspiegel represents an even more primitive stage. It is true that there exists a sharp distinction between negligence and *casus,* and *casus* is not punishable. But the negligent act is equated with that of

intention.[70] For "Schuld" not only knowledge ("Wissen") of the effect is important. There should also be present an unlawful will ("bösen Willen"). If the actor had no knowledge of the effect and if a harmful effect was caused, the same punishment was meted out as if the actor had wanted the effect. It was sufficient that a dangerous situation was brought about.[71] In chapter 182 of the code we read:

Ramet ein man eins vogels uf einem boume. oder uf einem wege. da nut luite phliget zegenne allichen mit werfenne. oder schiezzenne. und triffet er einen menschen. und stirbet er da von. da verwirket nieman sinen lip mit noch sinen gesunt. und rueffet man in an. daz er weder werfe. noch schiezze. und siht er das mensche. und mag man in dez uber ziugen selbe dritte. er ist an dem menschen schuldig. und wen sol uber in rihten alse ob er den menschen mit siner hant ertoetet hette. geschiht es aber uf einem wege. da die luite alle zit phlegent ze genne. da wird er schuldig an den menschen. wan swa die luite gant. oder ritent. da sol nieman nuites varen. mit werfenne noch mit schiezzene.[72]

Klagspiegel[73] indicates a step forward. Here we find a more elaborate treatment of negligence.[74] Concerning the "unbedacht"-caused effect the code distinguished two forms of non-punishable situations:

Hat er aber etwas gethon unn auch volendet / und hat sollichs nit gedacht zuo thuon / als der der ein menschen ertoedt / ist dann der selb ertoedter ein kindt / infans in latein / oder furiosus ein thore oder narr / so sol das malefitz ungestrafft bleiben. Auch wo einer an eim end uff eim baum este stymmelt unn abhawet / da kein gemeiner unn sunderlicher füsspfad were / unn so einer da geschediget würt / solichs bleybt auch ungestrafft. Und auch in andern casus etc. Ist er aber zuo seiner verstentnüss kommen / unn ist gesundts gemuets / geschicht dann das übelthat in trunckener weiss / so sol sollichs guetlicher gestrafft werden. Ist das criminaliter die sach geuebt würt /unn auch wann sollichs geschehe durch geylhet / oder ein boess exempel braecht oder maecht / so sol auch leichtlicher gestrafft werden.[75]

The distinction between punishable and non-punishable situations was made in consideration of the actor's imagining the possibility of the harmful effect. If the actor had acted "sunder per lasciviam durch geylheyt" or if the act was "ein boess exempel" he was punished with a less severe penalty. If no negligence could be found, the actor was not punished.[76] The term "geylheyt" was used to identify those cases that we should term negligent.[77]

7. Compared with German law it is a fact that English criminal law has been and still is reluctant to work with general concepts regarding the subjective side of the crime. This historically determined characteristic of Anglo-American criminal law has caused difficulties that, owing to the tremendous technological development of the 19th and 20th centuries, have become more obvious in modern times. In particular, the lack of a general negligence concept has been a great disadvantage. Concerning the subjective requirements, the contents of these have been developed within the separate treatment of the particular crime. Hence, the development of negligence in Anglo-American criminal law is closely related to the crime of homicide. The concept seems to have developed from a limitation on the defence of misadventure regarding homicide to a more or less independent concept of imputation.

The period between the time of *Bracton* and the 17th century does not, to judge from the available literature concerning the period, seem to have led to important developments regarding the negligence concept. It is true that certain types of homicide had become absolutely justifiable.[78] In the case of all other killings the perpetrator was liable criminally.[79] There was no differentiation between intentional and negligent homicide in the early common law.[80] The killing of a man was a crime, regardless of the nature of the act.[81] The person who committed homicide by misadventure was guilty of a crime.[82] The offender could, however, obtain a pardon from the King.[83] The procedure to be followed in such cases was regulated in the Statute of Gloucester.[84]

In Bracton's writings we find an endeavour to distinguish different types of homicide. He bases his division on the "lawfulness" or "unlawfulness" of the act and he maintains that the perpetrator, if his act was lawful, cannot be blamed except where he did not show "due diligence".[85] It must, however, be stressed that Bracton's work on this matter was not representative of the law of his day. He was influenced by the canonists and particularly by *Bernhard of Pavia.*[86] But it is clear from the subsequent development of English criminal law that Bracton's

stressing of the mental requisites of criminality was to exert a great influence on the further evolution of criminal law.

8. As with the oldest Germanic law, so also in connection with the earliest Nordic law one cannot speak of a criminal law in a modern sense but rather of an "atonement law".[87] The rules of the Swedish Provincial Laws should be viewed against the background of the fact that only a short time before the recording of the laws the provincial communities were still controlled by the old families. The institution of the feud, which may still be traced in the provisions of the Provincial Laws, was not officially abolished until the first part of the 14th century. The ancient feud is instead replaced by a system of sanctions controlled by the community. At the time of the recording of the Provincial Laws the old "atonement law" is in conflict with a criminal law in a more modern sense.[88]

Responsibility was based on the so-called "Erfolgshaftung". It was sufficient that the accused stood in a certain, law-given causal relation to the harm in issue; "guilt" was not required.[89] In Nordic medieval law we find examples in this direction.[90] This harsh view gradually had to give place to a more humane approach. In connection with the influence of the increasing strength of the power of the king and also to a great extent owing to the influence of Christianity, the ancient "Erfolgshaftung" was gradually replaced by the idea of guilt.

In the medieval Swedish laws the difference between intentional and unintentional violation of law is generally realized. Here we may trace an influence from Roman and Canon law. In the Germanic law area, this influence seems to have been least strong in the Nordic countries. With the then prevailing procedural system and particularly the formal law of evidence, it was not possible in the individual case to decide in the light of the particular circumstances whether the act was to be judged intentional or unintentional. The distinction made in the Provincial Laws between "viljaverk" and "vådaverk" *(Ungefährwerk)* was thus not equivalent to what in modern law is meant by *dolus* and *culpa.* Under the concept of "vådaverk" *(vaþi)* there was assigned, besides *culpa,* also *casus.*[91] The issue whether "våda-

verk" was at hand was decided by recourse to particular external critera mentioned in the code. "Vådaverk" may be regarded as types of action distinguished in the law that by their character have been regarded by the legislator as punishable. The formal "character of guilt" is obvious in the following example from the "Manhelgdsbalk"[92] of *Upplandslagen.*[93] Under III in this code we read:

Nu hugger någon efter en man, en annan kommer i vägen och får därav bane; eller om någon hugger två män på en gång i samma hugg, den ene bakåt och den andre framåt, då skall det vara i vådaverksbot, som göres bakåt, och det i viljaverksbot, som göres framåt, i fråga om sår.

– Now, if someone aims a /sword/ blow at another and a third person gets in the way and thereby suffers mortal injury; or if someone strikes two persons in the same stroke, one stroke behind and the other before, then the backward stroke shall be fined as for an unintentional act, the forward as for an intentional act, in regard to the /death-/ wound.[94]

The formal character of the judging of an act as "vådaverk" is further clearly visible under IV in the same code:

Nu blir en man dräpt i vådadråp genom hugg bakåt eller genom handalöst vådaverk; då är det vådaverk, som båda säga vara vådaverk, . . .

– Now, if a man is killed in homicide by misadventure through a backward /sword/ stroke or through an unintentional act not done by hand; that is an unintentional act, which both /parties/ say to be so, . . .[95]

In the Provincial Laws one finds mentioned particular cases – what we may call "typical negligence cases" – that are punished more severely than are "vådaverk" in general. Certain formulations, furthermore, carry our thoughts involuntarily to a modern negligence concept. In the "Manhelgdsbalk" of Upplandslagen, under VI, it is said:

Finnes brunn i en gård, den skall man täcka och omgärda. Faller en man i och får bane därav, han är gill till vådaverksbot, sju marker. Äga fler brunnen, böte den som försummar och ej den som bygger.

– If there be a well on a farmstead, it must be covered and fenced in. If a person falls into it and thereby suffers mortal injury, he is entitled to compensation as for an unintentional act, namely seven marks. If several persons own the well, the one who is neglectful shall be fined, not the one who has built the well.[96]

The code does explain why the act is assigned to "vådaverk", viz. neglect of a duty to put up a fence. As distinguished from other exemplifications, the responsibility does not here have a

character of "strict liability". I believe we can see in this example an incipient tendency towards a responsibility based on negligence.

We may here compare the provision from *Dalalagen,*[97] the "Manhelgdsbalk", under XXVI: "Har någon gamla hus på sin gård och ej vill vårda dem eller laga dem, faller det ner på en man och får han bane därav, då skall han gäldas med . . ."
– "If someone has old buildings on his farmstead and will not take care of them or repair, and something falls upon a person and he thereby suffers mortal injury, then the owner shall pay . . ."[98]

In the construction of the above-mentioned provision from Upplandslagen, as well as considerable parts of the rest of the code, it seems obvious that Canon law has served as a model.[99]

In Dalalagen, "Kyrkobalken",[100] under V, it is provided:

Brinner kyrkan på grund av vanvård, (aff wangömu), böte klockaren fyrtio marker.
– If the church catches fire owing to neglect, the sexton shall be fined forty marks.[101]

We note the brevity of the provision. If it is compared with provisions of Upplandslagen and *Södermannalagen*[102] it is noticeable that the casuistic description of the crime typical of the time is lacking. The provision from Dalalagen is hereby given a more general scope. It is worth noticing that the provision only prescribes liability for neglect *(culpa)*, which expresses a later view of legal matters according to which harm caused by accident (misadventure) does not lead to a criminal sanction.[103]

In Upplandslagen we meet expressions like "whether it happened by misadventure or wilfully".[104] According to *Holmbäck,*[105] "viljaverk" was present if the perpetrator had "willed" the effect that was brought about. Yet from this one should not be led to believe that the law, when separating "viljaverk" and "vådaverk", consistently used the concept of volition. For this the procedural system was too underdeveloped. If, then, the procedural system of the medieval Nordic law made it impossible to inquire into the actual guilt, some writers have chosen to see, in the endeavours of the medieval codes to limit the responsibility for harm that one from experience should take care not to cause, an idea of guilt – a presumption of *culpa.*[106] To talk about "presumed negligence"[107] and "an idea of guilt even if in

a rigid and imperfect shape"[107a] seems to me not to give a correct idea of the concepts of "viljaverk" and "vådaverk". One must all the time keep in mind that the oldest Nordic law, as it is found in Sweden in the Provincial Laws, did not know any concepts of intention and negligence that can be considered of use from the point of principle. This is also true regarding the comparatively highly developed Icelandic *Grágás.*[108]

Although concerning the gradual growth of the doctrine of imputation the development in Sweden achieved by the coming into being of our Provincial Laws must be considered of essential importance, the idea of individual guilt first took root in the Swedish code of 1734.[109] The growth of a doctrine of guilt in the modern sense occurred under strong influence from Christianity through Canon law and late Roman law. The concept of *culpa* of Canon law as it developed from Justinian law[110], but also and above all the negligence concept of Italian law and its influence on *Carolina*[111], played an important role in this connection.[112] Rules concerning negligence came to be more important during the century preceding the codification of 1734.[113] Regarding, for example, the extremely common shooting accidents and well accidents, a pure "casus liability" prevailed in spite of the more modern rules in, above all, Upplandslagen. During the 17th century, however, a clear reaction against this occurred. To a great extent the courts either acquitted the accused or simply avoided pronouncing a sentence.

9. A rather important step forward is achieved by the enactment of the two codes *Constitutio Criminalis Bambergensis*[114] and *Constitutio Criminalis Carolina.*[115] Here, under strong influence from Italian and Roman law, the "Erfolgshaftung" for the part of German law has in principle given way to the "Schuldhaftung".[116] The "Ungefährwerk" of the medieval laws has in principle been abandoned and for punishment there is required a mental relation between the act and the perpetrator. *Carolina* in many different ways expresses the idea of guilt.[117] It does not, however, give a definition of the concepts *Schuld, dolus* and *culpa.* The terminology used is far from uniform.[118] The apprehension of guilt must be abstracted from the particular provisions. For the concept of negligence it is essential to note

that from the beginning of the 16th century a distinction is made between negligence and misadventure (culpa and casus).[119]

Carolina, which only regarding a few specifically mentioned acts takes measures against negligent acts, mentions in art. 146 that the act is punished if it is committed "vngeuerlich auss geylheyt oder vnfürsichtigkeyt, doch wider des thatters willen".[120] "Geylheyt" and "vnfürsichtigkeyt" seem to correspond to the culpa lata and levis of the Roman law. Carolina tried to make clear where the boundary between the punishable and the non-punishable lay by using typical cases of casus from the *Digesta.* An example of causing death by misadventure would be where a barber in his shop "als gewohnlich zu Schern ist", is, while attending to a customer, pushed by a third person in such a way that he cuts the customer's throat – or where a hunter is shooting "inn eyner gewohnlichen Zilstatt" and somebody runs into the line of fire or a shot is fired unexpectedly and in this way somebody is hit. If, however, the barber meets with such an accident when on the street or otherwise he "an eyner vngewohnlichen statt" practises his profession or if it happens to the hunter when he shoots "an eyner dergleichen vngewohnlichen statt, da man sich versehen mocht dass leut wanderten" or "hielt sich der Schütz inn der Zilstatt vnfürsichtiger weiss", then culpa is present.[121] What then according to Carolina is regarded as negligence is a mistake that could have been avoided and has been caused by want of care – what we would call inadvertent negligence.[122] Advertent negligence, then, would be an act done "auss geylheyt doch wider des thatters Willen".[123] As pointed out by *Himmelreich,* the code made a clear distinction between dolus and culpa and negligence as opposed to dolus was developed from the concept of casus.

Trotz Fehlens einer festen Terminologie in der Schuldauffassung der Karolina fand sich hier als durchgehendes Kriterium für die Strafbarkeit einer Handlung die unberechtigte Herbeiführung einer gefährlichen Sitaution durch einen verständigen Menschen. In jedem Einzelfall wird die Persönlichkeit des Täters sowie die psychische Einstellung berücksichtigt und nach einem schuldhaften Verhalten gefragt. Das eine zeigt sich als eine Ableitung aus dem dolus (böswillige Gesinnung) des Römischen Rechts, das andere als aus dem casus (unvorsichtiges Verhalten) hervorgegangen. Beide Verhaltensweisen sind vollkommen selbständige Schuldformen, die nur darin übereinstimmen, dass ein verständiger Mensch unberechtigterweise eine gefährliche

Situation herbeigeführt hat. Die Fälle, die wir heute unter die Fahrlässigkeit einordnen, decken sich ungefähr mit jener zweiten Schuldform.[124]

The 17th and 18th century German criminal law did not bring about a significant development of the negligence concept. The works by *Harpprecht, Carpzov* and *Böhmer* did not help significantly to clarify the psychological phenomenon of negligence.[125] Culpa was in practice significant primarily regarding homicide and careless handling of fire ("Brandstiftung"). The concept remained tainted by an antiquated casuistic style right up to the late 18th century.

"Die Aufklärungszeit bedeutet im Strafrecht die endgültige Abschüttelung des Mittelalters und die Heraufführung der Gegenwart" says *Hippel* in his work from the beginning of the present century.[126] The increased interest in criminal law due to the Enlightenment, an interest which concerned both theories of punishment and questions of criminal sanctions, gave an impetus to research in all areas of criminal law. Regarding the doctrine of guilt, German criminal law shows towards the end of the 18th century the beginning of a considerable research contribution that gave rise to abundant legislative activity. In line with the demands of the Enlightenment for exactness in the criminal legislation and for leaving only a minimum to the judge's discretion, we find endeavours by the legislator to define in the codes the content of the subjective requisite of crime. In *Allgemeines Landrecht für die Preussichen Staaten,*[127] we find in the general part a definition of negligence. The person acts negligently who does not foresee "die gesetzwidrige Folge seiner Handlung", but "bei gehöriger Aufmerksamkeit und Überlegung hätte voraussehen können".[128]

The considerable research carried out in the late 18th and early 19th centuries by German criminal lawyers had a tremendous influence on the development of the criminal negligence concept in Continental European law, and even in Scandinavia its influence has not been negligible. A "sacred" concept has from the outset been that of "Schuld". The search for the very nature of Schuld as a main concept under which the concepts of intention and negligence should be grouped has, however, been rather unfortunate, especially for a realistic apprehension of

negligence. We often find discussions concerning the content of negligence because this is required by the nature of Schuld.[129] This, as it has turned out to be, unfruitful approach has led to an analysis of negligence within the framework of intention. The historically-determined basic separation between intention and negligence due to the development of negligence originally as a part of casus has thus been overlooked.

10. We have seen that Bracton dealt with questions of negligence about which the common law had as yet no rules. The influence on Bracton of Roman and Canon law is unmistakable. According to *Holdsworth,* Bracton's authority declined somewhat in the following centuries, the 14th and 15th,[130] only to have its greatest influence upon modern English law in the 16th and 17th centuries.[131] And it is in the latter that we may find the beginning of a negligence concept in common law. The main rule is that there is no criminal responsibility without *mens rea.* The crime of murder required malice afore-thought. It is true that a distinction was made between that crime and manslaughter. But manslaughter – a killing in a sudden affray – also required *mens rea*. Homicide by misadventure[132] was not equated with murder or manslaughter. It was not a felony. If while the accused was doing a lawful act he caused the death of another without evil intent, he was not guilty of murder or manslaughter. But his act entailed a forfeiture.

> Without any evil intent. If a man knowing that many people come in the street from a Sermon, throw a stone over a wall, intending to fear them, or to give them a slight hurt, and thereupon one is killed, this is murder; for he had an evil intent, though that intent extended not to death, and though he knew not the party slain. For the killing of any by misadventure, or by chance, albeit it be not felony . . . yet shall he forfeit his Goods and Chattels, to the intent that men should be so wary to direct their actions, as they tend to the effusion of man's blood.[133]

As pointed out by *Moreland*, this treatment of homicide by misadventure indicates that negligence was as yet "unknown" in common law. At the same time it shows clearly that a development towards such a concept is well under way. This becomes evident when we consider the famous *Hull's* case that was published shortly after *Coke's* statement here cited.[134]

Hull was indicted for murder. He was a labourer who together with several other workmen was building a house which was situated about thirty feet from a highway. At the end of the day's work he was sent to bring down a piece of timber that was lying on the second floor. He called out, "Stand clear! ", and threw down the timber, which killed a workman. The act was held not to be manslaughter but homicide by misadventure because the house stood thirty feet from the highway and Hull did what was usual for workmen to do, giving warning by shouting, so that anyone within the range of his voice might avoid the danger. There is a dictum in the case to the effect that, if the defendant had committed the act in "London or other populous town", then the homicide would have been manslaughter despite the use of the warning.[135]

The case is certainly rather significant. It was a case of "accidental" killing resulting from a lawful act. And here we find evidence that the law was discussing "what limitations should be placed on the word 'accidental' in such cases".[136] The discussion of the question in the case and in the subsequent discussions to which it has given rise[137] show that negligence in a modern sense has entered the criminal law as a limitation of "misadventure" or "accident". If we leave out of consideration the factor that a "lawful act" must be present and the negative determination "without intention", the discussion concerned how it was to be determined whether the defendant acted "with proper caution" to prevent danger. *Hale* mentiones "quia debitan diligentiam non adhibuit" (because he did not exercise due care)[138] and *Foster* talks of "using proper caution to prevent danger".[139]

It seems evident that the courts here established a basis for criminal liability that was not compatible with the then prevailing idea of *mens rea* in common law. The primary question does not concern the mental attitude of the defendant towards his act but his act's conformity with the prevailing standards of safe action in the matter.[140] This becomes even more evident when we consider two additional cases. The first is called *Rampton's* case.[141]

Rampton was indicted for manslaughter. He had found a pistol in the street and he had tried it with a rammer to find out whether it was loaded or

not. Coming to the conclusion that it was not, the defendant pointed the pistol at his wife in jest. It went off and his wife was killed. Rampton was found guilty of manslaughter.

The other case is given by Foster.[142]

A man took a gun to church but discharged it before he got there. He left the gun at the door and a friend borrowed it and loaded it. He then put it back without telling the defendant. The defendant took up the gun after he brought it home, pointed it in the direction of his wife, touched the trigger, and the gun went off, killing her. The court was of opinion that the defendant had reasonable grounds for believing that the gun was not loaded and directed the jury that if they were of the same opinion, they should acquit him. He was acquitted.

Foster maintained that the verdict in Rampton's case was wrong.[143] He suggested that it could not be required of Rampton that he should take such "reasonable precaution" as is "usual and ordinary in like cases".[144] So if the defendant used reasonable precaution, such as was usual and ordinary in like cases, he should be acquitted.

It thus seems clear that the first stage of development of a negligence concept did not involve a qualification of negligence as "gross" – at least not explicitly. The qualification of negligence as "gross" seems to be primarily a development of the 19th century. In Halsbury's *Laws of England* we find a definition that seems to be a fairly accurate statement of the law in this field as it has in principle been maintained up to now:

A person on whom the law imposes any duty or who has taken upon himself any duty tending to the preservation of life and who grossly neglects to perform that duty or performs it with gross negligence and thereby causes the death of another person is guilty of manslaughter.[145]

It seems reasonable to believe that the commonly accepted idea that negligence must be sufficiently gross to be a basis for criminal liability is, viewed historically, influenced by the requirement of a mental element in crime. But this is only one possible explanation out of many; another explanation, and a likely one, is the harshness of punishing for manslaughter a slightly negligent person who has been unlucky enough to bring about the death of another person. The common law was simply not ready to meet the problems it had to face in the modern industrialized community.

11. In the development in Sweden from the medieval laws to the Code of 1734, the consolidation of the idea of public criminal law played an important role. The process was a slow one. Thus the "Country Laws"[146] as well as the "City Law"[147] took over the concept of "vådaverk" as we find it in the Provincial laws. The provisions were in this respect mitigated through legislation in the 17th century and at the beginning of the 18th.[148] Although the Code of 1734 must as a whole be regarded as an important step forward, it still followed the old track from the time of the Provincial laws. So it is not until the Penal Code of 1864 that the idea of guilt in a modern form can be said to have been realized.[149] This development has an intimate connection with the transformation of the system of evidence in criminal law.

The casuistic technique of legislation that still stamped the Code of 1734 meant, of course, that this law was ill equipped to indicate general concepts such as the forms of imputation. The negligence terminology was diverse and confusing. Even if the Code, in contrast to other parts of the criminal law concerning the negligence requisite does not from a conceptual point of view contain any important step forward, nevertheles one may trace in the wording of the Code the beginning of the development that took place during the 19th century. The old law's concept of "vådaverk" was broken up. We find an endeavour – even though this led to obvious difficulties for the legislator – to delimit acts of negligence.[151] As a rule the so calld "full våda", i.e. casus in the modern sense, was not punished. The law did, however, in certain cases,[152] though to a minor extent, provide punishment for casus. One finds clear signs of an attempt to get rid of the "Erfolgshaftung".[153] A "modern" impression is also given by the statement that the degree of negligence should determine the severity of the punishment.[154]

The leading Swedish legal writer of the 18th century, *Nehrman*, gives a detailed account of homicide by negligence *(vållande)* and homicide by casus *(våda)*.[155] He delimits these two forms of homicide on the one hand from homicide by intention *(viljadråp)* and on the other hand from each other. Regarding the crimes of homicide as distinguished from crimes

concerning assault and battery Nehrman maintains a very severe concept of negligence. As far as crime of the former type is concerned, the result in practice is "Erfolgshaftung".[156] Having regard to the social function of punishment, Nehrman justifies this severity by referring to the interest of the community in preventing fatal accidents by means of deterrence – "androm til Warnagel" – a utilitarianistic justification in the spirit of the Enlightenment.[157] Where assault and battery are concerned, however, casus was not punished.[158] Nehrman suggests certain aids to deciding whether negligence should be considered gross or less severe.[159] Stating that the law cannot give more precise rules about this because there are so many cases and the attendant circumstances of them vary so greatly, Nehrman gives the advice "that the judge should even in this type of case consider the bases of the law and thereafter draw a conclusion from the will of the legislator in other cases that are similar."[160] Is this perhaps a suggestion concerning the importance of case law for the determination of the negligence concept?

What we have seen in this respect regarding Roman, Germanic, medieval Italian, Anglo-Saxon and German law – namely that the concept of negligence has, so to speak, grown up on the foundation of casus – is also true concerning the development in Nordic law. Thus historically the concept of negligence has nothing to do with the concept of intention (dolus). The two concepts are historically and also, as we shall see, theoretically separate and should for analytical purposes be kept apart. It is also evident that the most important and difficult problems regarding negligence – practically as well as theoretically – concern the boundary between negligence and the non-punishable area. It is preferable to analyse the question of the borderline between negligence and intention in connection with the concept of intention. The lower limit of dolus here coincides with the upper limit of negligence.

[1] *Vinogradoff*, 182, *Maschke*, 6 and *Antell*, 8f.

[2] Certain facts indicate that unintentional action was penalized even outside the area of homicide. See *MacDowell*, 44–45.

[3] *Vinogradoff*, op. cit. supra.

[4] *MacDowell,* 44–45 and 58.
[5] Inscriptiones Graecae i[2] 115.11–32. Cit. in *MacDowell,* 118.
[6] Ethika Megala 1188b29–38.
[7] *MacDowell,* 59–60.
[7a] Cited from *MacDowell,* 46.
[8] *MacDowell,* 46–47. It is interesting to note that Aristotle in the *Art' of Rhetoric,* I, xii 16 and 17 – which in the edition by J. H. Freese, London 1947, 147, in relevant parts reads: "Misfortunes are all such things as are unexpected and not vicious; . . . And it is equitable to pardon human weaknesses, . . . and to look, . . . not to the action itself, but to the moral purpose;" – tries to separate negligence from the area of the non-punishable. It is, however, not easy to reach a correct understanding of the works of Aristotle. Thus we find in his works a mixing of causalityissues and guiltissues. According to Aristotle, negligence should be the "non-foresight" of the adequate bringing about of the result. See *Maschke,* 158–159.
[9] On the term, see note 87.
[10] *Vinogradoff,* 182–183, and *Jones,* 264.
[11] *Feuerbach-Mittermaier,* 103, *Brunnenmeister,* Tödtungsverbrechen, 130 and *Rein,* 162.
[12] Concerning this method of constructing legal rules, see further the illustrations *infra.*
[13] See *Voigt,* Leges regiae I, 557ff and II, 643ff, and *Bruns,* I, 1ff.
[14] Cited from *Bruns,* I, 10 and II, 79.
[15] *Beschütz,* 39.
[16] "Sonach ist es nicht möglich, den Begriff der Fahrlässigkeit bereits in das ältere, republikanische Strafrecht zuruckzuverlegen". *Pernice,* 243.
[17] *Mommsen,* 89 note 5, *Düll,* 93, *Voigt,* XII Tafeln 794–795, *Binding,* Vermutungen and *Oehler,* Legalordnung 7–8. Many different meanings have been attached to the term culpa in legislation and legal writing. In modern times the term is commonly used as equivalent to negligence. It has, however, earlier not infrequently meant the factor of "subjective guilt". See, e.g., the *Leges Henrici,* where we read "culpa malum aggravat". *Liebermann,* 2:2, 266 under Absicht 12) and 2:1, 42.
[18] *Mommsen* 90 and *Hippel,* 74.
[19] *Löffler,* Schuldformen 83, *Beschütz,* 43 and *Hippel,* 73.
[20] *Löffler,* Schuldformen 83 and *Köstlin,* Römische Recht 202ff.
[21] *Löffler,* Schuldformen 93, Beschütz, 49 and *Mommsen,* 89.
[22] *Löffler,* Schuldformen 26 and Beschütz, 49. Against, *Binding,* Normen IV, 65ff. Cf. *Hippel,* 74 and references there given, as well as *Gessner,* 14.
[23] See *Binding,* Normen IV, 66ff and *Hippel,* 74 and references there given.
[24] *Mommsen,* 198ff, *Pernice,* 420ff, *Löffler,* Schuldformen 85–86, *Beschütz,* 51ff, and *Binding,* Normen II, 2 716ff.
[25] See *Himmelreich,* 11 and especially note 52.
[26] I have found only two. Marcianus D. 47,9,11 and Paulus D. 48,8,7. It should be noted that both utterances are deemed to be interpolated. See *Levy-Rabel,* Index Interpolationum. Tomus III, Weimar 1935, columns 513 and 535–536.
[27] Page 578. Cf. *Hippel,* 46–47, *Forsman,* 12 and references there given, *Hemmer,* Vådaverken 27–28, and *Munktell,* Mose lag 133–134.

[28] *Mitteis-Lieberich,* 27, *Eb. Schmidt,* Einführung 30–31, *Arthur Kaufmann,* Schuldprinzip 218, *Brunner,* Antwort 55f., *Amira,* Grundriss 231, *Deutsch,* 11. Cf. *Ekkehard Kaufmann.*
[29] *Himmelreich,* 12–13, and *Eb. Schmidt,* Einführung, 31.
[30] *Welzel,* Strafrecht 10, v. *Schwerin-Thieme,* 28 and *Hardwig,* 33.
[31] *Mannheim,* 84 and v. *Bahr,* History 203.
[32] *Beschütz,* 74ff, *Eb. Schmidt,* Einführung 32, and *Hippel,* 117ff.
[32a] See *Liebermann* 2:2, 265, under Absicht 2a).
[33] *Holdsworth,* 43.
[34] See e. g., the exposition in *Holmes,* 17–19, and *Liebermann* 2:2, 265 under Absicht 2).
[35] *Holdsworth,* 50–51.
[36] *Pollock &Maitland,* 458 and *Sayre,* 980.
[37] *Holdworth,* 53.
[38] Crime and insanity in England I, 16.
[39] *Ibid.*
[40] *Id.* at 17 and *Liebermann* 2:2, 265 under Absicht 4).
[41] See *Beschütz,* 88–89 and *Schaffstein,* 151.
[42] *Engelmann,* 77.
[43] *Id.* at 155ff.
[44] See *Himmelreich,* 15.
[45] *Ibid.*
[46] *Ibid.* But see *Beschütz,* 114.
[47] *Engelmann,* 226.
[48] *Dahm,* 257–258 and 271ff.
[49] *Dahm,* 257.
[50] *Engelmann,* 188 and 193.
[51] ". . daraus folgt, dass die Fahrlässigkeit nicht bloss in Folge einer ausdrücklichen Strafbestimmung, sondern auch ohne eine solche in allen Fällen zu bestrafen ist, . . ." *Hälschner,* 160.
[51a] Practica nova. Pars III. Quaestio CXLII. 32.
[52] See, e. g., the Bavarian penal code of 1813, art. 64.
[53] See *Anners,* Europas rättshistoria I, 81.
[54] See *Kuttner.*
[55] *Löffler,* Schuldformen, 147ff.
[56] Cf. the "felony murder" and "misdemeanor manslaughter" rules in Anglo-American criminal law.
[57] *Löffler,* Schuldformen, 117.
[58] An important step away from the feud and towards a public criminal law is constituted by the so-called "Friedensordnungen" (Peace-laws) of the European continent and the Scandinavian "Edsöreslagarna". See *Himmelreich,* 13–14 and *Anners,* Straffrättshistoria, 10–11.
[59] Geschichte des Deutschen Strafrechts bis zur Karolina 13. Cf. *Eb. Schmidt,* Einführung, 71 and *Mannheim,* 85.
[60] Cited from *Mannheim,* 85. This example of a persisting objectivistic legal technique that has its roots in the old Germanic law is a phenomenon that is represented in the Germanic literature. In the oldest Nordic literature, e. g. the Icelandic tales, we find that the narrator when he describes what actually happened, does not express himself as we probably would have

done. He does not describe the "inner" side, but exclusively what he observes with his eyes.

[61] From the beginning of the 13th century.

[62] From the end of the 13th century.

[63] From about 1425.

[64] *Löffler,* Schuldformen, 119 and *Beschütz,* 117.

[65] *Himmelreich,* 15.

[66] See *Eckhardt,* Sachsenspiegel.

[67] *Binding,* Grundriss, 121, maintains that the word "fahrlässig" is derived from "ware-los". *Fahrlässigkeit = varelosigkeit = absque dolo.* Cf. *Löffler,* Schuldformen, 119, *Conrad,* 442, *His,* Strafrecht, 99, and Geschichte, 13, *Binding,* Normen IV, 91ff., and *Himmelreich,* 16.

[68] *Himmelreich,* 16.

[69] *Eckhardt,* Schwabenspiegel.

[70] *His,* Strafrecht, 99, and Geschichte, 13–14, *Eb. Schmidt,* Einführung, 67.

[71] *Himmelreich,* 16–17.

[72] Cited from v. *Lassberg,* 87–88.

[73] *Sebastian Brant,* Der Richterlich Clagspiegel, Strassburg 1516.

[74] *Brunnenmeister,* Bambergensis, 172, *Binding,* Normen IV, 126.

[75] Cited from *Himmelreich,* 17, note 99.

[76] *Himmelreich,* 17–18.

[77] Concerning the term "geylheyt" see *Oppermann,* 42. See also *Beschütz,* 132ff, and *Kollmann,* 631ff.

[78] *Holdsworth,* 358, note 1, mentions killing in execution of a lawful sentence of the court or at the arrest of an outlaw or a manifest thief.

[79] *Pollock & Maitland,* 470–472.

[80] *Mikat,* 27, maintains that the sources do not merit an, in principle, pure "Erfolgshaftung". He says, however,: "Denn ebensowening wie wir im angelsächsichen Volksrecht allgemein gültige Maximen über die generelle Zulässigkeit der Erfolgshaftung finden konnten, lässt sich auch das konkret-individuelle Erfordernis einer irgendwie gearteten subjektiv-personalen Schuld noch nicht in allgemein verbindlicher Form nachweisen."

[81] Unless it did not fall within certain narrow categories. See *Pollock & Maitland,* 472, note 3.

[82] See *Moreland,* Negligence, 1, and in note 2 mentioned examples of cases from the Kings's Court, and *Pollock & Maitland,* 470.

[83] *Pollock & Maitland,* 479, *Holdsworth,* 259, *Sayre,* 994, note 8, and *Stephen,* 35–37.

[84] From 1278. See *Moreland,* Negligence, 2.

[85] See *Moreland,* Negligence, 2, note 4.

[86] *Sayre,* 985, note 8.

[87] According to the Germanic view the feud did not aim at the inflicting of pain or torture but the humiliation of the opponent and his relatives. Instead of a blood feud a so-called *atonement* treaty could be concluded between the families in question. *Eb. Schmidt,* Einfuhrung, 24 and 55. See also *Anners,* Straffteorierna, 241–242, and Straffrättshistoria, 5–11. With regard to the decisive role played by the idea of atonement during the time of the old family community, there seems to be good reason to speak of an

"atonement law" as distinguished from what we mean by a criminal law.
[88] See *Holmbäck-Wessén,* I, XXII ff.
[89] *Hemmer,* Vådaverken 27, *Strahl,* Utvecklingen, 875f. and *Hasselberg,* 184.
[90] See, for instance, *Andreas Suneson's* famous paraphrase of the Skånelagen (cited by *Waaben,* Forsæt, 8). See also *Hemmer,* Straffutmätningen, 14–15.
[91] Concerning va ǂ i, see above all *Hemmer,* Vådaverken, and Straffutmätningen 19ff. See also v. *Amira,* Obligationsrecht, 376ff.
[92] Criminal code.
[93] The may be most important and most highly-developed law of the Swedish Provincial Laws of the 13th century. It dates from 1296.
[94] *Holmbäck-Wessén,* I. Upplandslagen, 89.
[95] *Ibid.*
[96] *Id* at 90.
[97] From the beginning of the 14th century.
[98] *Holmbäck-Wessén,* II, Dalalagen 36.
[99] Cf. Exodus 21:33 and 34.
[100] "The Church code".
[101] *Holmbäck-Wessén,* II, Dalalagen 5.
[102] From the beginning of the 14th century and ratified by the King in 1327.
[103] See *Hemmer,* Dalalagen. Cf. regarding the Rigalaw, *Hasselberg,* 190.
[104] Manhelgdsbalken, XXII. Cf. XXIII: "Nu slår fullvuxen man en annan till blods av våda och ej med vilje . . ."
[105] *Holmbäck-Wessén,* I. Östgötalagen, 95. This code dates from the late 13th century and early 14th century.
[106] Following *Winroth* see *Hemmer,* Straffutmätningen, 21. See *Winroth,* Rättshistoria, 43 and *Skeie,* 163. The latter maintains that in Norwegian case law there was a tendency to acquit altogether when not even negligence was present and he cites a case. Cf. *Munktell,* Brott och straff, 9.
[107] *Hemmer,* Straffutmätningen, 21.
[107a] *Skeie,* 163 and 165.
[108] See *Merker,* 16.
[109] *Strahl,* Utvecklingen, 886–887 and *Winroth,* Rättshistoria, 46.
[110] *Kuttner,* 138ff.
[111] See *infra.*
[112] It must, however, be mentioned that we can trace the idea of guilt, that the perpetrator has drawn guilt upon himself through the crime – a guilt that he himself must expiate – already in the so-called "Peace laws" (Frids- and edsöres laws) that we find in Sweden in the 13th century. See *Munktell,* Brott och straff, 11, *Forsman,* 26–27, *Anners,* Straffrättshistoria, 10–11, and for the German law, *Himmelreich,* 13–14.
[113] *Abrahamsson,* 507 (e) where a distinction is made between "rätt våda" (correct casus), "våda" (casus), and negligence. Cf. *Winroth,* Rättshistoria, 46.
[114] From 1507.
[115] From 1532. See *Kohler-Scheel,* Die Carolina und ihre Vorgängerinnen, I:Die Peinliche Gerichtsordnung Kaiser Karls V. constititio criminalis

carolina, 1900 and II and III: Die Bambergische Halsgerichtsordnung, 1902 and 1904.

[116] *Eb. Schmidt,* Einführung, 117, and Die Carolina, 18–19, and *Beschütz,* 137.

[117] *Binding,* Grundriss, 101ff., and *Löffler,* Schuldformen, 162.

[118] Apart from the expressions mentioned *infra* in the text we meet in art. 180 the word "vnfleiss" and in art. 134 the expression "vnfleiss oder vnkunst". See also *Himmelreich,* 18, note 106.

[119] *His,* Strafrecht, 93. Carolina is in this respect influenced by the Clagspiegel from the 15th century. *Brunnenmeister,* Bambergensis, 172, maintains that the Clagspiegel is the first German code that expressly distinguishes between *culpa* and *casus.*

[120] *Oppermann,* 39.

[121] *Id.* at 41–42.

[122] See *Beschütz,* 141, v. *Almendingen,* 230–231, *Kollman,* 631.

[123] We must, however, stress that the code did not use the modern distinction advertent-inadvertent negligence.

[124] *Himmelreich,* 19.

[125] *Himmelreich,* 20–21.

[126] *Hippel,* 285.

[127] From 1794.

[128] Cited from *Hippel,* 278.

[129] See *Erenius,* 39–42.

[130] See *Holdsworth,* 287.

[131] See *id.* at 288.

[132] *Moreland,* Negligence, 3, particularly note 9.

[133] *Coke,* Institutes 57. Cited from *Moreland,* Negligence, 3.

[134] Kelyng 40, 84 Eng. Rep. 1072 (1664). As late as in the middle of the 19th century *Stephen* cites the case as "leading". See *Stephen,* Commentaries, 65.

[135] On the case see *Moreland,* Negligence, 4, and *Davis,* 216.

[136] See *Moreland,* Negligence, 5.

[137] See e. g., the discussion of the dictum by *Foster,* Crown Law (2nd ed. 1791) 263, and 1 *East,* Pleas of the Crown (1803), 262.

[138] *Hale,* Pleas of the Crown. Cited from *Moreland,* Negligence, 5.

[139] *Foster,* Crown Law. Cited from *Moreland,* Negligence, 5.

[140] It has, however, been asserted that the judges of the time did not think that they were establishing a new basis for criminal liability. They would have regarded negligence as a type of *mens rea.* See *Davis,* 216 and 219. If this is true, it provides an ideological reason, in addition to obvious practical reasons, for introducing negligence as a basis for criminal liability. It also helps to explain the reluctance in modern Anglo-American criminal law to consider negligence as a basis for liability.

[141] Kelyng 42, 84 Eng. Rep. 1073 (1664).

[142] *Foster,* Crown Law (1762), 262–263. Cited from *Davis,* 219–220.

[143] *Foster,* Crown Law (2nd ed. 1791), 264. Cf. Kelyng 42.

[144] The discussion of an even earlier case, *Sir John Chicester's* case (Aleyn 12, 82 Eng. Rep. 888 (1647)) in 1 *East,* Pleas of the Crown, (1803), 266–269, accords with this view: "It is sufficient that a reasonable

precaution, what is usual and ordinary in like cases, be taken; such as hath been found by long experience in the course of human affairs to answer the end". See *Moreland,* Negligence, 7, note 29 and *Davis,* 217.

145 9 *Halsbury's Laws of England* (2nd ed.), 445.

146 We find two codes for the "countryside" of medieval Sweden: Magnus Erikssons landslag (about 1350) and King Kristofers landslag (1442), which succeeded the first.

147 Magnus Erikssons stadslag.

148 See note 113.

149 Taking into consideration the presence in the code of the so-called "objective surpluses" (crime requisites that did not need to be covered by a mental element), which are undoubtedly to be regarded as survivals from the "Erfolgshaftung", it is, I think justifiable to say that not even in the penal code of 1864 was the idea of guilt consistently realized. The so-called "objective surpluses" have been abolished in the Penal Code of 1965.

150 See Nelson, 340.

151 MissgiernıngsBalk XXXVIII Cap. 1 §: "sker thet af full våda . . . " and XXIX Cap. 1 § ". . . pröfves sådant emot hans vilja och uppsåt skedt vara".

152 So for instance "vådadråp". See *Nehrman,* 259, §§ 39–41.

153 So, for instance, in MissgierningsBalk XXX Cap. 2 §, where already a negligent causing of danger is punished. "Lägger amma spädt barn hos sig i säng; böte. . . äntå at barnet ej får theraf skada."

154 MissgiernıngsBalk XXVIII Cap. 3 § and XXXIII Cap. 3 §. *Nehrman.* 254 § 21. Cf. 256 § 30 ". . . then, som genom wållande dräper hafwande quinna, bör med swårare böter beläggas, . . . Ty här spilles tu lif . . .".

155 *Nehrman,* 248–261.

156 *Id.* at 248, § 3 and 258, § 37.

157 *Id.* at 259–260, § 41.

158 *Id.* at 291 § 58. Cf. MissgierningsBalk XXXVIII Cap. 1§.

159 *Id.* at 255.

160 *Id.* at 254, § 22. Translation by the author.

II

To discard established terms is seldom possible; and where it is possible, is seldom expedient... Instead of rejecting conventional terms because they are ambiguous and obscure, we shall commonly find it better to explain their meanings.

Austin

The term responsibility is widely used in criminal law as well as in philosophy.[1] It is a difficult concept with many different meanings in different contexts. Its provenance is not altogether clear but it seems to be of relatively modern origin.[1a] The term appears often in combinations such as legal responsibility, moral responsibility, political responsibility, cultural responsibility, etc.[2] It could be maintained that the analysis of the concept should always be carried out in a certain context. Criminal responsibility should be studied in the context of other aspects of criminal law, etc. This viewpoint has been called in question and it has been suggested that there exists something which may be called "the problem of responsibility".[3] To investigate whether common elements could be found in the different uses of the word would, however, in the present context carry us too far. In view of the limited scope of this treatise it is my purpose only to analyse the concept of criminal responsibility, and this can be done without taking into consideration the equivalent conceptual forms in other fields.

1. The Oxford English Dictionary defines responsibility as "the state or fact of being responsible". Concerning the word responsible, the dictionary gives the meanings "answerable", "accountable (to another for something)", "liable to be called to account", "morally accountable for one's actions" and "capable of rational conduct".[4] Do all these – and other – applications of the term possess a unifying feature? *Hart* suggests that the word "answer" may play this part. Though, according to him, "answer" is connected with all the main meanings of responsibility, it is not that meaning of answering questions.[5] Recognizing that the original meaning of the word "answer" was not that of answering questions but that of answering or rebutting accusations or charges which, if established, carried liability to punishment, etc., Hart finds that

> (t)here is, therefore, a very direct connexion between the notion of answering in this sense and liability-responsibility[6] which I take to tbe the primary sense of responsibility: a person who fails to rebut a charge is liable to punishment or blame for what he has done, and a person who is liable to punishment or blame has had a charge to rebut and failed to rebut it.[7]

Our analysis will focus almost entirely on this "primary sense of responsibility" which Hart calls liability responsibility. It is obvious that according to Hart a significant distinction can be made between liability and responsibility, though it is not altogether clear that this is so when we take into consideration the terminology used in other Anglo-American legal writing.[8]

To a certain extent it seems as if the terms responsibility, liability and culpability may be used as synonymous in legal literature in a sense that best can be referred to in continental European law as "imputation". Hence in the Model Penal Code, e. g., recklessness and negligence are mentioned as "kinds" or "requirements" of "culpability" under the heading of "general principles of liability".[9] What a continental European calls the requisite of "imputability" is, on the other hand, mentioned as responsibility in art. 4 of the Model Penal Code. This use of the terms responsibility and liability, though recommended by some authors,[10] is not representative of the entire field of the criminal law. In *Kenny, Turner* consistently uses the term liability except in the case of "diminished responsibility",[11] while the same author in *Russel* speaks throughout of responsibility with the exception of "strict liability". The last-mentioned combination, "strict liability", seems to be more widely used than "strict responsibility". There are reasons for such a use,[12] just as reasons can be found for not using the term liability in a certain context.[13]

From the vast number of distinguishable senses of the term responsibility Hart selects four. In addition to the above-mentioned liability-responsibility, he analyses the responsibility concept under the subheadings role responsibility, causal responsibility and capacity responsibility.[14] I believe that Hart has here hit upon the most common and from a legal viewpoint most important meanings of the word. Among these meanings the lawyer would, however, pay least attention to role responsibility. To him liability responsibility is far more interesting. What then is liability responsibility?

Hart had earlier defined 'legal accountability', as he then called it, as the legal responsibility for something that means that under legal rules a person is liable to be made either to suffer or to pay compensation in certain eventualities.[15] According to Hart this definition, which treats as synonymous the expressions "A is legally responsible for x" (where x is some action or harm) and "A is legally liable to be punished or to be made to pay compensation for x" needs further qualification.[16] Responsibility should be directed to a narrower and more specific issue – one

which is mainly, though not exclusively, psychological. Liability, on the other hand, also includes the question whether the kind of action done was ever punishable by law. (Whether the action at hand was "tatbestandsmässig" to use the German expression.) The term responsibility is confined to the "criteria" of responsibility, i.e. "(i) mental or psychological conditions; (ii) causal or other forms of connexion between act and harm; (iii) personal relationships rendering one man liable to be punished or to pay for the acts of another".[17] It should be noted that the concept of liability responsibility thus includes also capacity responsibility, which is singled out by Hart as a separate meaning of responsibility. In addition, the term liability is used in connection with the concept of "imputability".[18] This is not altogether easy to understand in view of the fact that the terminology in this field is almost totally confusing, with one exception: the term responsibility seems to be used by the vast majority of legal writers to indicate "imputability". The way in which Hart deals with the issue leaves the impression that, starting out from liability as the most comprehensive concept, he abstracts from it issues concerning *actus reus (Tatbestandsmässigkeit)* and describes what is left in responsibility terminology. In so doing he uses the word liability to qualify responsibility in a certain context. Seen from a terminological point of view this could easily lead to confusion. Hence a rephrasing of the doctrines of *mens rea* and causation in responsibility terminology is as regards language alone a rather intricate task. Considering these difficulties and taking into account Hart's analysis of the concept, it may be questioned whether an elimination of the *term* would be desirable. No doubt, the legal realities behind the four different meanings of responsibility used by Hart could be analysed without using responsibility terminology.[19]

We have seen that the term is almost consistently used in connection with matters of imputability. Where there is mental disorder or immaturity the person is often said not to be "responsible for his actions". But even this "certain" use of the term may be questioned. In Swedish criminal law, e. g., the use of the term capacity responsibility would not, at least in theory, make sense. Unlike most present-day penal codes the Swedish Penal Code (BrB) does not require capacity responsibility as a requisite for crime. Neither in the section of BrB which deals with this issue – Chap. 33, sec. 2

– nor elsewhere in the code is there any mention of irresponsibility. Sec. 2 runs as follows:

"For a crime which someone has committed under the influence of mental disease, feeblemindedness or other mental abnormality of such a profound nature that it must be considered equivalent to mental disease, no other sanction may be applied than surrender to special care or, in cases specified in the second paragraph, fine or probation.

Fines may be imposed if they are deemed to serve the purpose of deterring the defendant from further criminality. Probation may be imposed if in view of the circumstances such sanction is considered more appropriate than special care; in such case treatment provided for in Chap. 28, sec. 3, may not be prescribed.

The defendant shall be free from sanction if it is found that a sanction mentioned in this section should not be imposed."

It is obvious that the Swedish legislator does not think in categories of responsible and irresponsible persons.[20] Neither the lack of ability on the part of the offender to comprehend that he has committed a wrong nor the lack of ability to act in accord with the law is to be taken into consideration. Such a rule, as is to be found in the leading case of *Daniel M'Naghten*[21] and in Model Penal Code, sec. 4.01, though reformulated,[22] has no place in BrB simply because it does not point to realities that can be established.[23] The legislator has instead tied the provision in question to criteria the existence of which can be established (mental illness and feeblemindedness). This reminds one of the "product" rule enunciated in *Durham* v. *United States,*[24] but leads further inasmuch as BrB adds a third category – "other mental abnormality of such a profound nature that it must be considered equivalent to mental disease". Here, of course, it is more difficult to establish what is equivalent to mental illness. This innovation of the Swedish legislator, at least in theory, falls somewhere between the "extreme" position of the elimination of responsibility, as advocated by, especially, Lady *Wootton,*[25] and the most widely accepted position of dividing perpetrators into two categories, responsible and irresponsible. In his polemics against the "extreme" position Hart seems to have taken a stand that is very similar to the Swedish position while advocating a " "moderate" form of the new doctrine".[26] Other legal writers, too, have taken up positions more or less similar to that of BrB.[27] In this respect BrB has avoided any commitment to the old ideas of responsibility with their fictive division into categories of responsible and irresponsible persons, whilst steering clear of the "extravagances" of the "extreme" position.[28]

As a consequence of the fact that BrB does not recognize responsibility as a requisite for crime, even a little child can commit a crime. However, Chap. 33, sec. 1, of the code states that no one may be sentenced for a crime he committed before he reached the age of 15.

Does insanity exclude *mens rea* (including negligence) so that, where insanity is established, intention, recklessness and negligence are negatived? *Glanville Williams* seems to be thinking along these lines when he states: "The evidence of insanity negatives not only the *mens rea* but the mental element (the element of volition) in the *actus reus*" and concerning negligence ". . . to be justified in returning a verdict of negligence (e. g., of

manslaughter) the jury must be satisfied beyond reasonable doubt that the accused was sane; if they are not so satisfied, but the facts are such that if the accused were sane the verdict would be one of negligence, there must be a special verdict."[29] If this is true, the Swedish position as I have stated it here turns out to be rather problematic, since for the application of BrB Chap. 33, sec. 2, it is required that the insane person, the feebleminded person, etc., shall have acted intentionally or negligently.[30] Concerning negligence, this problem has to be faced in connection with the analysis of the entire concept and so I shall return to the issue frequently below. It is, however, necessary to add that it seems realistic to assume that in reality the more practical problem here mentioned is in principle not so unique as it may appear to be. While it is certainly true that the Swedish code does not explicitly consider capacity responsibility, this does not mean that Swedish criminal law looks upon everyone as responsible, and that the concept of capacity responsibility is of no real significance in Swedish criminal law. There are, on the contrary, many reasons for looking upon the reform as very much a terminological one.[31] The reform is best understood if considered from an ideological point of view. It is mainly a repudiation of the idea of retribution in criminal law.[32]

The elimination of the term might possibly be justified on the ground that it has developed into a technical term with many different connotations in different connections. But even if it were desirable, it would certainly be no easy task to eliminate the term from criminal law. It is deeply embedded in its structure and as, moreover, it is widely used in ordinary language it does not seem possible to eliminate it. Hence we are left with the essential task of explaining its meaning. Hart has through his analysis made a substantial contribution in an important field of criminal law. It is, however, doubtful how far his analysis has taken us on the way towards a full understanding of the *concept.* I believe it is an important task not only to delineate the main uses of the term in criminal law but in addition, and perhaps primarily, to describe what these uses have in common. How is it possible to justify the use of the term responsibility in so many different meanings? In short: What is the meaning of the concept of criminal responsibility?

2. Let us now focus on the *meaning* of the responsibility concept, not on the criteria for responsibility. Let us inquire not into the circumstances in which a person is said to be responsible for a certain act, but into the meaning of the statement: "A certain person, A, is responsible for the act".[33]

The statement "A is responsible for an act" in criminal law presupposes that an offence has been committed. The first step in asserting responsibility is to call the perpetrator to account, to demand a statement of what has happened. If this process of accountability reveals that the requisites for responsibility are present, the accused is penalized.[33a]

This gives us, in short, the basic elements of responsibility in criminal law: *accountability responsibility*,[34] to carry the responsibility for an act means to be the person who can be called to account; and *sentencing responsibility*, to be responsible for an act means to be the person who can be sentenced for committing of it.[35] Here the concept is viewed within the framework of a legal process. The use of the term both outside and in law indicates that responsibility is something one has *for* something (e. g. a crime) *to* someone (e. g. a court of law or a "court" in the widest sense of the word). Thus the legal decision could pertinently be viewed as the outcome of a legal process.[36] If in this connection we leave evidential aspects out of account, that person is prosecuted who has committed the criminal act and the proceedings in court focus on the issue whether there can be established grounds (objective or subjective) for eliminating sanction. He who can rightly be held to account for the criminal act has accountability responsibility. To be accountability-responsible means to be compelled to answer – to rebut accusations or charges.[37]

Sentencing responsibility, as we have defined it above, presupposes accountability responsibility. A person may legally only be sentenced for a violation if he can legally be called to account for it.[38] Thus the sentence "A is responsible for x" has the same meaning in criminal law as "A may legally be punished for x". What, then, is the signification of the expression "A *may legally* be punished"? *Ross* points out that in legal language this sentence contains a reference to a certain judicial system, e. g. the Swedish legal system.[39] The assertion "A is responsible for x" is equivalent to a claim that certain facts are present and according to valid Swedish criminal law A is laible to punishment. It is this connection between the conditioning facts and the conditioned legal consequence that is expressed by the responsibility termino-

logy. This is not a "natural" (causal or logical) connection. It exists only because of rules of law. The facts are judged on the basis of rules of law.[40]

According to Ross, the responsibility expression indicates the *connection* between guilt and punishment. But why does not responsibility mean *either* the conditioning facts:

A is responsible for the killing of B because he, being mentally sane, intentionally shot B to death.

or the conditioned consequence:

A may (shall) be punished for the killing of B because he is the person who is responsible?

Ross answers that this is not so because one could equally well in the *same* connection use the responsibility expression in the meanings mentioned. We may say that A is responsible for the killing of B because he shot her; and because he is responsible for her death he may (shall) be punished. The reason for this is that responsibility is a systematical *tû-tû* concept.[41] The common linguistic use of the term responsibility indicates that responsibility is something that exists as a connecting link between conditioning facts and conditioned consequence. It is obvious that no such link exists. All that exists is the legal connection between fact and consequence.[42]

3. What then is *tû-tû?* In 1951 Ross published an influential article under the exotic title *"Tû-tû".*[43]

It originated from a lengthy discussion between the Swedish law professors Per-Olof Ekelöf and Ivar Strahl in the Scandinavian legal periodicals *Tidsskrift for Rettsvitenskap* and *Svensk Juristtidning* in 1945. Although the point made by Ross was not entirely new and original in Scandinavian law,[44] his article, with its masterly lucidity, helped to clarify a difficult and controversial legal issue. The controversy concerned the meaning of words like "ownership" and "claim". Ekelöf, who started the discussion, maintained that in law these words are used in two different meanings. One meaning refers to what he called a complex of legal facts and the other to a complex of legal consequences.[45]

To illustrate the matter, let us consider the syllogisms:[46]

(1) If there is a purchase, there also exists ownership for the purchaser. Here there is a purchase. Therefore there also exists ownership for the purchaser.

(2) If ownership exists, the owner can obtain recovery. Here there is ownership. Therefore recovery can be obtained.[47]

According to Ekelöf, the term "ownership" in (1) can be substituted for a complex of legal consequences. In (2) on the other hand, the term "ownership" could be substituted for a complex of legal facts.

This view has been criticized in great detail by Strahl.[48] According to him it is a logical contradiction that "ownership" in this way is used in two different meanings. The syllogisms (1) and (2) should be brought together in one syllogism:

(3) If there is a purchase, there also exists ownership for the purchaser. If ownership exists, the owner can obtain recovery. Here there is a purchase. Therefore recovery can be obtained.

According to Strahl the concept of "ownership" is here used not in two different meanings but only in one. And this meaning stands for the legal facts, the disjunctive totality of conditioning facts. At this stage of the discussion Ross published his article.

His starting point is an imaginary description of the finding of the Illyrian anthropologist Mr Ydobon concerning the civilization on the Noisulli Islands in the South Pacific where the primitive Noit-cif tribe dwells in a state of darkest superstition. (The names used seem baffling until the reader applies his childhood technique of reading words backwards. Then Mr Ydobon becomes Mr Nobody, Noisulli becomes Illusion and Noit-cif becomes Fiction. This discovery makes it much easier to understand the points of the author.)

The Noit-cif tribe holds certain superstitious beliefs. For example, if a man encounters his mother-in-law, or if a totem animal is killed, or if someone has eaten of the food prepared for the chief there arises what is called *tû-tû*. A person who carries out such an act becomes *tû-tû*. *Tû-tû* is of course nothing but a word. The violations mentioned above give rise to various natural effects such as a feeling of dread and fright. But the use of the word *tû-tû* does not refer to this. The talk about *tû-tû* is pure nonsense. In spite of this – and this is remarkable – one cannot maintain that it is meaningless when these people talk about *tû-tû*. The word has a function to perform in everyday language: to prescribe and to describe. We may, for instance, consider the following pronouncements:

If a person has eaten of the chief's food he is *tû-tû*.

If a person is *tû-tû* he shall be subjected to a ceremony of purification.

Hence: If a person has eaten of the chief's food he shall be subjected to a ceremony of purification.

In this there is certainly no superstition. In the same way as this description a prescription can be pronounced with the aid of *tû-tû*. Hence in a certain context the concept is meaningful even though, used in isolation, it is altogether meaningless.

Ross now transfers the basic thoughts from the allegory to jurisprudence. He formulates the following syllogism:

If a loan is granted there comes into being a *tû-tû*.

If a *tû-tû* exists, then payment shall be made on the day it falls due.[49]

This is only a roundabout way of saying:

If a loan is granted, then payment shall be made on the day it falls due.

In place of *tû-tû* Ross now inserts the word "claim". He reaches the conclusion that words like "claim", "ownership", "right", etc., are words

without semantic reference. Hence an endeavour to establish the meaning of such words is unproductive. Then Ross sets out to answer the question why jurisprudence utilizes such a strange technique of expression. In his view the answer is not hard to find. It is obvious that the legal rules concerning "ownership" can be expressed without the use of this term. In so doing, however, we should need a number of propositions.[50] Here the introduction of meaningless expressions can be advantageous. From a practical point of view it is almost necessary to use these meaningless words.[51]

Accordingly, a *tû-tû* concept is a word that is in itself meaningless, a word without semantic reference. When stating this, it must be borne in mind that it is a mistake to believe that a sentence cannot express a meaningful assertion because it contains meaningless words.[52] The assertion "A has ownership of x" has semantic reference to the complex situation that there exists one of those facts which are said to establish ownership, and that A can obtain recovery, claim damage, etc.[53] The concept is only a syntactical aid that will acquire meaning only when looked upon in the context in which it is being used.

4. Let us now see how this affects the responsibility concept. As stated above Ross maintains that responsibility is a systematical *tû-tû* concept, the function of which is simply to express the connection between guilt and punishment, conditioning facts and conditioned consequence.[54] To be responsible for x means to be the person who legally may be punished fo x. The assertion "A is responsible for x" means that there exist certain facts that according to a given set of norms, e. g. Swedish criminal law, render A liable to punishment. The difficulty with the concept of responsibility in criminal law is the problem of the meaning of the sentence: A is responsible for x.

What is the meaning of this sentence? To answer this question we need a definition of "responsible" rendering the meaning of the sentence within a given system of positive law, e. g. Swedish criminal law. Before we can find a definition we must consider what rules of law concerning responsibility are to be found in the given system of positive law. This is part of Hart's valuable work in "Punishment and Responsibility"[55] It does not, however, reach – perhaps does not even pretend to reach – a satisfactory definition. Hart's work is primarily of systematical and terminological value. But it does not throw direct light on the concept of responsibility.

A definition of responsibility can make use of either the disjunctive totality of legal facts or the cumulative totality of legal consequences:

If and only if F, then A is responsible for *x*.

If and only if A is responsible for *x*, then C.

F is a complex of legal facts and C is a complex of legal consequences. The two propositions above can be looked upon as alternative definitions of the responsibility concept. With the aid of the two propositions we can lay down the alternative definitions:

A is responsible = the definition F is valid concerning A.

A is responsible = the definition C is valid concerning A.

The framing of such a definition, however, is certainly not unproblematic seen from a practical point of view.[56] It must be difficult to express the exact content of the definition. In addition, the meaning of the term responsibility will change from time to time, and from a legal-comparative viewpoint the term responsibility will be employed for different concepts in different countries. As the work of Hart[57] indicates, if we define responsibility in terms of other expressions to which we have already attached interpretations or meanings, the responsibility definition will indirectly acquire a certain corresponding interpretation or meaning.

These and other difficulties can, however, be eliminated if we simply refrain from defining the concept. Instead we may choose to regard the term as a meaningless linguistic symbol whose function is to facilitate inference from statements not involving that term to other statements not involving it.[58] In using this model, criminal law is certainly not unique in science. The so-called exact sciences, especially, employ words without semantic reference as vehicles of systematization and deduction. As a practical alternative to phrasing a great number of sentences, it is clear that this last-mentioned use of the phrase "A is responsible for *x*" represents a convenient means of systematization.

Ross has obviously realized this. He has, however, not applied this model in a consistent way. If I understand Ross correctly, he applies the "definition model" when distinguishing between "accountability responsibility" and "sentencing responsibility" (the two forms of responsibility according to Ross)[58a] while using the "*tû-tû* model" concerning "sentencing responsibility". "Accountability responsibility" seems to include not only what

Hart calls "role responsibility" but also parts of his "liability responsibility". A person is accountability responsible when he can legally be prosecuted. To be responsible in this sense means, according to Ross, that the person fulfils the objective requirements for sentencing.[59] Concerning "responsible" in the meaning "sentencing responsibility" the subjective requisite must be complied with in addition. Apart from the fact that the distinction objective-subjective in this respect is in itself highly questionable,[60] it is certainly not obvious that a person can be prosecuted if he has committed a prohibited act when the requirements of culpability (intention, recklessness, negligence) cannot be shown.

Mainly for this reason, I cannot see that the distinction "accountability responsibility" – "sentencing responsibility" carries us very far towards an understanding of the concept. This once again underlines the great difficulties of expressing the exact content of the concept. At the same time the "*tû-tû*-model", consistently applied, stands out as the most appropriate alternative.[61] Considering that the function of the responsibility concept is to express the connection between the conditioning facts ("guilt" in the widest sense of the word) and the conditioned consequences (sanctions of different kinds) the use of terms like "accountability responsibility", "sentencing responsibility", "causal responsibility", etc., is of no interest. Concepts like causation, imputation, imputability, etc., should be analysed separately. The systematical clarity of the concept of responsibility as here recommended will then be of great help.

[1] It is interesting to note that even in the field of theology, especially in Christian ethics, the concept of responsibility has recently emerged as the dominant theme. Responsibility has become the central and normative motif for many theologians. In the area of Christian social ethics we find the term "responsible society". (See *J. H. Oldham,* A Responsible Society. The Church and the Disorder of Society, 147–154. London 1948.) In the debate regarding situation ethics the concept is an important one. (See *Joseph Fletcher,* Moral Responsibility: Situation Ethics at Work, 8, 237. Philadelphia 1967.) Again responsibility appears in the discussion concerning the Christian attitude towards the existence in this world and towards the structures and institutions of this world. (See *Harvey G. Cox,* On Not Leaving It to the Snake. New York 1967 and The Secular City. New York

1965.) *Charles E. Curran* says: "In these three important areas of social ethics, personal ethics and the general attitude of the Christian towards his existence in this world, responsibility has become a primary normative term in moral theology; but the term is very often used without any precise explanation of its meaning, and in some areas it tends to become a slogan which robs it of value and precision". Quoted from Responsibility in Moral Theology: Centrality, Foundations, and Implications for Ecclesiology, 31 The Jurist 111, at 118.

[1a] According to the *Oxford English Dictionary* the noun "responsibility" first appeared in English as well as in French at the end of the 18th century, while the adjective "responsible" was used earlier. The use of the word in law seems to be of even later date. See *McKeon*, 8–9, and *Pennock*, 5.

[2] *McKeon*, passim, and *Pennock*, 3–5.

[3] *Pennock*, 4–5.

[4] See also *Pennock*, 6, and *McKeon*, 8–9.

[5] Punishment and Responsibility, 265.

[6] Regarding the term, see *infra* p. 54ff.

[7] Punishment and Responsibility, 265. *Pennock*, 13, says that responsibility "has two primary meanings, or that what I have called the core of meanings has two facets, (a) accountability and (b) the rational and moral exercise of discretionary power (or the capacity or disposition for such exercise), and that each of these notions tends to flavor the other". Cf. *McKeon*, 7, and *Freund*, 29.

[8] Punishment and Responsibility, 266.

[9] Cf. Study Draft of a New Federal Criminal Code, Chap. 3. "Dolus" and "culpa" are sometimes referred to as "types and degrees of responsibility". See *Abbagnano*, 34.

[10] See *Gordon*, 45–46, and *Jacobs*, 10–12.

[11] The Homicide Act of 1957, sec. 2, not only refers to "diminished responsibility" but also to "degrees of responsibility".

[12] See *Jacobs*, 11, and *Gordon*, 45–46.

[13] See *Jeffery*, who in his book Criminal Responsibility and Mental Disease, 280, defines responsibility as "the ability to make a response". According to him, the concept must be viewed in a totally empirical framework – it is not a philosophical one. "We should examine the consequences of behavior, not probe the mind, to understand the problem of responsibility". *Id.*, at 281.

[14] *Hart*, Responsibility, 211–212. Cf. *Jerome Hall's* distinguishing of the principal meanings of the term, Criminal Law, 296.

[15] Morality, 15–16.

[16] Punishment and Responsibility, 216–217.

[17] Id., at 217–218.

[18] Concerning the meaning of the term, see supra and *Hart*, Punishment and Responsibility, 218.

[19] This is certainly not mentioned as polemics against Hart's view. On the contrary, Hart's lucid analysis has so clearly revealed the ambiguity of the term that it could seriously be questioned whether or not the word should be retained in legal language.

[20] See Brottsbalken III, 264–265.

[21] 10 Cl. & F. 200, 8 E. R. 718 (1843).
[22] See also the almost identical formulation in § 503 of the Federal Criminal Code. Cf. *United States* v. *Freeman*, 357 F. 2 d 602 (2d Cir. 1966).
[23] *Strahl*, Introduction, 19.
[24] 214 F. 2d 862 (D. C. Cir. 1954).
[25] See *Wootton*, Crime and the Criminal Law.
[26] Morality, 24–25 and 14–15.
[27] *Hurwitz-Waaben*, 313, *Waaben*, Criminal Responsibility 274, *Waaben*, Utilregnelighed 145, *Kneale*, 30–32. See also *Brush* in 67 *DUKE L. J.* 86–89.
[28] The old position has many weaknesses, some of which are well illustrated by the vast literature in the field of law and psychiatry. The adherence to the old position underlines the tension between one-sided medical viewpoints and one-sided moralizing viewpoints, and creates difficulties for the courts owing to unclear psychiatric terminology and systematics, etc. See *Jareborg*, Uppsåt, 340. An increasing number of legal and psychiatric writers are also questioning the desirability of continuing to recognize an insanity defence. See Committee on Federal Legislation, New York State Bar Association, The Dilemma of Mental Issues in Criminal Trials, 41 N.Y. STATE B J., 394; *Goldstein & Katz*, Abolish the Insanity Defense-Why not?, 72 YALE L. J. 853; *Karl Menninger*, The Crime of Punishment, New York 1968; *Lawrence J. Friedman*, No Psychiatry in Criminal Court, 56 A. B. A.J., 242; *James V. Bennet & Arthur R. Matthews*, Mental Disability and the law, 54 A. B. A.J., 467.
[29] Criminal Law, 490 and 529.
[30] See *Jareborg*, Uppsåt 341, and *Hart*, Morality, 25.
[31] See *Agge-Thornstedt*, 128–129, *Waaben*, Utilregnelighed, 145, *Jareborg*, Uppsåt 342–343, and *Strahl*, Straffrättens allmänna del, 183–184.
[32] *Agge-Thornstedt*, 128–129.
[33] The following exposition has close links with the analysis of the responsibility concept by *Ross* in Skyld, ansvar og straf, 25–50. The greater part of Ross's article is also published under the heading "Skyld, ansvar og straf" in Nordisk Gjenklang. Festskrift til Carl Jacob Arnholm, 253, Oslo 1969.
[33a] The responsibility literature seems to be more occupied with the issue concerning the criteria for responsibility than with the issue regarding the meaning of the responsibility concept.
[34] This is in harmony with Hart's etymological explanation of the term responsibility. See supra. See also *Ross*, Skyld, 30, and, concerning the use of the term accountability in this respect, *McKeon*, 6–7. Hart speaks of "legal accountability" in a somewhat different sense. See Morality, 16.
[35] Cf. the division of the concept into "accountability" and "imputation" in *McKeon*, 26–28. It must be noted, however, that McKeon does not seem to make a distinction between imputation and imputability. See *McKeon*, 28.
[36] *Ross*, Skyld, 29.
[37] Cf. Hart's etymological explanation of the term responsibility. Punishment and Responsibility, 265, and supra.
[38] *Ross*, Skyld, 35. In this connection Ross talks of objective requisites for

a crime concerning accountability responsibility and objective as well as subjective requisites for a crime concerning sentencing responsibility. This use of the words "objective" and "subjective", though fairly frequently used by legal writers, is not satisfactory. In the law of criminal negligence it soon becomes apparent that the "subjective" requisite negligence includes – or rather primarily contains – "objective" elements. This is, I think, reason enough to avoid the use of the terms subjective and objective in the sense Ross seems to use them. I will return to this terminological question later on.

[39] *Ross,* Skyld, 35. The concept of responsibility must be analysed within the framework of a certain legal system. It is of no primary interest at this stage *which* legal system. We are presuming that there is a legal system. Otherwise it would be meaningless to analyse the legal aspects of the concept.

[40] *Ibid., 36.*

[41] *Id., at. 38.*

[42] *Ibid.*

[43] In Festskrift til Henry Ussing, Copenhagen 1951, 468. Later the article was translated into, inter alia, English and published in 70 HARV. L. REV. 812 as well as in 1 Scandinavian Studies in Law 137. The references here are to the article in HARV. L. REV.

[44] *Undén* advocates a division into "concepts of function" and "concepts of substance". See *Undén,* 170–171. Cf. *Lassen,* Definitioner. Both these Scandinavian legal writers are influenced by Cassierer's work "Substanzbegriff und Funktionsbegriff" from 1910.

[45] TfR 1945 p. 211. See also *Ross, Tû-Tû,* 824 and *Grönfors,* Subjektive Recht, 40–41.

[46] *Ross, Tû-Tû,* 823.

[47] *Ekelöf* uses the term "claim" (TfR 1945 p. 211 ff.) but in other respects the syllogisms here stated are analogous to Ekelöf's. See *Grönfors,* Subjektive Recht, 41.

[48] TfR 1946 p. 204 and TfR 1947 p. 481.

[49] *Ross, Tû-Tû,* Festskrift til Henry Ussing, 474.

[50] *Ross, Tû-tû,* 819.

[51] *Ross, Tû-Tû,* 819–821. See also *Wedberg,* 273–274, and *Grönfors,* Subjektive Recht, 43–44.

[52] See *Marc-Wogau,* 169–173.

[53] *Ross, Tû-tû,* 822.

[54] *Ross,* Skyld, 38.

[55] Especially Chapter IX, 210–230.

[56] Theoretically there seems to be no valid objection to these definitions. See *Wedberg,* 266–272.

[57] Punishment and Responsibility.

[58] *Wedberg,* 273.

[58a] Cf. *Hart,* Morality, 16–17, where Hart makes the distinction "legal accountability" – "personal responsibility".

[59] *Ross,* Skyld, 30.

[60] See p. 125.

[61] Cf. *Helen Silving,* Criminal Conduct, 16, where the responsibility concept

is referred to as a "relational concept" in connection with *Paul K. Ruy's* thesis "Korean Culture and Criminal Responsibility".

Note: The work *Ross,* Skyld, frequently referred to in this chapter, has now appeared in English. See Alf Ross, On Guilt, Responsibility and Punishment. London 1975. This translation has been accessible to the author too late to make possible a revision of the text.

III

Whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart.
Matthew 6:28

In the preceding chapter we chose to treat responsibility as expressing the connection between the conditioning facts and the conditioned consequences. In order to dig a little deeper and try to obtain a knowledge of the meaning of the sentence "A is responsible for x" concerning negligence we have to analyse the "subjective" and "objective" parts of the conditioning facts. As this book mainly deals with the "subjective" side of the negligence delict, we will primarily focus on the guilt issue. Our aim in this chapter will be to throw some light upon the *mens rea* issue in relation to the concept of criminal negligence.

1. Let us first turn to German criminal law.

Concerning the concept of crime the German theory first distinguishes the "tatbestandsmässige" act. The act must comply with the statutory definitional requirements. In addition, the act must be "rechtswidrig" (unlawful) and, finally the "tatsbestandsmässige" and "rechtswidrige" act will suffice as a crime only if "Schuld" (guilt) is at hand. Hence the three main parts of the German crime concept are "Tatbestandsmässigkeit", "Rechtswidrigkeit" and "Schuld".

In modern German criminal law the guilt concept (here referred to as Schuld) is a central concept. German criminal law is said to be a criminal law based on guilt ("ein Schuldstrafrecht") in contrast to a criminal law based on consequences ("Erfolgsstrafrecht").[1]

Legal writers in the German language adhere to the principle of *Schuld*. Punishment without *Schuld* is said to be "Unsinn, Barbarei".[2] The case law expresses itself in a more restrained manner though very clearly when it speaks of "des unantastbaren Grundsatzes allen Strafens, daß Strafe Schuld voraussetzt".[3] *Mezger* has in analogy with Feuerbach's famous framing of the principle of legality formulated the doctrine in a slogan-like form: "Ohne Schuld keine Strafe".[4]

This is clearly expressed in the German Draft Penal Code of 1962.[5] In its work on the reform of the German Penal Code the draft committee has elevated the concept of Schuld to the rank of "eine grundsätzliche Bekenntnisse" and hence withdrawn the concept from all discussion.[6] The punishment is, in the drafters' view, "ein sittliches Unwerturteil über Menschliches Verhalten". To punish while lacking such a "Schuldvorwurf" would destroy

the meaning of punishment and turn it into a "colourless" measure that could be misused to forward political aims.[7] The following quotation from the Draft gives a good picture of the basic importance of the Schuld concept in German criminal law:

> Der Begriff der Schuld ist im Volke lebendig. Ohne ihn gibt es kein leben nach sittlichen Wertvorstellungen. Ohne sittliche Wertvorstellungen ist menschliches Leben aber nicht möglich. Auch die Wissenschaft vermag nicht der Überzeugung die Grundlage zu entziehen, daß es Schuld im Handeln des Menschen gibt. Neuere forschungen geben dem Raum. Die Schuld kann auch festgestellt und gewogen werden, wenn auch nur im Rahmen menschlicher Erkenntnismöglichkeiten. Es handelt sich dabei nicht um eine kausalwissenschaftliche Feststellung, sondern um einen sittlichen Wertungsvorgang innerhalb der Rechtsgemeinschaft, der gerade das eigentümliche Wesen des Richterspruches ausmacht.[8]

What then is the meaning of Schuld?

The doctrine of Schuld in German criminal law is a rather complicated and at the same time fairly simple conception. To give a picture of the essence of the concept in the prevailing theory is not difficult. On the other hand, an endeavour to describe in detail the content of the concept is a delicate and demanding task. For it is a well-known fact that it would be difficult to find three German legal writers who are completely of the same opinion in this matter. Because of the very great interest concerning the issue in Germany the literature on it is extensive. Hence a really exhaustive discussion would necessarily carry us too far, considering the limited scope of this book. My exposition of the concept is therefore relatively brief. This does not necessarily mean, however, that much that is of interest will be passed over.

In the second half of the 19th century the prevailing Schuld concept of natural law was replaced by the *psychological theory of Schuld.* This theory had its starting point in the division between the external part of the criminal act and its mental constituents. The term Schuld was then used as a main concept for the mental or "subjective" part of the crime. Schuld was composed of intention *(Vorsatz)* and negligence *(Fahrlässigkeit)* and both had to do with the concept of will. Gradually, however, it became clear that intention and negligence were not parallel concepts. While intention is to a great extent a psychological

criterion, negligence is primarily a normative concept. Hence guilt concerning the negligent act could not be explained sufficiently by the psychological Schuld theory.[9] To avoid this and other difficulties, Schuld was defined in a formal way as "Verantwortlichkeit". "Schuld ist jene subjektive Beziehung der Täter zu dem eingetretenen rechtswidrigen Erfolg, an welche die rechtliche Verantwortlichkeit geknüpft ist".[10]

The critique of the psychological Schuld theory that was of greatest importance for the future development came from *Reinhard Frank.* He criticized the understanding of Schuld as a psychological main concept for intention and negligence. To use Frank's own example let us think of two persons who have both committed embezzlement, one of them because he badly needs money for his existence and the other in order to live a more luxurious life. The latter is said to be more guilty than the former. Hence, the whole of the Schuld concept does not lie in intention. Why? Because, according to Frank, "begleitende Umstände" are taken into consideration. Schuld consists of imputability, intention, negligence and "accompanying circumstances" (beleitende Umstände). Schuld is "*Vorwerfbarkeit*". Frank thought that in the term "Vorwerfbarkeit" a *normative* consideration was embedded. Frank is regarded as the originator of the theory now prevailing in Germany in this field, the *normative Schuld theory.* The establishing of Schuld not only means that the perpetrator has acted intentionally or negligently and that he is mentally sane but also, and primarily, involves a moral evaluative judgment. Schuld implies that the perpetrator has acted "pflichtwidrig" (against his duty) and that therefore from an ethical point of view he may be blamed for the act.

The normative Schuld theory is adhered to by the German Federal Supreme Court (Bundesgerichtshof) when it states: "Strafe setzt Schuld voraus. Schuld ist Vorwerfbarkeit. Mit dem Unwerturteil der Schuld wird dem Täter vorgeworfen, daß er sich nicht rechtmässig verhalten, daß er sich für das Unrecht entscheiden hat obwohl er sich rechtmässig verhalten, sich für das Recht hätte entscheiden können."[11] The German Draft Penal Code E 1962 expresses itself in a similar way: "Schuld wird dabei als

Vorwerfbarkeit derjenigen Willensbildung verstanden, die zur rechtswidrigen Tat geführt hat."[12]

An important variant of the normative Schuld theory is the guilt theory of the "finale Handlungslehre".[13] Concerning the intentional act the finality refers to the carrying out of the crime; it is tantamount to the intention. For the finalist theory, intention is an element of the act and not a part of the guilt concept. Intention does not belong to the "subjective" but to the "objective" requisites of crime.[14] When intention, the last psychological part of the act, is taken away from the Schuld concept we may refer to the finalists' Schuld theory as a *purely normative Schuld theory*. What is left as Schuld according to this theory is a moral "Vorwerfbarkeit".

An important distinction is the division into a *formal* and a *material* Schuld concept. The predominant and the most important of the different meanings of formal Schuld [16] is that the concept comprises the mental elements of the act that in a given legal system are required to qualify the imputation. In this respect the formal Schuld concept is further divided into "Vorsatzschuld" (intention guilt) and "Fahrlässigkeitsschuld" (negligence guilt). According to this view, imputability ("Zurechnungs- or Schuldfähigkeit") is not a part of the Schuld concept.[17]

The formal "Fahrlässigkeitsschuld" does not, for instance take into consideration the meaning of the elements of negligence, – in German law "Pflichtwidrigkeit, Voraussehbarkeit and Vermeidbarkeit" – but only their (correct) place in the concept of crime. In this respect the dividing of the concept into a *general, "objective"*, standard and an *individual, "subjective"*, standard is of the greatest importance. Earlier German legal writers adhered to a "purely" general standard applying the "bonus pater familias" standard.[18] According to the prevailing theory, however, the individual standard should also be used. The question at issue is then to a great extent whether the failure to exercise the requisite care ("der im Verkehr erforderliche Sorgfalt") is an issue only of "unlawfulness" (Rechtswidrigkeit) or an issue of Schuld as well.

"Die Struktur der Fahrläßigkeitstat" is much debated in

German legal writing.[19] Another controversial issue concerns the substance of guilt regarding inadvertent negligence *(unbewusste Fahrlässigkeit).*[20] The assertion that inadvertent negligence is not guilt because guilt must be based on an evil will,[21] presupposes an understanding of Schuld in a material way. What then is meant by the expression material Schuld?

A material Schuld concept will according to German theory reveal the material content, the core, of the Schuld.[22] On what conditions is it just to base the imputation on a certain mental state? The material Schuld concept can be based on the demands of ethics or general security, on the uniqueness of man's control of his will or the aim of punishment.[23]

The material Schuld concept concerning the negligence delict is one of the most widely discussed and controversial issues in German criminal-law theory. Since the days of Feuerbach the output of literature in the field has been enormous. The oldest theories – still influential – are the "theories of will and conception" *(Willens- und Vorstellungstheorien).* For these theories the division into advertent *(bewusste)* and inadvertent *(unbewusste)* negligence is rather essential. This distinction was originated by Feuerbach.[24] A person acts with advertent negligence when he knows that he is exposing his surroundings to danger. The awareness of concrete danger constitutes the difference. In the case of inadvertent negligence the perpetrator is not aware of the possibility of danger. This distinction is widely accepted in continental European and Scandinavian law by legal writers as well as by the courts.[25] The importance of this distinction for Feuerbach's theory must be viewed in the light of his doctrine of psychological constraint ("der psychologische Zwang"),[26] the basis of Feuerbach's guilt theory. Feuerbach defines negligence as "die Begehung einer äusseren Handlung, mit dem Bewußtsein des Subjekts von dem Kausalzusammenhang derselben mit einem möglichen oder wahrscheinlichen gesetzwidrigen Erfolg".[27] This definition only recognizes advertent negligence because the aim of a penal provision is "durch die Vorstellung der gedrohten Strafe, von der in dem Gesetz genannten Handlung abzuschrecken, also den Willen psychologisch zur Unterlassung zu bestimmen".[28] When Feuerbach later

extended negligence to cover even inadvertent negligence[29] he consistently adhered to his view of "eine gesetzwidrige Bestimmung des Willens" as the basis for negligence Schuld. The negligent person chooses to be ("will") inattentive.[30]

As pointed out above, the concept of advertent negligence in German law is historically connected with a material Schuld theory based on the will *(Willenstheorie)*. Though not uncontested, the distinction between advertent and inadvertent negligence is adhered to by the great majority of legal writers as well as by the courts.[31] But is it a valuable distinction, useful for the analysis of the concept?

From a terminological point of view the distinction is somewhat unfortunate and is difficult to understand. Briefly, negligence is often described as the form of imputation where the perpetrator was not aware, but ought to have been aware that his act was such as to render him punishable. The lack of awareness, however, does not fit the definition of advertent negligence given above. An inadvertently negligent person is not lacking in attention. The fault on his part is that he does not properly consider the information he is in possession of. Further, the distinction also could be understood as indicating the possibility that every negligent act may be committed either inadvertently or advertently.

Ross[32] has maintained that these difficulties emanate from the fact that expressions like negligence have a double meaning. Negligence denotes both a standard of conduct and a mental state on the part of the actor. According to Ross the first meaning is the original one. Later on, the term negligence was also used to stand for a mental state. Because the violation of the standard of care could also, though more seldom, be advertent, the term advertent negligence came into use together with inadvertent negligence. Ross maintains that it was overlooked that in these connections negligence does not denote a mental state. Advertent negligence is equivalent to advertent violation of the standard of care. Hence advertent negligence does not signify a mental state and cannot be equated with negligence as a form of imputation.[33]

Ross would seem to be correct in maintaining that negligence as a standard of conduct is the original form. Negligence has "grown" on the ground of "casus" ("Ungefährwerk") and not as an excrescence on the tree of intention. Originally it had nothing to do with the concept of "Willensschuld".[34] It is therefore no wonder that the distinction advertent – inadvertent negligence as originating from Feuerbach's endeavour to explain the content of guilt concerning negligence is unsatisfactory from a terminological point of view. The question remains, however, whether the distinction, materially too, is unsatisfactory. This has been claimed by, among others, *Schmidhäuser* and *Schröder*. Their views seem to be compatible. If the requirement that the actor relies on his not effectuating the result means that he does not regard the harmful result as possible any more, then the advertent negligence has become inadvertent.[35] On the other hand, if the actor continues to act although he knows that the act could have either a happy or an unhappy outcome, then *dolus eventualis* is present.[36]

The difference between dolus eventualis and advertent negligence is that in dolus eventualis the actor would have acted even if he had been certain that the harmful consequences would follow, while the person who would have refrained from the act if he had been certain of the harmful outcome has acted with advertent negligence. Considering this, the two forms of negligence seem to be psychologically different, and in theory the construction simplifies the drawing of the line between negligence and intention. In reality, however, the contruction of dolus eventualis is rather difficult to apply. It is also just as difficult to distinguish between advertent and inadvertent negligence in practice.[36a] The German Penal Code, like the Swedish counterpart, does not make this distinction necessary. The two forms of negligence will not lead to different legal consequences.[37]

Our conclusion from this brief account is first of all that the distinction is unclear. This seems to emanate from the fact that the distinction has its origin in an antiquated German doctrine. Concerning negligence, the psychological element is almost totally relegated to the background. Hence it is not possible to base the culpability of negligence on psychological considerations. In addition, it is important to underline that the distinction seems to be of no practical importance.[38]

Feuerbach's theory of "intentional" negligence had a great influence on German legal writers in the 19th century[39] and has not been unimportant for the thinking on this subject in the present century.[40]

The will and conception theories of guilt found in the inadvertent negligence a positive-psychological process with elements of will. In later years legal writers have stressed the relation between negligence and oblivion (*"die Gefühls und Interessentheorien"*). The most noted representatives of these theories are *Exner* and *Engisch.* A negligent actor is punishable because through his act he has shown "daß er die rechtlich geschützten Güter gering werte und ihm an ihrer Verletzung nichts liege."[41] This "pflichtwidrigen Geringwertung des Rechtsgutes" is to be found "in den emotionellen Mängeln, in den Fehlern der Gefühlsseite".[42]

A third main category of guilt theories pertinent to negligence consists of the theories of "character faults" (*"Charakterfehler"*). These theories take into account that during the formation of the personality through education and experience, through a passive registration of impressions as well as through action, a person's character can unconsciously become negatively affected – a development of "Charakterfehler". The most elaborate theory of this kind is perhaps Welzel's. He recognizes Schuld in "dem

fehlerhaften Aufbau der Persönlichkeitsschicht, in einem vorwerfbaren Charakterfehler".[43]

2. If we turn to the *mens rea* concept in Anglo-American criminal law, it soon becomes apparent that the German Schuld and *mens rea* are not identical concepts.[44] Systematically, as well as terminologically and methodologically, Anglo-American criminal law has undergone a development that is essentially different from that of continental European law. As a result, it has become rather difficult for continental European scholars to arrive at a true understanding of *mens rea*. Löffler's remark from the beginning of this century that "English law is very antiquated as to the doctrine of *mens rea*"[45] is symptomatic of this difficulty. A certain light is thrown on the matter by the – somewhat anachronistic – observation of an American legal writer that "the history of the elucidation of the *mens rea* concept is a dispiriting record of legislative, judicial, and scholarly imprecision".[46]

Although the term *mens rea* is one of the commonest in Anglo-American criminal law, its origin is not clear. *Pollock* and *Maitland* maintain that the original source is to be found in St Augustines's Sermons: "Ream linguam non facit nisi mens rea".[47] *Jerome Hall* suggests that Augustine's inspiration for this statement came from biblical expressions and he asserts that there is a direct source for the formula in the letters of Seneca, who wrote: "Actio recta non erit, nisi recta fuerit voluntas . . .".[48] In English law the maxim first appeared already in the *Leges Henrici.*[49] The first English legal writer to make use of the formula, however, was *Coke,* who in his Third Institute wrote: "Et actus non facit reum nisi mens sit rea."[50]

Early in English legal history the sources of law indicate that the mental elements of a crime are to be taken into consideration. The expressions used show influences from Roman and especially Canon Law. During the period from the time of *Bracton* to the 18th century the doctrine concerning the mental element of crime in English law developed various subjective requisites in connection with the particular crimes. The use of terms like "animo", "voluntate", "nocendi voluntas", "negligentia" and "mala conscientia", as found in Bracton's writings,

reflects the influence of Roman and Canon law.[51] Though Coke several times mentions the term *mens rea* it was not until *Blacktone's* "Commentaries on the Laws of England" that we find a more elaborate exposition of the doctrine concerning the mental element of crime. In Vol. 4, Chap. 2, Blackstone gives the following exposition:

> All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable . . . And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be first, a vicious will; and, secondly an unlawful act consequent upon such vicious will.[52]

On the basis of this doctrine, which was influenced predominantly by the moral-blameworthiness theory of retribution, Blackstone singled out certain circumstances where the perpetrator is not liable to punishment. He mentions infancy, idiocy, lunacy, intoxication, misfortune, ignorance, compulsion and necessity.[53] Blackstone treats these circumstances as grounds for the elimination of punishment, as "defences" or "excuses". This collection of excuses[54] is derived entirely from case law.[55] Some writers have seen in this notion of *mens rea* a "shorthand" phrase for describing a number of excuses,[56] an early exposition of the ascriptive theory of *mens rea*.[57]

During the century that elapsed between Blackstone and *Stephen* we must consider the analytical works of *Bentham* and *Austin*. Bentham's work of 1789 *An Introduction to the Principles of Morals and Legislation* was written as an introduction to a draft penal code. His philosophy of law is consistently based on two theses: first, that human existence is subject to "pleasure and pain"; and secondly, that right and wrong can only be measured in one way, namely, the capacity of the act to create "pleasure and pain".[58]

The dualism of *Descartes* is adhered to by Bentham and seems to have entered into English legal philosophy through the latter's writings:

In every transaction therefore, which is examined with a view to punishment, there are four articles to be considered: 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, unconsciousness, or false consciousness, that may have accompanied it.[59]

Intention is will and may concern either the act itself or its consequences.[60] When explaining the meaning of *consciousness*, Bentham distinguishes between advised and unadvised acts; in the latter type of act the actor was not aware of the circumstances. An unadvised act could be either *heedless* or not heedless.

It is termed heedless, when the case is thought to be such, that a person of ordinary prudence, if prompted by an ordinary share of benevolence, would have been likely to have bestowed such and so much attention and reflection upon the material circumstances, as would have effectually disposed him to prevent the mischievous incident from taking place.[61]

Austin, too, analysed the psychology of the act. He took as his starting point the concepts of "volition" and "act".[62] He maintained that intention is "a *precise* state of the mind" that must be kept apart from negligence.

To intend is to believe that a given act will follow a given volition, or that a given consequence will follow a given act. The chance of the sequence may be rated higher or lower; but the party *conceives* the future event, and believes that there *is* a chance of its following his volition or act. Intention, therefore, is a state of consciousness.[63]

In *negligence*, on the other hand, "the party does *not* think of a given act, although it is his duty to do so."[64] Austin also defines the term *heedlessness* as "*not* think[ing] of a given consequence" of the act which the party commits, and the term *rashness* as the party's advertence "to those consequences of the acts; but, by reason of some assumption *which he examines insufficiently*, he concludes that those consequences will not follow the act in the instance before him."[64]

It follows from this that Bentham and Austin aimed at a more thorough analysis of the act and its psychology. Their work in this connection has undoubtedly had certain influence on English law, but criminal law has not accepted their analysis. Legal writers, though they have "paid lip service to the principles of responsibility advocated by Bentham and Austin",[65] have to a great extent continued in the old manner, and the courts in

particular have been reluctant to take advantage of the concepts of the analytical theory. But it is interesting to note that English criminal law in this phase of its development could have come closer to a "continental European" method if there had been an inclination to elaborate a general doctrine based on such concepts as "intention" and "negligence".[66]

In contrast to the subjective, special-deterrence approach advocated by Bentham and Austin, a general-deterrence theory of utility gained considerable ground towards the end of the 19th century. *Holmes* was the leading spokesman for this approach to the law of excuses. He maintained that "public policy sacrifices the individual to the general good"[67] and identified penalty with pain. The only purpose of the penalty is to give the actor a new motive for not committing the punishable act. "For the most part, the purpose of the criminal law is only to induce external conformity to the rule . . . it (the law) is ready to sacrifice the individual so far as necessary to accomplish that purpose . . .".[68] To achieve the ends of criminal law, all that it demands is external conformity to its commands. In this objective theory of liability there is no place for the concept of *mens rea*.[69]

Holmes' theory had an enduring influence on Anglo-American criminal law.[70] The endeavours to attach a single precise meaning to the term[71] were to a great extent rejected.[72] Even supporters of the "subjective" approach considered the expression *mens rea* to be meaningless.[73] According to this view, *mens rea* is a *formal* concept that covers every "subjective" requirement, but it could not be defined in general terms. *Sayre* expressed a similar thought in his well-known conclusion: "The old conception of *mens rea* must be discarded, and in its place must be substituted the new conception of *mentes reae*."[74]

What has been said here illustrates the traditional reluctance of Anglo-American criminal law to work with general concepts. In this respect Anglo-American criminal-law theory differs considerably from the continental European variety. The developments which have occurred in the modern industrialized society have from time to time revealed the inadequacy of the *mens rea* concept. The expansion of criminal law beyond the classical criminal-offence area has, especially because Anglo-American law

has traditionally lacked a general negligence concept, been an impulse to closer consideration. The lack of thinking in terms of general concepts such as dolus, culpa and casus has turned out to be unfortunate. Since the second world war, in addition to an intensive expansion of the study of comparative law, there has occurred a revival of interest in issues concerning liability and punishment. These factors are among the reasons for the penetrating discussions in recent years of the *mens rea* concept in Anglo-American law, and especially in the USA has resulted in an unprecedented activity in the field of legislation.

3. In the centre of the intensive and clarifying discussion that has taken place during the last two decades concerning the *mens rea* concept in Anglo-American criminal law, stand two important works by *H. L. A. Hart,* "The Ascription of Responsibility and Rights"[75] and "Negligence, *Mens Rea,* and Criminal Responsibility".[76] The first-mentioned essay forms the starting point of a fruitful discussion concerning a relevant approach to the *mens rea* concept while the other throws a clear light on the relationship between *mens rea* and negligence, a relationship that had remained obscure through centuries of legal writing.

Hart maintains that *mens rea* should be regarded as a "shorthand" phrase for describing a number of excuses. The doctrine of *mens rea* groups together several "grounds of defeasibility" and according to Hart it cannot properly be understood in another setting.[77] This method of describing *mens rea* we may call the *ascriptive* approach. It has not been rigidly adhered to by other legal writers. It has, however, had considerable influence, especially on the younger generation of scholars.[78] The majority of criminal jurists seem to hold the view that *mens rea* stands for a positive requirement of an appropriate form of blameworthiness in every case.[79] *Mens rea* is looked upon as revealing, in advance of prosecution, specific elements that must be proved before any conviction can be considered just. This is often expressed by saying that an accused must have known what he was doing, that he must have foreseen the consequences of his act, and that his act must have been voluntary.[80]

The descriptive approach runs into trouble when considering the negligence concept. This approach, with its strict separation of mind and act, has led scholars to reject negligence as a permissible basis for ascriptions of responsibility under *mens rea*. *Turner*, for example, confines the maxim to a combination of two elements: the accused's conduct should be "voluntary" and "foresight" of the consequences of the conduct must be present.[81] According to this position, negligence does not fall within *mens rea*, but is instead a form of "strict" or "absolute" liability.[81a] *Glanville Williams* also excludes negligence from *mens rea*, because it is not necessarily a state of mind and thus cannot be equated with intention and recklessness. Negligence is, however, a "kind of legal fault" and in that respect is "akin to crimes requiring *mens rea*".[82] Some writers have stretched formulations that negligence is *mens rea* "of an omissive nature".[83] Other seek to avoid the difficulties connected with the negligence concept, considering it to be an "extension of rather than a departure from the values associated with the *mens rea* concept".[83a]

The traditional view of *mens rea* was attacked by Hart in the late 1940s. He turned against the descriptive view of the concept of responsibility as adopted by certain legal writers who

> have sought to impose a spurious unity ... upon these heterogeneous defences and exceptions, suggesting that they are admitted as merely evidence of the absence of some single element ("intention") or in more recent theory, two elements ("foresight" and "voluntariness") universally required as necessary conditions of criminal responsibility.[84]

What is meant by the mental element in criminal liability *(mens rea)*

> is only to be understood by considering certain defences or exceptions, such as Mistake of Fact, Accident, Coercion, Duress, Provocation, Insanity, Infancy, most of which have come to be admitted in most crimes and in some cases exclude liability altogether, and in others merely "reduce" it.[85]

"The cash value of the maxim" is that the elements mentioned are admitted as defences or exceptions. Words like "voluntariness" and "foresight" are not of very much help. They are

> convenient but sometimes misleading summaries expressing the absence of all the various conditions referring to the agent's knowledge or will which eliminate or reduce responsibility.[86]

It is to the credit of Hart that he has clearly pointed out in Anglo-American legal writing the essentially ascriptive character of the *mens rea* concept. This is undoubtedly a great step forward. As to the negligence concept, "[w]e would be less likely to make the mistake of contrasting negligence as a mode of culpability with the others on the ground that it is the mere *absence* of any state of mind and hence an inadequate basis for the assessment of fault".[87] On the other hand, however, as pointed out by *Dubin*, the essentially ascriptive character of the maxim does not necessarily lead to Hart's conclusion that the concept is rigidly defeasible.[88]

> It simply does not follow that because the *mens rea* concept is fundamentally ascriptive no valuable generalizations exist to govern the concept's applicability which may, when taken collectively, define its precise and entire scope . . . Why cannot unifying principles both ascriptive and descriptive be formulated to explain the reason or justification for all such defenses or exceptions? Must there not at least be some operative criteria determining the initial recognition and subsequent amendment of such "heterogeneous" excuses?[89]

Using a basically ascriptive approach to the *mens rea* concept, *Brett* has, in contrast to Hart, developed what he calls a "positive analysis". According to him the combining positive criterion is moral blameworthiness.[90] It seems, however, that the "positive analysis" is developed into a "negative" one. The lack of moral blameworthiness becomes an extra defence.[91] It would seem that in recent years legal scholars have preferred "a combined outlook".[92] General rules are combined with more precise rules concerning defences and excuses.[93] The Model Penal Code has chosen such a combined approach.[94] Although the authors of the draft apply descriptive words and phrases, they acknowledge the essentially ascriptive character of *mens rea*. Thus, talking about negligence, they write:

> The tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. Whether that finding is verbalized as "substantial culpability", as the draft proposes or as "substantial deviation from the standard of care that would be exercised by a reasonable man under the circumstances", as the alternative would put it, presents the same problem here as in the case of recklessness. The jury must find fault and find it was substantial; that is all that either formulation says or, we believe, that can be said in legislative terms.[95]

The combined approach of the Model Penal Code has favoured a more realistic view concerning the negligence concept.[96]

4. In condensed terms the doctrine of "subjective" guilt in the Nordic countries could be stated as follows: Objectively, punishability exists where the act conforms to the statutory definitional requirements of the code. For an act to constitute a crime, the "objective" requisites of a crime must stand in a certain legal technical relation to the "subjective" element – the "objective" requisites must be "covered" subjectively. (In Swedish criminal law, legal writers talk about the "covering principle" (täcknings-principen)).[97] The "subjective" side, the *imputation*, presupposes *imputability*.[98] The forms or elements of imputation are *dolus* (Vorsatz, intention) and *culpa* (Fahrläßigkeit, negligence). Dolus may be direct, indirect (dolus directus, dolus indirectus) or dolus eventualis.[99] As expressly stated in the Swedish Penal Code (BrB 1:2), dolus is required unless it is otherwise stated in the particular provision. Culpa is the lower form of imputation. As we have seen, legal writers make a distinction between advertent culpa and inadvertent culpa.[100] A distinction between "gross", "normal" and "simple" culpa is also commonly made.

5. As a designation for the above-mentioned "subjective" requisites of a crime, legal writers in the Nordic countries not infrequently use the word guilt (skuld, skyld). The assertion that punishment presupposes guilt, i.e. dolus or culpa, is here only a *formal* statement. In modern legal writing there is *not* to be found a discussion of the material content of the concept. On the contrary there is, particularly in Sweden, a pronounced reluctance even to use the word in this formal connotation.[101] The term guilt as it appears in legal writing is not altogether clear-cut. The weightiest reason for not using it, however, seems to be that the word could be understood as expressing a rejected criminal-law ideology. It has been maintained that the concept of guilt is inseparably connected with the idea of retribution and hence is irreconcilable with the philosophy of prevention prevailing in present-day Sweden.[102] I think we may here leave the discussion of this issue and regard it as an open question. It would carry us

too far to examine it in detail in the present context. It must suffice to say that it is certainly not necessary that the guilt concept should contain a normative social or moral evaluation. The word may be used without a metaphysical secondary connotation as a convenient "shorthand" phrase for the "subjective" requisites of crime.[103]

Talking about guilt not as a consequence, like the feeling of guilt, but as a prerequisite of a consequence – here punishment – we may ask ourselves: What exactly is it that is called guilt? This is a hard question to answer. But we are able to explain the meaning of a sentence like: "In committing murder, A has brought guilt upon himself".[104] *Ross* explains its meaning in a functional way. A has put himself in a situation where, because he has violated the "normative order" in issue, he faces *dissapproval*, for instance in the form of a criminal sanction.[105] This explanation presupposes the existence of a "normative order" in the community in question. Ross's exposition does not in this respect differ very much from the views of *Strahl,* who maintains that the meaning of guilt is only that the act does not come up to standard – the person concerned has not complied with the reasonable demands of the community.

As pointed out above, we find in the criminal law system a complex set of rules concerning crime requisites – "objective" as well as "subjective". The analysis of the guilt concept does not lead to a definition of the limits regarding the criminal area. Nevertheless a useful guilt concept will be obtained through an analysis of these requisites. Guilt is present simply when these requisites are met.[107] The efforts of German criminal law to explore the nature of material guilt therefore represent a sterile method. This unproductive approach is to some extent paralleled by the discussion by, e. g., *Turner* in England and *Jerome Hall* in the U.S.A., concerning the question whether negligence is a form of *mens rea.*[108] The issue is not whether negligence is *mens rea,* "the issue is whether it is true that to admit negligence as a basis of criminal responsibility is *eo ipso* to eliminate from the conditions of criminal responsibility the subjective element which, according to modern conceptions of justice, the law

should require".[109] In order to answer this question I think the application of the ascriptive approach as described above is essential.

For an evaluation in its turn of the significance of this approach the distinction dolus-culpa must be regarded. Though it appears more correct to apply a descriptive or positive approach concerning the concept of intention, it must be admitted that Hart's analysis throws light on something essential. To view intention problems also as an issue concerning which defences are relevant – an approach that seems to be more natural in a common-law system – must facilitate the understanding of a rather complex concept. The relevant defeasible concept is here that of being deserving of punishment.[110] Negligence, on the other hand, renders a somewhat different picture. It is my view that the negligence concept cannot be properly understood *unless* an ascriptive approach is applied. The so-called "inadvertent" negligence implies a lack of awareness. The crucial question with respect to the "subjective" or mental element is: "Could the accused have acted according to the standards accepted by the community? " In answering this question we have to take into consideration certain "defences" or, as I should prefer to call them, *individual elements.* What is meant by negligence *as a mental element in crime* is not properly understood until these individual elements are considered.

[1] Concerning the historical development of Schuld in German criminal law, see the references under note 3 in *Müller-Dietz,* Schuldgedanke 1, and *supra.*
[2] *Hafter,* 101. Cf. *Mikat,* 10, and *Beck,* 45.
[3] BGH St 2, 202.
[4] *Mezger,* Schuld und Persönlichkeit, 5.
[5] Entwurf eines Strafgesetzbuches (StGB) E 1962. The German Draft Penal Code.
[6] Deutscher Bundestag, 4. Wahlperiode, Drucks., IV/650, 96. This has been criticized by *Salm,* 177.
[7] Entwurf 1962, 96. From this it is certainly clear that the strong adherence to Schuld in German criminal law after the second world war must be viewed in the light of the unfortunate experiences of the German legal system during the years of Nazi rule. See *Simson,* Straffrättsreform, 257, 260, 262–263.
[8] Entwurf 1962, 96. Cf. *Dreher,* 5–15. In 1969, when the German Penal Code was changed, § 60 of the Draft was adopted as § 13. According to this

section "Die Schuld des Täters ist Grundlage für die Zumessung der Strafe". Cf. Alternativ-Entwurf, §§ 2 and 59. Concerning the philosophical basis for the view of the committe, see comments by *Simson,* Strafrättens utveckling, 588.

[9] *Radbruch,* 338ff. Radbruch himself suggested that the concept of Schuld should represent a summary of all psychological elements of the criminal act. Concerning negligence, Radbruch assigned the non-psychological element to the concept of unlawfulness (Rechtswidrigkeit). *Id.* at 345ff. For other solutions see *Sturm,* 46–52, and *Schmitt,* Uber Schuld und Schuldarten, 94ff.

[10] v. *Liszt,* 154. See also *Löffler,* Schuldformen, 5; *Kohlrausch,* Irrtum, 1.

[11] BGH St 2, 200, or 52 NJW, 594.

[12] Entwurf 1962, 137. See further *Maurach,* 359 and *Jescheck,* Lehrbuch 276–277.

[13] Concerning this doctrine see *infra* p. 127f.

[14] *Welzel,* Bild, 41–43, and Strafrecht, 138–141.

[15] *Jescheck,* Lehrbuch, 277.

[16] The formal Schuld concept has also been defined in German legal writings as a formal logical concept with different possible meanings. See *Müller-Dietz,* Schuldgedanke, 47.

[17] See *Müller-Dietz,* Schuldgedanke, 48, and *Jescheck,* Lehrbuch, 277–278.

[18] On this standard, see *infra,* p. 153ff.

[19] See *Müller-Dietz,* Schuldgedanke, 50–51, especially note 97.

[20] Concerning the terms inadvertent and advertent negligence, see *infra.*

[21] See, inter alia, *Arthur Kaufmann,* Schuldprinzip, 162, and *Bockelmann,* 212–215.

[22] On the different material Schuld concepts, see *Arthur Kaufmann,* Schuldprinzip, 140 ff., and *Engisch,* Untersuchungen, 451ff.

[23] *Jescheck,* Lehrbuch, 278.

[24] *Himmelreich,* 22.

[25] The German Reichsgericht has stated that negligence is at hand "wenn feststeht, dass der Täter die Sorgfalt, zu der nach den Umständen und seinen persönlichen Kenntnissen und Fähigkeiten verpflichtet und imstande war, ausser acht gelassen hat und dass er infolgedessen entweder den erfolg, den er bei Anwendung der pflichtgemässen Sorgfalt hätte voraussehen können, nich vorausgesehen hat – unbewusste Fahrlässigkeit – oder den Eintritt des Erfolgs zwar für möglich gehalten, aber darauf vertraut hat, er werde nicht eintreten – bewusste Fahrlässigkeit". RG St 56, 343, 349. Cf. RG St 58, 130, 134 and 67, 12, 18. The German Draft Penal Code E 1962, § 18, defines advertent negligence in the following terms: "(2) Anybody who deems it possible that he will effectuate the definitional elements of a crime, but in violation of duty and in blameworthy fashion trusts that he will not effectuate them, also acts negligently." The terms advertent and inadvertent are here used as synonymous with the words "conscious" and "unconscious" which are used by some writers. See *Andenæs,* Criminal law, 218.

[26] The theory asserts that the motive of the crime is connected with the satisfaction of a need. Owing to the threat of punishment the conception of the feeling of pleasure aimed at the satisfaction is converted into a feeling of

displeasure when it is associated with the expected penal reaction. If this feeling of displeasure dominates, the presumptive perpetrator is induced to abstain from the committing of the crime. "Die Tat kann nicht begangen werden, ohne das Übel zu leiden; das Übel kann nicht vermieden werden, ohne dass die Tat unterlassen wird." *Feuerbach,* Anti-Hobbes, 217f., *Hepp,* 80ff., and *Grünhut,* 19ff. See also *Thornstedt,* Legality, 214.

27 *Feuerbach,* Dolus und culpa, 223.

28 *Feuerbach,* Dolus und culpa, 211.

29 "Culpa durch Unwissenheit," "Übereilung" and "Unbedachtsamkeit". See *Himmelreich,* 23–24, and *Erenius,* 40–41.

30 *Exner,* 19.

31 See, inter alia, *Jescheck,* Lehrbuch, 202–204 and 377–378.

32 Hensigt er ikke forsæt, 355–356.

33 *Ross,* Hensigt, 356.

34 See *Himmelreich,* 50, *Schönke-Schröder,* 527, *Mannheim,* 98, and *Erenius,* 35.

35 *Schmidhäuser,* 345–346, and *Schönke-Schröder,* 527.

36 *Schönke-Schröder,* 527. When the result is neither desired nor considered certain or preponderantly probable, but has merely presented itself to the actor as more or less possible and the actor has decided that he desires the act to be done even though the unfortunate consequence should follow, then dolus eventualis (in German bedingter Vorsatz) is present. See *Andenæs,* Criminal Law, 212–213.

36a See *Mannheim,* 92–95.

37 See Alternativ-Entwurf, § 18, 57, and *Erenius,* 81–82.

38 The issue concerning the distinction has for a long time been a battleground for German legal writers. For a summary of the discussion see *Binavince,* Fahrlässigkeit, 140–154.

39 The guilt content of inadvertent negligence has been regarded as: "negativ-böse Wille" (negative-evil will) *Klein,* 91ff.; "Willensentschluss zu einem rechtswidrigen Tun", v. *Birkmeyer,* 32; "unbewusst rechtswidrigen Willen", *Bruck,* 4, and "ein negatives Verhalten des Willens", *Köstlin,* Strafrecht, 165.

40 According to Mittermaier, negligence is based "in der Willensbildung, in der Motivation", *Mittermaier,* 435. To Mezger the most important element in the concept of negligence was "der bewussten Pflichtverletzung", *Mezger,* Unrechtselemente, 254. In quite recent writings there can be found tendencies pointing in the same direction. See *Maurach,* 536, where we can read: "Was der Täter des unbewusst fahrlässigen Deliktes will, ist . . . eine Risikohandlung."

41 *Exner,* 176. Cf. *Engisch,* Untersuchungen, 460.

42 *Exner,* 165. Nowakowski talks about negligence as "Mangel im Gefüge der Wertgefühle", *Nowakowski,* 104. Also Jescheck could be mentioned in connection with these theories. According to him the guilt by negligence is to be found in "einem Mangel der Funktionsweise des Wertgefühls." *Jescheck,* Aufbau, 26.

43 *Welzel,* Strafrecht 150. Cf. also v. *Bar,* Schuld, 443–444, and *Engisch,* Untersuchungen 452–453.

44 See, inter alia, *Mueller,* The German Draft Criminal Code 1960 – An

Evaluation In Terms of American Criminal Law. 1961 U. ILL. L. F. 25, 40.
45 *Löffler,* Körperverletzung, 261.
46 *Dubin,* 351. One of the first important works to remedy this lack of understanding is *Mannheim,* Mens Rea in German and English Criminal Law.
47 *Pollock & Maitland,* 476.
48 *Jerome Hall,* Criminal law, 79–80. See also *Lévitt,* The Origin of the Doctrine of *Mens Rea.* In 17 ILL. L. REV. 117, and *Biggs,* The Guilty Mind.
49 *Pollock & Maitland,* 476, and *Sayre,* 978–980.
50 *Stephen,* History, 94, and *Sayre,* 988. See also *Plucknett,* 283.
51 *Sayre,* 984–987.
52 Blackstone's work here stands out as the most elaborate among the important works in England from the end of the 17th century, together with the prominent legal writers Hale, Hawkins and Foster. See *Brett,* 38–40, and *Dubin,* 351–353.
53 4 *Blackstone,* Commentaries, 22.
54 See *Stroud,* Mens Rea, 22.
55 See *Brett,* 40.
56 *Brett,* 41. Dubin asserts that an analysis of the doctrines on *mens rea* of Blackstone as well as Hale and Hawkins reveals the three principles of proscription, conformity and function. *Dubin,* 354–356.
57 See *Hart,* Ascription, and *Brett,* 41ff., as well as *infra* p.
58 *Bentham,* 11.
59 *Id.* at 75.
60 *Id.* at 84.
61 *Id.* at 90.
62 *Austin,* 414–415.
63 *Id.* at 428.
64 *Id.* at 428 and 431.
64a *Ibid.*
65 *Dubin,* 357.
66 See *Waaben,* Forsæt, 32. Cf. also Dubin, 356–357.
67 *Holmes,* 41.
68 *Id.* at 42. See also Holmes's lucid exposition in *Comm.* v. *Pierce,* 138 Mass. 165, 52 Am. Rep. 264 (1884).
69 *Dubin,* 357–358, and *Binavince,* Foundation, 28–29. For a discussion of Holmes's theory see *Jerome Hall,* Criminal Law, 147–158, *Binavince,* Negligence 428, 450–454, and in greater detail *Jacobs,* 124–142.
70 See *Lévitt,* Extent and Function of the Doctrine of *Mens Rea.* In 17 ILL. L. REV. 578, 579, and, more recently, *Barbara Wootton,* Crime and the Criminal Law.
71 We have seen that Blackstone defines it as a "vicious will". 4 *Blackstone,* Commentaries, 21. Other suggestions are "the intent to do what is morally wrong" and "intention to commit a crime". For different meanings as proposed by legal writers or occurring in the case law, see *Sayre,* 1023–1025.
72 *Sayre,* 1025–1026.
73 *Stephen,* History, 95.
74 *Sayre,* 1026. See also *Dubin,* 358, and *Jerome Hall,* Criminal Law, 73–76.

[75] First published in 49 Proceedings of the Aristotelian Society, 171 (1949). Reprinted in *Flew,* Logic and Language, 151 (1965). Partially reprinted in Freedom and Responsibility, 143 (1961).
[76] First published in Oxford Essays in Jurisprudence, 29 (1961). Reprinted in Punishment and Responsibility, 136 (1968).
[77] *Hart,* Ascription, 179–180.
[78] See, e. g., *Brett,* Chapter 3, and *Griffiths,* 1440–1441. See also *Dubin,* 359–363. Some legal writers seem to believe that the formulation of the principle is of little importance. See, e. g., *Williams,* Criminal Law, 30–31, and *Packer,* Limits, 106–107.
[79] This view is shared by such prominent scholars as Williams, Turner and Jerome Hall.
[80] See *Dubin,* 359. For the disadvantages of this approach, see *id.* 359–361.
[81] *Turner,* 199. Cf. the critique of this view by *Hart,* Negligence, 140–145.
[81a] The idea of criminal negligence as a form of strict liability has recently been argued anew in Anglo-American legal writings. In Negligence the author maintains that the essence of criminal guilt consists of the "free choice of the individual to do something he knows to be wrong" (965). The elements of *mens rea* should be (1) that the individual made a choice to do something wrong, (2) that the choice was freely made, and (3) that the individual knew or could appreciate the wrongness of what he chose to do (965–966). From this it follows that negligence falls outside the concept of *mens rea.* In the case of negligence there is no choice by the actor to do something wrong (974). Cf. Packer, who in "*Mens Rea* and the Supreme Court" p. 144 maintains that "negligence and strict liability share reliance on an external standard that ignores the actual state of mind of the offender." In Limits 128, Packer expresses himself more moderately on this matter.
[82] *Williams,* Criminal Law, 31.
[83] *Mueller,* 1063.
[83a] *Packer,* Limits 129, and *Packer, Mens Rea,* 143.
[84] *Hart,* Ascription, 180.
[85] *Id.* at 179.
[86] *Id.* at 181.
[87] *Griffiths,* 1441.
[88] *Mens Rea,* 362.
[89] *Ibid.*
[90] *Brett,* 145. Cf. the German concept of "Vorwerfbarkeit".
[91] *Ibid.* See also *Jareborg,* Uppsåt 335.
[92] *Dubin,* 363.
[93] See *Wechsler, Packer, Mens Rea,* and *Hughes,* Omissions, and *Dubin,* See also *Hart,* Intention, 114–122. It seems that Hart has changed his view somewhat. He mentions "intention" as a positive requirement of crime.
[94] Model Penal Code 24–31. Cf. Study Draft, 24–28.
[95] Model Penal Code, Tentative Draft 4, 126.
[96] *Id.* at 126–127.
[97] *Agge,* II, 253, 255–264.
[98] Concerning the abolition of the imputability concept in Swedish

criminal law see *supra* p. 55ff.

[99] For an explanation of the terms, see *Strahl,* Introduction, 9–10. Concerning the concept of probability intent that is adhered to in Denmark and Norway see *Andenæs,* Criminal Law, 211–212.

[100] See p. 76f for a discussion of this distinction.

[101] See *Agge,* II, 253.

[102] See *Strahl,* Introduction, 7–8, *Andenæs,* Criminal Law, 90–93, and *Sellin.*

[103] In this sense it has been widely used, especially in Denmark and Norway. See the works by Andenæs, e. g. Strafferett, § 20, *Waaben,* Forsæt, and *Hurwitz-Waaben,* § 36.

[104] *Ross,* Skyld, 14.

[105] *Id.* at 15.

[106] *Strahl,* Idealism 326. *Jareborg,* Uppsåt 351.

[107] *Waaben,* Forsæt, 30

[108] See *Jerome Hall,* Negligent behavior. In the classical work by *Exner,* 45, we find the syllogism:

Alle Schuld ist Willensschuld
Fahrlässigkeit will den Erfolg nicht
Fahrlässigkeit ist keine Schuld.

This view is in principle adhered to by *Arthur Kaufmann,* in his Habitilationsschrift from 1961, Das Schuldprinzip. (See 149 and 177ff.) Kaufmann's conclusion sounds like a distant echo of Kohlrausch's and Galliner's theories, which are based on v. Almendingen's work Über das kulpose Verbrechen. In Swiss legal writings we find negligence mentioned as a "Relikt der Erfolgshaftung". See *Dubs,* 42. Cf. Turner's view that negligence is a form of "strict" or "absolute" liability.

[109] *Hart,* Negligence, 140.

[110] See *Pitcher,* 235.

IV

Da sagt die Sprache, ich sei schuldig, denn ich hätte es ja voraussehen müssen ... Konnte ich es aber nicht voraussehen, dann bin ich ja unschuldig.

Kirkegaard

1. Having regard to the essentially ascriptive nature of the negligence concept, our interest is focused on the defences relevant to this form of imputation. Not every person whose act has fallen below the community-accepted standard is liable to punishment. The presence of exculpatory circumstances – defences – "removes" the blameworthiness. But *why* is the actor not to blame and, hence, his act not punishable?

The issue has in recent years been thoroughly discussed by *Hart* in England, *Dubin* in the USA and *Jareborg* in Sweden.[1] Dubin sets out in his extensive and penetrating essay to analyse the meaning behind the label *mens rea*. He suggests that the answer is to be found in three principles of just punishment, the principles of *proscription, conformity* and *function*. Dubin often refers to these principles as the "tripartite meaning" of *mens rea*. He starts out by examining the language of the criminal law of excuses and suggests that the following formula reflects the central structure of the language of criminal law of excuses:

> Given certain circumstances, X (the accused) should not be punished for having done Y (the proscribed harm), because punishment is not justified; and in law there would be an applicable exculpatory principle, doctrine, or rule.[2]

He then distinguishes the four subcontexts of this statement form as:

(1) *The language of Exculpatory Circumstances:*
"Given certain circumstances,
(2) *The language of Non-responsibility:*
"X should not be punished for having done Y,
(3) *The Language of Exculpatory Rationales:*
"because punishment is not justified,
(4) *The Language of Exculpatory Criminal-Law Theory:*
"and in law there would be an applicable exculpatory principle, doctrine, or rule".[3]

Jareborg has reformulated the subcontexts of this statement form in a clearer and more complete way:

(a) Under certain *exculpatory circumstances* A may according to specified *rules* not be held liable for having committed a punishable act;
(b) these rules follow from *general rules and doctrines*,

(c) which in their turn are based on certain *principles*
(d) that are laid down because of certain *reasons* or certain *principles of a higher order.*
(e) Hence, in criminal law there should be *explicit rules* concerning non-responsibility, preferably as precise as possible,
(f) on the understanding that peremptory or at least very good reasons for *rules of exceptions* from rules referred to in (e) may be considered.[4]

Remaining mainly on the (c)-level, Dubin proposes three principles of non-responsibility: the principles of *proscription, conformity,* and *function.* These principles are considered as limitations upon the legislative power at the adjudicative stage. According to Dubin they "appear to exhaust the idea of just punishment which historically has comprised the internal logic of the *mens rea* concept."[5] Of these principles it is undoubtedly the conformity principle that is of greatest importance in this connection. The proscription principle is formulated as follows: "An individual is not criminally responsible if all elements of the proscribed harm are not present, or, if present, if their presence is not factually connected with his behavior."[6] It is hard to see that this adds anything significant to the limitation that is not already embodied in the rule of action ("*actus reus*") of the specific offence. The principle does not support general or more detailed rules of non-responsibility concerning exculpatory circumstances.[7] The function principle is formulated as follows: "An individual is not criminally responsible if his punishment for having failed to conform his conduct to the requirements of the law he is alleged to have violated would be purposeless because of special circumstances."[8] An evaluation of this principle must be carried out in the light of the aim of punishment. The content of the principle depends on what is deemed to be that aim, and this is very difficult to describe except in general terms. Hence, as a mean of determining "when we should not punish in individual cases"[9] the principle does not seem to be useful.[10]

"An individual is not criminally responsible if he could not have conformed his conduct to the requirements of the law he is alleged to have violated." This principle Dubin calls the conformi-

ty principle.[11] Its importance becomes obvious when it is considered that we find here the main features of the doctrines of negligence as well as of intention. In what follows we shall primarily focus on the principle in relation to the negligence concept.

In his clarifying evaluation of the principle, Jareborg starts out from his analysis of the sentence "A could have acted otherwise". Adhering to J.L. Austin's "Ifs and Cans", he maintains that "could" may be either indicative or subjunctive or both at once and may refer to ability and/or opportunity.[12] Consequently, the principle may be relevant in the following contexts:

(1) A did not have the ability to conform to the requirements of the law;
(2) A did not have the opportunity to conform to the requirements of the law;
(3) A would not have had the ability to conform to the requirements of the law, even if . . .; and
(4) A would not have had the opportunity to conform to the requirements of the law, even if . . .[13]

These four contexts may be used alternatively. Normally, the meaning of "could" is both ability and conformity in either the indicative mood or the subjunctive mood. Dubin goes a little further and asserts that: "The mood of 'could have' may be *either* past indicative *or* past conditional. The mood of 'could not have' is *both* past indicative *and* past conditional."[14] To fit crimes of negligence the principle must include the subjunctive mood. Jareborg points out that it is also possible to say that the mood of "could not have" is either indicative or subjunctive. The subjunctive mood then supports a negligence doctrine.[15] Having thus reached the conclusion that the subjunctive mood must be taken into account by the principle in order to fit offences of negligence, it is our task to formulate the condition. Dubin formulates it as "even if he had fulfilled all conditions of diligence required of him".[16] This is formulated under the heading of "the diligence doctrine", which suggests "that the accused must have fulfilled all conditions of diligence required of him (in his situation) before he may use the conformity principle as the basis for a successful plea of non-responsibility".[17] The

condition stands out more clearly if we formulate it "even if he has done X, which he ought to have done and had the ability and opportunity to do".[18]

The principle may, in order to fit both intention and negligence ultimately be formulated is follows:

An individual is not criminally responsible if he had not the capacity or the opportunity to comply with the requirements of the law and also would not have had the capacity and the opportunity to comply with the requirements of the law, even if he has done X, which he ought to have done and had the ability and opportunity to do.[19]

It must be kept in mind that the conformity principle thus formulated is primarily a principle of legal policy. Let us therefore see how it can be justified as being relevant to the negligence theory.

2. It has been asserted that the theories of punishment are able to explain satisfactorily the adherence to the doctrine of *mens rea* and in particular the requirements of intention and negligence.[20] Hence, to confront these theories with the conformity principle would seem to be an important task. As will be seen, however, the assertion in question – though frequently maintained – is one of ambiguity.

The theories of punishment deal primarily with the issues concerning the aim and justification of punishment. The literature concerning the absolute and relative theories of punishment as well as more modern "mediatory" views is so vast that it would almost be impossible to present a survey of it. And indeed it is outside the scope of this book to give an account of these theories.[21] A major obstacle regarding the discussion of the theories is the "either/or, but not both" fallacy. Each general purpose of the criminal sanction has been asserted to be a mutually exclusive justification.[22] This historically-conditioned distortion of the debate[23] is unfortunate and has contributed to obscure the discussion concerning the justification of the forms of imputation. In talking about justification of punishment it is necessary to make clear what is meant by the term "justifica-

tion". There are many possible meanings. As has been pointed out by *Armstrong*:

> It is important to notice that the moral justification of a practice is not the same thing as its general point of purpose, except in the eyes of those who have travelled so far down the Utilitarian road that they never question the means if the end is desirable. Every human practice that is not utterly random or unconscious has some point, but not all have and many do not need, a moral justification.[24]

Having thus seen that the justification of punishment is a complex matter, the next step is to single out the relevant subissues. As a starting point it may be quite safe to maintain that the aim of punishment is to prevent undesirable acts or enforce desirable acts in society. What is desirable and undesirable in this sense is a political question and has to be decided in the usual political way. Here, however, there is a subissue, namely how this prevention and enforcement is to be carried out. Is punishment the most suitable means for pursuing these "political" goals? Has the sanction been adequately constructed? This is an important field for empirical criminological and penological research. Ross[25] calls this subissue the *technical* criminal-policy subissue to distinguish it from the *moral* criminal-policy subissue – a distinction which is necessary though it is not always made. Among other questions relevant to the last mentioned subissue is that concerning the guilt issue – the rationale of excuses. As Hart puts it:

> This is a requirement of fairness or of justice to individuals independent of whatever the General Aim of punishment is, and remains a value whether the laws are good, morally indifferent or iniquitous.[26]

Thus according to this view it seems important to make a clear distinction between technical and moral criminal-policy aspects in discussing the basis for the conformity principle. Such an approach is, however, not frequently found in legal writing. On the contrary, the subissues in question are often treated under the same heading of the "justification of punishment". This may lead to terminological vagueness and at worst to substantively inadequate analysis.

A rather clear case of this is the views of Holmes. In his "hard" utilitarian system,

[p]revention would accordingly seem to be the chief and only universal purpose of punishment. The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed.[27]

This leads him to refute repression as a justification of punishment and hence to repudiate the significance of the "intuition of fitness".

The feeling of fitness seems to me to be only vengeance in disguise, and I have already admitted that vengeance was an element, though not the chief element, of punishment.[28]

Holmes maintains that public policy "sacrifices the individual to the general good".[29] As he further explains:

If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like".[30]

Obviously to Holmes the accused's capacity to conform is irrelevant, though he did not deny that criminal liability is founded on blameworthiness. The tests of liability, however, are external and "independent of the degree of evil in the particular person's motives or intentions".[31] He is thus advocating his central thesis, namely, as *De Wolfe Howe* puts it: " that liability to the sanctions of the common law has been less and less dependent upon the personal moral culpability of the offender".[32] The advocating of this "harsh" objective liability as opposed to a misconceived apprehension of Kantian philosophy[33] seems to be due to an insufficient understanding of the meaning of the "purpose of punishment".

In contrast to Holmes, *Jerome Hall* has penetratingly advocated the elimination of penal liability for negligent behaviour.[34] To a great extent Hall is arguing against the views of objective liability. In rejecting negligence as a defensible basis for criminal liability, he brings together a vast number of disparate arguments under the same subheading.[35] He does not keep arguments of a moral character apart from those of a technical character. This leads him to deny the deterrent effect of punishing negligence.[36] The technical criminal-policy issue whether punishment is a

suitable means of furthering the social goals of the community must be treated separately. It is true that we know very little of the individual and general preventive effect of a penal provision. But it is easy to exaggerate our ignorance. I do not think, e. g., it can be doubted that the knowledge on the part of car drivers of the presence of patrol cars on the roads and the possibility of punishment for, e. g., careless driving makes drivers more attentive and careful.[37]

The distinction here recommended between technical and moral criminal-policy issues concerning the justification of punishment has in principle been argued by modern lawyers and philosophers. Thus Dubin, following *Rawls's* view on this matter, distinguishes between "the purposes of punishment *as a practice*" and "the reasons for recognizing excuses *in individual cases*".[38] He correctly observes that some theorists consider the justification of the excusing conditions as corollaries of the general aims of punishment as a practice and, more important, that

> it has more recently been suggested that concern for the recognition of excuses really springs from the desire to protect the individual from the unjust exercise of legislative power, even though such recognition in some circumstances could render more difficult the achievement of the purposes for which the criminal sanction is employed.[39]

Dubin analyses the meaning behind the language of exculpatory rationales, taking into consideration the following three "principal justifications": (1) the retributive rationale of excuses, (2) the utilitarian rationale of excuses, and (3) the individual liberty rationale of excuses.[40]

It would seem that (1) is of no great interest in modern highly developed countries.[40a] In Sweden, e. g., criminal law pays no attention to repressive ideas like retribution and reconciliation. Instead, an overriding principle in this matter is prevention, prevention through deterrence, general or individual. Considering, however, the distinction made above, it is no wonder that Dubin reaches the conclusion that the idea of deterrence comes into collision with the conformity principle[41] and thereby with the doctrine of negligence. The idea of deterrence cannot support the imputation. It is in spite of and not because of this idea that the conformity principle has become an essential part of modern

criminal law. Hence the analysis of (2) is likewise not of direct relevance in this respect.[42] This is also true concerning the reformative theory of prevention. As regards negligence, it is obvious that even a person who has been judged not negligent from a "subjective" point of view may be in need of reform.

So far we have found no support for the conformity principle. As pointed out above, this finding is far from surprising. It is due to the fact that those discussing the theories of punishment and *mens rea* have to a great extent been unaware of the incommensurability of the two separate concepts of rules involved. A sound method of analysis has, however, slowly gained ground in criminal theory. As pointed out by *Thornstedt:*

> [T]he requirement of subjective covering seems later to have also received marked support from certain other ideological evaluations, which spring from the liberalistic cultural pattern characteristic of western states. According to these evaluations, a penal-law liability without subjective covering would in general be regarded as an unwarrantable encroachment on civil liberty. For such a liability means that to a large extent the citizen is deprived of the possibility of foreseeing the penal-law consequences of his action, since punishment may fall even on a person who has observed very great care in all his actions.[42a]

Hart, who has paid considerable attention to these problems, speaks in this respect of "universal ideas of fairness or justice and the value of individual liberty".[43] He continues:

> Thus a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.[44]

This acceptance of the conformity principle is also formulated in the following terms:

> What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.[45]

In justifying this moral criminal-policy aspect Hart develops in a more elaborate manner the idea put forward by Thornstedt. He analogizes between the mental element in crime and the mental conditions that are regarded as invalidating civil transactions. Considering that the recognition of the excusing conditions "may lead to a lower, not a higher, level of efficacy of threats" he continues:

. . . yet – and this is the point – we would not regard that as sufficient ground for abandoning this protection of the individual; or if we did, it would be with the recognition that we had sacrificed one principle to another; for more is at stake than the single principle of maintaining the laws at their most efficacious level. We must cease, therefore, to regard the law simply as a system of stimuli goading the individual by its threats into conformity. Instead I shall suggest a mercantile analogy. Consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. . . . what a legal system that makes liability generally depend on excusing conditions does is to guide individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.[46]

Hart suggests that we may regard the function of excusing conditions as

a mechanism for . . . maximizing within the framework of coercive criminal law the efficacy of the individual's informed and considered choice in determining the future and also his power to predict that future.[47]

The advantages of such a system compared with one of total "strict liability" are, according to Hart, threefold: (1) "we maximize the individual's power at any time to *predict* the likelihood that the sanctions of the criminal law will be applied to him"; (2) " we introduce the individual's *choice* as one of the operative factors determining whether or not these sanctions shall be applied to him"; and (3) "the pains of punishment will for each individual represent the price of some *satisfaction* obtained from breach of law."[48]

This individual-liberty approach to the recognition of excusing conditions does not necessitate the exclusion of departures from the conformity principle.[49] It must be remembered that it is mainly a principle of legal policy. Though it is highly desirable that the principle shall be upheld throughout criminal law, it is, as Hart points out, important to be realistic,

to be aware of the social costs of making the control of antisocial behaviour dependent on this principle and to recognize cases where the benefits secured by it are minimal. We must be prepared *both* to consider exceptions to the principle on their merits *and* to be careful that unnecessary invasions of it are not made even in the guise of "treatment" instead of frankly penal methods.[50]

Nevertheless there must be very good reasons for any departure from the principle. The deviation should be looked

upon as an exception from the rule. It seems necessary that the exceptions shall be clearly stated and defined.[51]

The capacity to conform to the requirements of the law is lacking in the case of "unfree actions". This may be due to mentally and physically defects on the part of the actor. In the following chapters we shall consider the relevant excusing conditions regarding the negligent agent, and I shall argue that systematically these conditions fall within the negligence concept.

[1] In the exposition I draw on Hart's articles in "Punishment and Responsibility", Dubin's "*Mens Rea* Reconsidered" and Jareborg's "Handling och uppsåt".
[2] *Dubin*, 326–327.
[3] *Id.* at 327
[4] *Jareborg*, Uppsåt, 355–156.
[5] *Dubin*, 364
[6] *Id* at 365.
[7] *Jareborg*, Uppsåt, 356.
[8] *Dubin*, 366.
[9] *Ibid.*
[10] See *Jareborg*, Uppsåt, 356–358.
[11] *Dubin*, 365.
[12] *Jareborg*, Uppsåt, 358.
[13] *Ibid.*
[14] *Dubin*, 331.
[15] *Jareborg*, Uppsåt, 359.
[16] *Mens Rea*, 332 and 366.
[17] *Id.* at 366 note 195. Cf. 391.
[18] *Jareborg*, Uppsåt, 360.
[19] See *Dubin* 332, and *Jareborg*, Uppsåt, 361, *Hart*, Negligence 152, and *Rawls*, Justice, 241.
[20] See *Jareborg*, Uppsåt 362, and *Dubin*, 335–336 (and references in note 40)
[21] Among works outlining the different theories, the following may be mentioned: *Müller-Dietz, Strafbegriff*, (with a vast number of references to literature in German), *Jerome Hall*, Criminal Law, 297–324, *Packer*, Limits, chaps. 3 and 4. *Andenæs*, Criminal Law, 55–93, *(Andenæs*, Strafferett, 71–110), *Andenæs*, Formål, *Eckhoff*, Rettferdighet, 166–199, *Hurwitz-Waaben*, 42–79, and *Agge*, I, 38–76.
[22] *Dubin*, 337, *Hart*, Prolegomenon, 2–3, *Ross*, Skyld, 45–47, 69, 90–95. See also *Jensen.*
[23] *Jerome Hall*, Criminal Law, 303.
[24] *Armstrong*, 474.
[25] *Ross*, 96.

[26] Prolegomenon, 14. Cf. *Hellner,* Anteckningar, 20, where concerning tort law it is said: "It seems as if much unclearness has been brought about through not observing that it is possible to accept the idea of prevention as a basis for tort liability in general but only as an exception as the basis for the constructing in detail of the particular rules".
[27] The Common Law, 40.
[28] *Id.* at 39.
[29] *Id.* at 41.
[30] 1 Holmes-Laski Letters 806 (Howe ed. 1953) (Dec. 17, 1925) Cited in *Dubin,* 341.
[31] The Common Law, 43. From the main rule that no account is taken of incapacities, Holmes makes an exception for "marked" weaknesses, such as infancy and madness (43). From a general-preventive point of view this exception is hard to explain. See *Waaben,* Utilregnelighed, 51–52.
[32] Introduction to the DeWolfe Howe edition of The Common Law, xxi.
[33] See *Ross,* Skyld, 82–86, 92.
[34] "Negligent Behavior Should Be Excluded From Penal Liability" and Criminal Law, 114–141.
[35] See, e. g., Negligent Behavior, 635–642.
[36] See Criminal Law, 137–138, and Negligent Behavior, 641–642.
[37] See Model Penal Code Tentative Draft 4, 126–127, *Ross,* Hensigt, 359, and *Hart,* Intention, 132–135.
[38] *Mens Rea,* 335. See *Rawls,* Concepts.
[39] *Mens Rea,* 336. Cf. *Griffiths,* 1398 note 38, where the author endeavours to "isolate the Utilitarian considerations involved in the choices among" the modes of culpability.
[40] *Ibid.*
[40a] See, however, *Jareborg,* Uppsåt, 372–373, especially the references in note 77 to some modern German criminalists.
[41] *Mens Rea,* 341–342, and *Jareborg,* Uppsåt, 365.
[42] In analysing the doctrine of prevention some legal writers distinguish between "hard" and "soft" utilitarianism. We have already mentioned the most influential representative of the "hard" utilitarians, Holmes. Among the much larger group of "soft" utilitarians we may count many of today's leading criminalists. The "soft" utilitarian maintains that punishment where there is no real possiblitity of deterrence is more or less meaningless. In agreement with this view of Bentham's are, e. g., *Stephen,* History, 171–172, *Williams,* Criminal Law, 738, *Jerome Hall,* Criminal Law, 138–139. See also *Thornstedt,* Om rättsvillfarelse, 6, and *Agge* II, 251. For criticisms of this view see principally *Hart,* Prolegomenon, 18–19, and *Hart,* Responsibility, 40–43. See also *Dubin,* 342–343, *Brett,* 53–54, and *Jareborg,* Uppsåt, 366–368.
[42a] *Thornstedt,* Om rättsvillfarelse, 6.
[43] Elimination, 181.
[44] *Ibid.*
[45] Negligence, 152.
[46] Responsibility, 44.
[47] *Id.* at 46.
[48] *Id.* at 47. My italics. Concerning the law as a guide of individual's

choices, Hart points out that the threat of punishment may "stimulate a man to a greater exercise of his faculties, wakefulness and care so that he does not commit an offence through negligence or inadvertence." I think it is important to stress this point, because, as pointed out by other legal writers, the prediction benefit can, as regards negligence involve a chilling effect on desirable activity. See *Griffiths,* note 38, 1398. As will be evident in the next chapter, this question has to do with the acceptance of a sound theory of negligence.

[49] See, however, *Dubin*, 344–345. He is critical of Hart's view that the principle may be sacrificed when the social costs of maintaining it are too high. He prefers to view it as "a necessary condition upon the use of the criminal sanction" (345).

[50] *Hart,* Elimination, 183.

[51] See *Jareborg*, Uppsåt 375.

V

Negligence and wilfulness are as immixable as oil and water.

Kelly v. *Malott.*

At the outset of this chapter it is necessary to remind the reader that we are here dealing exclusively with inadvertent or unconscious negligence as distinct from the species of the genus negligence which in Anglo-American law is called recklessness[1] and in continental European as well as in Scandinavian law is referred to as advertent or conscious negligence.[2] In what follows, the word negligence means inadvertent negligence; and our task is to analyse the concept as a limit of the criminal area in this respect.

1. In order to arrive at an understanding of the heterogeneous and often confusing literature concerning the negligence concept it is essential to bear in mind that a large number of the legal writers of the 19th century as well as our own have, consciously or unconsciously, been involved in what Binding calls the "Jagd nach dem Vorsatz". The old criminal-law literature was almost exclusively orientated towards intention. The issues concerning the relation of the act to the statutory definitional requirements and the blameworthiness regarding negligence were developed according to the model created in the field of intention. In German criminal law, e.g., negligence was analysed independently only as a form of guilt (Schuld). In this way a form of Cartesian dualism, with its rigid separation between an objective-external and a subjective-internal aspect, exerted an unhealthy influence on the development of the negligence concept.

The coupling together of the concepts intention and negligence, or rather the analysis of negligence using the "intention model", and the utilizing of intention terminology in describing the doctrine of negligence in Anglo-American law have helped to create a strong resistance to the use of negligence in criminal law. In continental European – especially German – law, this has caused doubts to be thrown upon the blameworthiness of the negligent act.

2. The negligence concept in Anglo-American criminal law is historically closely linked to the crime of homicide. Until the 19th century it had no relevance outside this field. As pointed out above, it entered criminal law as a limitation on the

defence of misadventure regarding homicide and such importance as it had lay almost entirely within the field of homicide. The reluctance of English judges to convict for negligent homicide where *mens rea* in the form of intention or foresight of consequences was not present is traceable in the requirement of *gross* negligence in criminal law.[3] The following statement by Halsbury is characteristic of English criminal law in the 19th century:

> A person on whom the law imposes any duty or who has taken upon himself any duty tending to the preservation of life and who grossly neglects to perform that duty or performs it with gross negligence and thereby causes the death of another person is guilty of manslaughter.[4]

That liability was postulated on gross negligence is still the prevailing rule in common law.[5]

In the USA this is accepted as the general rule.[6] Only in a very few states is a higher degree of negligence not required to suffice for the crime of manslaughter.[7] The courts express the required degree in many different ways. The most common terms used to denote this essential quality of negligence are "wilful",[8] "culpable",[9] "gross",[10] "gross or wanton carelessness",[11] "wanton or reckless disregard of rights and safety of others",[12] "reckless heedlessness of consequences",[13] and "reckless".[14] The terms used tend to create an impression of confusion. As Jerome Hall remarks: "The opinions run in terms of wanton and wilful negligence, gross negligence and more illuminating yet, that degree of negligence that is more than the negligence required to impose tort liability. The apex of this infelicity is wilful, wanton negligence, which suggests a triple contradiction – negligence implying inadvertence; wilful, intention; and wanton, recklessness."[15]

The attempt of the courts to distinguish between tort negligence and negligence in criminal law must be looked upon as a consequence of the want of a "test" that could be guiding for the jury. Such a test was not to be found in the statute books or in legal writing. The unique situation arose that the jury would not only consider the facts of the case but also determine whether these facts constituted criminal negligence.[16]

In the limited area apart from homicide where negligence had relevance, the development was even more illuminating. As far as assault and battery was concerned, the intention to commit that offence was inferred by the grossly negligent use of a motor car.

Earlier in this century the American courts not infrequently had to consider how to decide a case where fortunately a negligent operation of an automobile did not cause death but only bodily injury. Before the enactment of "negligent injuring" provisions in the statute books the driver was prosecuted for assault and battery, a common-law crime that traditionally seems to have required intention.[17] In a great number of cases the courts inferred the necessary intention if the negligence had reached a certain "quality". An illuminating case is *Com.* v. *Ireland,*[18] where it is stated: ". . .[I]ntention to commit the assault and battery is the very gist of the offence. The grossly negligent use of a potentially dangerous instrument like an automobile, in wanton disregard of the safety of others lawfully on the highways, will be sufficient to warrant an inference by the way of an intent to injure, and justify a conviction of assault and battery."[19] Similar remarkable motifs are found in the cases *Luther* v. *State,*[20] *People* v. *Waxman,*[21] and *State* v. *Schutte.*[22] On the other hand, there can be found other cases where it seems as if negligence should be sufficient as a subjective requisite for conviction in assault and battery.[23]

The explosive development of road traffic in this century has revealed the inadequacy of the common law concerning homicide and assault and battery. In England, as well as in several states in the United States, special provisions regarding negligent homicide and injuring have been enacted. A common feature of these provisions is that negligence must be of a higher degree than is required for civil liability.[24] In almost every state in the United States substantive penal-code revisions have taken place or are being authorized since the Model Penal Code project was started.[25] Reading the revised codes and the drafts, it soon becomes evident that as regards the definitions of the kinds of culpability the Model Penal Code has exerted a profound influence. In most of the fourteen states in which revision is completed before 1974, negligence is defined. The definition is similar to that in the Model Penal Code and it is required that the deviation from the standard of care of the reasonable man shall be gross or substantial.[26]

It is obvious that the development in the case law of negligent manslaughter has exerted a strong influence upon these definitions. Even if it is justifiable to limit liability for crimes like negligent homicide, that is not a reason for requiring gross negligence in the case of *all* negligence offences. It could also be questioned whether a distinction between "gross" and "simple" in this respect has substantive significance. The framers of the Model

Penal Code are aware of the difficulties. They point out that "[t]he jury must find fault and find it was substantial; that is all [the] formulation says or, we believe, that can be said in legislative terms".[27]

When we turn to continental European and Scandinavian law the picture in this respect is rather different. In German criminal law, e. g., there is basically no difference between degrees of negligence. Gross negligence *(grob Fahrlässigkeit)* is rarely required by law. Only in a few provisions of StGB is "leichtfertigkeit" a requisite.[28] Even "simple" negligence is enough for negligent homicide *(fahrlässige Tötung).*[29] This seems to be the position in Danish, Finnish and Swedish criminal law also.[30] The situation in Norwegian criminal law on the other hand, is quite different. There a rather gross negligence is required for liability concerning negligent homicide.[31]

As has been shown, a legislative approach along American lines as expressed in the Model Penal Code and the Federal Criminal Code Draft precludes the possibility of requiring only "simple negligence in cases where this should be deemed advantageous. This is unsatisfactory and obviously could not be remedied by merely deleting the word "gross" from the definition. For it is clear that there are strong reasons for limiting liability for some negligence offences. This, however, could be achieved when framing the particular provision of the penal code. There are strong reasons for being restrictive in the use of the word "gross" as a means of limiting liability. The example set by above all Anglo-American case law but also, e. g., by Swedish criminal law[32] does not invite imitation.

3. The resistance to negligence in German criminal law may derive from the theory of "intentional negligence" as forcefully advocated in more "modern" criminal law theory by *Feuerbach.*[33] According to that author, punishing is only possible when the perpetrator has given evidence of a positive evil will. Concerning the violation of the "obligatio ad diligentiam" (duty to pay attention) he speaks of the basic "Willensbestimmung" as a negligence determined by intention ("eine durch Dolus bestimmte Culpa").[34] After Feurbach a great number of German

legal writers tried to construct negligence as a form of "Willensschuld".[35] Among the more important theories concerning the guilt content of negligence, we find references to an indirect desire for the effect ("ein indirektes Wollen des Erfolges")[36], a negative evil will ("ein negativ-böse Wille")[37] or an unconscious will ("ein unbewusstes Wollen").[38] This advocacy of negligence as a form of "Willensschuld" has exerted a great influence even on modern negligence theory. *Mezger*, e. g., maintains that basically these theories point in the right direction.[39] Even the negligent delict must contain an unlawful will. There is also in negligence an element of conscious unlawful will ("bewusste pflichtwidrige Wollen")[40] Negligence, however, differs from intention concerning the relation of the will to the effect. The use of "will" terminology in describing negligence can be found even in very recent German legal writing.[41]

The theory of "intentional negligence" seems to have entered into Scandinavian criminal law with the writings of the Dane *Ørsted.*[42] This product of speculative philosophy was historically foreign to the legal development in Scandinavia. It took a long time before the theory was at all widely accepted in Sweden. In the important work on a new penal code for Sweden which occupied many decades of the 19th century, no traces of the theory can be found.[43] The theory did not become important until the turn of the century, when it was supported by the celebrated Swedish legal writers *Hagströmer* and *Thyrén.*[44]

Such a conception of the nature of negligence has meant, on the one hand, that the guilt content of negligence has been denied[45] or, on the other hand, that the basis for guilt concerning negligence has been constructed differently – without utilizing the concept of "Willensschuld".

The negligent actor has either not paid attention to the dangerous situation, or has not, as to the protected right, drawn a conclusion from what he knew of the danger to the right, or has not given his consciousness of this danger sufficient room in his imagination. As *Exner* formulates it: the negligent actor has shown that as far as he is concerned the violated good is not sufficiently valuable.[46] Negligence is the unlawful underestimation of the legal good ("pflichtwidrigen Geringwertung des

Rechtsgutes").[47] It originates from a faulty tactile perception ("Fehlen der Gefühlsseite").[48] This theory of tactile perception has exerted considerable influence even on modern legal writers.[49] Another theory of contemporary importance is the theory of *character faults* as mentioned above.[50]

The theories mentioned above seem to be too specific. Proceeding from different starting points, they lay down general rules that purport to deal in short and preferably simple theses with a matter that is complicated and difficult to deal with. This leaves all the theories open to justified criticism from different angles. Thus it is difficult to combine the concepts of "Willensschuld" and negligence because there will always be an incompatibility between the current conscious will and the inadvertent negligence.[51] The theory of tactile perception also seems to be wide open to just criticism when it asserts that faulty tactile perception is a sufficient ground for claiming guilt.[52] Nor does the theory of character faults[53] provide a correct answer to the question of the guilt content of negligence. The case law does not seem to confirm the idea that character fault or the defective formation of character is the essence of guilt concerning negligence.[54] On the other hand, to say, that these theories are totally wrong is far from correct. Thus, e. g., it is the merit of the theory of "Willensschuld" that it stresses that, as a general rule, even a negligent offence requires a consciously willed act or ommission. Even though the actor "undoubtedly wanted to do an act", his will did not include "*such an act* as he actually has done".[55] In this respect the theories of tactile perception and character fault have correctly maintained that the negligent delict comprises more than a defective will. The crucial error inherent in all these theories is, however, that they are presented as being final and complete and thus excluding other theories. In evaluating them it must be kept in mind that they are all trying to catch the elusive concept of "Schuld" – a concept of the highest dignity which hitherto has defied all attempts to provide an adequate explanation.

It must be admitted that the justified criticism of the theories mentioned is not a sufficient reason for not investigating further into the field of guilt concerning negligence. But it seems to be a

waste of time to try, as has been suggested in recent German legal writing, to find a psychological element that preserves or maintains the fundamental unity between the actor, the act, and the object of the act.[56] Generally it is impossible to describe the concept of inadvertent negligence using psychological criteria. Basically we have here to work with normative elements.[57] The adherence in German criminal law to "Schuld" as an overriding and universally applicable and uniformly formulated concept leads in principle to the much-decried "Jagd nach dem Vorsatz".

4. If the opposition to negligence in German criminal law may be traced back to the unfortunate analysis and use of the concept of Schuld, the lack of a dogmatic structure of systematics does not render it easier for us to find the answer to the equivalent problem in Anglo-American law. There has been and still is a strong resistance to criminal negligence in An glo-American law. An analysis of the literature and the case law reveals many different answers. The most important and persistent of these seems to be what we may call the *volition-as-choice theory*. The starting point here is that "*voluntary* harm-doing is the essence of fault".[58] Voluntariness is equated with choice.[59] Thus, to be culpable an actor must have *chosen* to do harm.[60] The adherents to the "choice theory" seem to deny the culpability of negligence not only in common law but even concerning statutory offences.[61]

It is essential to make clear the difference between, on the one hand, issues concerning the desirability of excuses and, on the other, the basic question regarding the permissibility of punishing for negligence. The volition-as-choice theory concerns the last-mentioned issue. This question of permissibility is naturally in itself a justifiable one. It is, however, inseparably linked to the eternal issue regarding the basis of punishment. To reach universally recognized solutions in this respect is, as history shows, an almost impossible task. The degree of ambition does not seem to correspond to reality. Undoubtedly the behavioural sciences have not reached a stage where such a question can in a meaningful way be asked generally.

The volition-as-choice theory is implied in one of the answers to this eternal question. *Jerome Hall,* e. g., maintains that "[n]o one should be punished unless he has clearly acted *immorally*".[62] The theory is supposed to have a general bearing on the whole field of criminal law and it therefore excludes inadvertent negligence as a form of culpability.[63] A discussion of this theory is rendered difficult, if not impossible, by logical and terminological uncertainty. What is volition? This is a basic question that has not been adequately answered in legal writing. What is the proper meaning of choice? In addition to choice to do harm does it also mean choice to break the law? Until these and other pertinent questions are answered, a discussion of the merits of the volition-as-choice theory is not meaningful. In the search for a sound negligence theory we may therefore proceed in the assurance of that the advocates of the volition-as-choice theory have not been able to formulate it in a satisfactory way. Nor does it seem that any Western legal system has as yet adopted it.[64]

As *Henry M. Hart* puts it, punishment of criminal behaviour "is commonly justified not on the ground that violators can be said to be individually blameworthy, but on the ground that the threat of such punishment will help to teach people generally to be more careful".[65] The deterrent effect, or to be more specific the individual- and general-preventive effect, of punishment in this area is, however, not universally accepted. On the contrary, especially in Anglo-American legal systems doubts have been expressed concerning this effect. In fact the questioning of the effect has turned out to be one of the main arguments against criminal punishment of negligent behaviour. *Williams* says that the deterrent theory

> finds itself in some difficulty when applied to negligence. At best the deterrent effect of the legal sanction is a matter of faith rather than of proved scientific fact; but there is no department in which this faith is less firmly grounded than that of negligence. Hardly any motorist but does not firmly believe that if he is involved in an accident it will be the other fellow's fault. It may seem, therefore, that the threat of punishment for negligence must pass him by, because he does not realise that it is addressed to him. Even if a person admits that he occasionally makes a negligent mistake, how, in the nature of things can punishment for inadvertence serve to deter?[66]

In its simpler form this criticism runs: The basis for the deterrence theory is the hypothesis that the prospective offender is aware of the existence of punishment for criminal acitivity, and will therefore adjust his behaviour to avoid committing a criminal act. By definition, the negligent harmdoer is unaware of the risk he imposes on society. Hence the theory is not applicable as to the negligent actor.[67]

This assertion does not seem difficult to contradict. Perhaps the most influential refutation of this view comes from *Wechsler* and *Michael.* These authors maintain that a knowledge that punishment may follow upon behaviour that inadvertently creates improper risk "supplies men with an additional motive to take care, before acting, to use their faculties and draw upon their experience in determining the potentialities of their contemplated acts."[68] This view has been adopted by the framers of the Model Penal Code as well as the Federal Criminal Code.[69] A more convincing argument against the questioning of the deterrent effect of penalizing negligence is, I think, to stress the increasingly important "intentional" element in negligence.[70] If we turn to the most important field of criminal negligence, namely the area of motor traffic, it is a fact that most road accidents – and as time passes an increasing number of them – are due to intentional violations of traffic rules, the object of which is to prevent accidents. An intentional "mistake" on the part of the motorist is likely to condition him and others not to repeat it in the future. That this is a sound and realistic expectation can easily be confirmed in everyday life. The presence of a patrol car on the highway has a remarkable influence on the driving of cars.[71]

A more thoroughgoing criticism in this respect is set forth by *Turner* in his essay "The Mental Element in Crimes at Common Law". In explaining why the negligent person cannot possibly be deterred, Turner sets out to reveal the very nature of negligence. Negligence, he maintains, "indicates the state of mind of the man who acts *without adverting* to the possible consequences of his conduct".[72] The proper meaning of negligence should, according to him, be "inadvertence".[73] This view is based on the assertion that negligence is a "state of mind". Regarding inadvertence, "the

man's mind is a blank as to the consequences in question". Hence the talk about degrees of negligence is meaningless. "There are no different degrees of nothing".[74] Since inadvertence does not ground liability at common law, negligence is likewise not a proper ground for liability.

In asserting that negligence denotes a state of mind, viz. inadvertence, Turner overlooks the basic meaning of negligence in legal contexts, i. e. as indicating a departure from community-accepted standards.[75] Hence he disregards the most vital part, the normative element, in negligence and stresses only the psychological element. On the other hand, it cannot be disputed that there is a psychological element in negligence. We may call it inadvertence. As pointed out by Hart, there is an important connection between the psychological and the normative element.

> Very often if we are to comply with a rule or standard requiring us to take precautions against harm we must, before we act, acquire certain information: we must examine or *advert* to the situation and its possible dangers . . . and watch our bodily movements . . . But this connexion far from identifying the concepts of negligence and inadvertence shows them to be different.[76]

From another aspect, too, Turner's view, which has been rather influential on both sides of the Atlantic, seems to be a mistake. Talking of inadvertence as "a blank" or "nothing" is ambiguous. As has been pointed out by *Ross*, within the dimension that concerns the colourational qualities of things the designation "colourless" is just as real a characteristic as the designation "red". Correspondingly to use the designation "noiseless" regarding an engine or the designation "negligence" for a way of acting is to describe a real characteristic.[77] To the ordinary person it is not difficult to describe the difference between the psychological state of the negligent and of the non-negligent driver.

> The opinion that negligence has no place as a basis for criminal liability because inadvertent conduct is not morally imputable has had and still has many advocates. As we have seen, especially in the common-law countries utilitarian considerations have here played an additional and significant role. Punishment for the negligent actor is deemed useless "since he cannot be deterred when he is unaware of danger"[78] A rather unconventional theory

along these lines, a theory that seems to be a mixed product of continental European and Anglo-American legal thinking, is advocated by *Helen Silving*. According to her, we know too little about deterrence to warrant the imposition of punishment on this basis. The negligent harmdoer can, however, be rather dangerous to society. Even if he is not deemed guilty he ought not to be left at large and permitted to continue endangering the community. Her draft therefore proposes "application of measures rather than of punishment to those who produce harm or danger without advertence, that is by negligence".[79] The test is one of dangerousness. "Guilt" is not in issue. Consistently with the denial of the deterrent effect a "subjective" test is applied. The theory does not utilize a normative concept of care or diligence but focuses on a psychological concept of "awareness". "Anyone who does not notice a danger that would be obvious to most others is in need of treatment by measures that might correct such a dangerous personality defect". This test shows a marked resemblance to a mental incapacity test. And Helen Silving admits that she considers negligence a symptom of "incapacity" short of insanity. The negligent actor is believed to be "mentally inadequate".[80] The test of dangerousness seems, however, in reality to be an "objective" one. "The failure of awareness must be judged in the light of the external circumstances under which the defendant acts. If under similar external circumstances a community majority would have possessed no awareness, criminal law measures are inappropriate."[81] But how then do the individual elements enter the picture? Here a "reversed" subjective approach is applied. If a person is physically exhausted and because of this is incapable of noticing the dangerousness of his conduct, he ought not to be deemed "dangerous", if most other people in such a state of exhaustion would also have failed to notice it. Mental inadequacy, on the other hand, does not confer exemption from protective measures.[82]

Even apart from the fallacy of denying the deterrent effect of punishment for negligence and the faulty idea of equating negligence and inadvertence, I think this theory does not solve the problems inherent in the negligence issue, but creates new problems. Thus, how can the draft's subjective "objective comparative standard" test in reality be carried out? How do we get to know what is "normal" in the community and to establish the possession of "awareness" of the majority in the community? What kind of rehabilitating measures (less serve than a fine) are adequate? What judicial safeguard is there that a "notoriously" dangerous person will not because of a trifling violation, be taken into care for rehabilitation during the rest of his life? When is he to be regarded as rehabilitated?

According to jurists like Jerome Hall and Turner a man should not be punished unless he has in his mind the idea of causing harm to someone or something. The contrary is said to be a recourse to strict liability. It seems obvious that to Hall and Turner cirminal negligence is in reality to be considered strict liability, viz. the imposition of criminal sanctions in the absence of any fault on the part of the actor.

The proof of the actor's state of mind is irrelevant in cases of strict liability. That kind of liability is sometimes interpreted as the legislative judgment that persons who intentionally engage in certain activities and occupy some position of control are to be held accountable for the occurrence of certain consequences.[83] But this definition is not reconcilable with the notion of fault that, as we have seen, is argued by some influential jurists, namely the kind of fault that is predicated on some affirmative state of mind with respect to the particular act or consequence. If this notion of fault is accepted, it has been further questioned whether it is consistent with the punishing of negligence. Thus *Wasserstrom* maintains:

> If the objection to the concept of strict liability is that the defendant's state of mind is irrelevant, then a comparable objection seems to lie against offenses founded upon criminal negligence. For the jury in a criminal negligence prosecution asks only whether the activity of the defendant violated some standard of care which a reasonable member of the community would not have violated. To the extent that strict liability statutes can be interpreted as legislative judgments that conduct which produces or permits certain consequences is unreasonable, strict criminal liability is similar to a jury determination that conduct in a particular case was unreasonable.[84]

It must, however, be borne in mind that there are important differences between strict liability and negligence.[85] Despite these differences it is asserted that the conception of negligence as a kind of criminal fault deserves the same criticism as strict liability because it fails to require a mental element. According to this view, the similarity of the two kinds of imputation should be kept in mind when the negligence concept is analysed.[86] To many Anglo-American jurists strict liabiblity is an odious phenomenon which should have no place in criminal law. Thus when the similarity between this form of liability and negligence is asserted, this may be regarded as a rather serious attack on criminal negligence. There is therefore good reason to examine whether this assertion is sound or not.

Let us with reference to *Griffiths'* analysis[87] consider the following two "archetypes":

(1) A fired his pistol; B died.

(2) A fired his pistol; without due care; B died.[88]

A's activity and the consequence are the same in (1) and (2), in both strict liabiblity and negligence situations. Those who argue that negligence and strict liability are similar maintain that the two forms of culpability really only differ in the description of the conduct from which liability follows if the consequence materializes. As will be apparent later on, I think this is essentially correct. For archetype (2) may be reformulated as follows: "A fired his pistol without doing a, b and c; B died". "a, b and c", then, are the things a person has to do in order not to be negligent in this type of situation. The argument, however, is carried further and it is asserted that negligence is not morally different from strict liability because neither of them, in contrast to intention involves a "state of mind".[89] This view is, I consider, vitiated by the obscure talk of "state of mind" especially concerning negligence delicts. Further, I think that it is erroneous because there is a fundamental difference between strict liability and negligence.[90] If we regard the activity of "firing a pistol" as a "neutral activity"[91] strict liability differs from negligence in that in the case of negligence the conditions under which the base activity can be freely engaged in can be stated. This possibility of "predicting" freedom from criminal liability is, in my view, the decisive factor in this respect. There is a clear difference between the "acting at one's peril" in the case of strict liability and the individual's possibility of "predicting the future".

5. As pointed out above, it is necessary for analytical purposes to distinguish the issue of *the permissibility of punishing the negligent actor* from *questions regarding the desirability and the construction of the excuses concerning negligence.* In this book we shall almost exclusively consider the last-mentioned questions. But let us here say a few words concerning the prime issue of the basis for punishing negligence. This issue, is, as we have already seen, very much debated and it will in the forseeable future continue to be a "battlefield" for different schools in the field of criminal law. From one point of view it is a simple issue, but from another it involves rather complicated considerations. The inconsistency of the different views is, of course, due to many

reasons. But one of the main difficulties, in this respect would seem to be that above all psychology, philosophy and criminology have not as yet provided us with adequate tools. Our knowledge in these fields is too limited to provide a reasonably firm foundation for conclusions regarding the permissibility of punishing negligence. This does not mean, however, that punishing negligent acts must inevitably be a dubious and unsound practice. After all, criminal negligence is by no means the only concept where our "definite" knowledge is rather limited. Moreover, it is very easy to exaggerate the limitations of our knowledge. I feel that in the field of criminal negligence, experience of life and common sense supply us with more accurate information than we are prone to admit. Another obstacle when discussing fundamental issues of this kind is the persistence of some writers on criminal law in applying a medieval concept of negligence to present-day social conditions. This simply will not work.

To illustrate what I have in mind, let us consider what is in practice the most important area for criminal negligence – road traffic. As time passes, road traffic becomes a more and more complicated and dangerous activity. The book of traffic rules grows thicker year by year. At the same time more and more people are driving motor vehicles and to many of them it becomes a daily routine. The driver's actions at the steeering wheel become more a matter of unreflecting habit than of conscious behaviour. It is not realistic to require a continuous, consciously strained attention on the driver's part. In reality the driver acts according to more or less unreflected chains of reaction which he has been trained in. He cannot rely on his conscious attention. We expect from the driver that he shall be well acquainted with the traffic rules and that his observing them shall become so familiar to him that his actions in traffic are almost "automatic".[93] The correct action in road traffic will then, as indeed reality seems to show be a result of practical patterns of action. A negligent driver is not to be blamed for a lack of attention – the attention of a reasonable man under the circumstances – but for *non-conformity with the patterns of action developed within the field of road traffic.* As to the

permissibility of punishing the negligent driver, several theories have been formulated. It has been maintained that the relationship between duty *(Pflicht)* and culpability of negligence is essential.[94] In German criminal law the construction of "Rechsimperativ" and "Pflichtimperativ" are alleged to be essential to the determination of the "Unrechtscharakter" of the negligence requisite.[95] These issues are closely linked to the eternal question of what law is. It does not, therefore, seem meaningful to analyse them in the present connection. For our purpose it is sufficient to note that a solution of this question is not necessary for the analysis of the negligence concept. From a scientific point of view it seems correct and sufficient, having regard to the stand of legal science today, to start out from the empirically known or demonstrable facts that the negligent harmdoer feels "guilt" and that people can be deterred from acting carelessly by the threat of punishment for negligent acts. Members of the community disapprove of negligent harmdoing. It is not regarded as a sufficient excuse to say "I didn't mean to do it" or "I just didn't stop to think".[96]

6. As we have seen, negligence is equated by some with strict liability. Thus advocates of this thesis, such as, e. g., *Turner*, maintain that there is no "subjective element" involved in the negligence delict. This is a way of questioning the very basis of the requisite as a form of liability. As mentioned above we shall not deal here with that issue. The "mental element" of the negligent delict arises, however, in another theoretically as well as practically important question at issue namely: "Is negligence a state of mind or conduct?" Though rather essential, the question thus stated is certainly not unambiguous. What is really meant by the expression "state of mind"? And what is "conduct"? It seems to be preferable to try to describe what these expressions do not mean in this context. The resolving of the "state of mind – conduct" problem does not directly centre around the issue whether to take into consideration individual elements like "ignorance, stupidity, bad judgment, timidity, excitability, or forgetfulness",[97] age, inadequate or superior experience, fatigue, etc. This issue is commonly referred to under the heading "Is negligence subjective or objective?"[98]

"Subjective" and "objective" are certainly useful terms. I think, however, they are *too* useful. They crop up in so many different settings in criminal law that when used in a certain connection they need an explanation. Such an explanation, however, is not always given. Therefore it sometimes happens that the reader is left uncertain as to the proper meaning of the term in the context. Not only formally but also materially the distinction "subjective-objective" may be questioned in criminal law. *Mens rea* (Schuld) is commonly referred to as a subjective requisite, while conduct is an objective one. The distinction seems to be based on an obsolete apprehension of the separation of soul and body (cf. Cartesian dualism). Presicely concerning the negligence concept this terminology is not a very happy one. The content of the "subjective" requisite negligence is above all determined by an "objective" comparison between the act in question and the community-accepted standards. Whether in this comparison the individual characteristics of the actor should be taken into consideration is often referred to as a "subjective-objective" issue. As the use of these terms in this respect is apt to create confusion, it would be an advantage from the point of view of clarity to abandon them in the discussion of the requirements of liability.[99]

Nor is the distinction between "state of mind" and "conduct" equivalent to the question, intensively discussed in German legal writing as to whether the individual qualities of the actor should be considered in determining the "care concept" (*der Sorgfaltsbegriff*).[100,101] The discussion of the "state of mind – conduct" issue in Anglo-American law is a more basic one. As a typical exponent of the "state of mind" theory[102] *Salmond* is commonly cited. Of negligence and intent he writes:

Each involves a certain mental attitude of the defendant towards the consequences of his act. . . . He is guilty of negligence . . . when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, and therefore does not refrain from the act notwithstanding the risk that they may happen. The careless man is he who does not care – who is not anxious or not sufficiently anxious that his activities shall not be the cause of loss to others. The wilful wrongdoer is he who desires to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are inconsistent and mutually exclusive states of mind.[103]

If we disregard what Salmond calls "wilful negligence",[104] indifference or inadvertence seems to be the decisive state of mind of the negligent actor according to the "mental view".[105] This carrying over into tort law of what we have already seen to be a misconception of the relationship between negligence and

inadvertence[106] in criminal law has not attracted many imitators. It is not difficult to see that behind this theory lies an analogy between negligent and intentional harms.[107] There is a clear parallel here between the stressing of the "intentionality" of the negligence concept in 19th-century German criminal-law writing and the discussion of the exclusion of negligence from *mens rea* in Anglo-American 19th- and 20th-century writing on criminal law.

Though the discussion concerning "state of mind – conduct" has undoubtedly shed light on the negligence concept, it has been unhappily profiled. Very much in line with the objectivistic view of *Holmes* and the standpoint of *Roscoe Pound*[108] *Edgerton* asserts that the "mental theory" is erroneous.

> Negligence neither is nor involves ("pressupposes") either indifference, or inadvertence, or any other mental characteristic, quality, state, or process. Negligence is unreasonably dangerous conduct – i. e., conduct abnormally likely to cause harm.[109]

If then negligence is asserted to be unreasonably dangerous conduct, what is meant by "conduct". For proponents of the "conduct theory" this question tends to be more troublesome than it need to be. According to the theory, a "state of mind" has no relevance whatsoever for the determining of "conduct" and thus of negligence.

> ... the proposition that negligence is conduct means that there is negligence if there are unreasonably dangerous motions, and not otherwise; consequently, that no particular mental schortcoming proves negligence or is necessary to negligence, and no particular mental attainment precludes neglicence.[110]

The negligence concept has thus lost contact with the individual harmdoer. A determination of what is a negligent act only takes into consideration external elements and totally excludes the perpetrator as a person.[111]

> The individual's actual mental characteristics and qualities, capacities and habits, reactions and processes, are not, then, among the "circumstances" which the law considers in determining whether his conduct was, under the circumstances, reasonably safe. He must behave as well (as safely) as if he were in all mental respects normal, though he may be in some respect subnormal; he need behave no better, though he may be in some respect super-normal.[112]

It is immaterial what mental shortcoming – ignorance, stupidity, bad judgment, timidity, etc. – it was that *produced* the negligent act. According to the conduct theory, negligence *is* "conduct" and not a particular mental condition. This does, however, not mean that individual elements like blindness, awkwardness, poor memory, slow reaction time, etc., are definitely left out in considering the case regarding the harmdoer. They may enter the determination either as a part of the question regarding the standard of conduct to be applied,[113] or as an independent ground for eliminating responsibility.[114] But it seems that under the conduct theory an inquiry into the actor's mind does not constitute a part of the negligence concept.

The assertion that negligence *is* unreasonably dangerous conduct or *is* a state of mind in itself implies an incorrect or at least inadequate statement of the problem in issue. A formulation of the problem as "What *is* negligence? " is an unhappy starting point. The meaning of the legal concept of negligence must be determined on a factual and legal-policy basis within a given system of law, i. e. Swedish Criminal Law. Any answer to the question what is negligence leads to other questions, e. g., "What is conduct? " or "What is a state of mind? " etc. Edgerton certainly realizes this, and in order to answer the question what is meant by conduct he discusses the legal meaning of an act.[115] If action according to the prevailing doctrine is taken to mean an act of will or volition this does not seem to be much help as to negligence. We could, of course, mean by action anything we "do". But in that case the concept of negligence according to the conduct theory becomes limitless and definitely devoid of boundaries. If, as a third possibility, we take action in a more restrictive sense as meaning a movement based on the individual's ability to control his motion,[116] the same objections may still be raised as to the first alternative.

The discussion of the "conduct – state of mind" issue in Anglo-American negligence theory carries one's thoughts to the German doctrines of action and their importance for the concept of *Fahrlässigkeit*. The concept of action is a rather essential concept in German criminal theory. Every prominent German criminal law theorist seems to have his own doctrine of action. The most important groups of theories, however, seem to be the basic causal (or natural) doctrine of action as well as the final (subjective-

final) and social (objective-final) doctrines of action.[117] The contributions of the finalists, especially Welzels, to the discussion have intensified the debate. In particular, the finalist's position in relation to negligence has been the ground for extensive discussion. As to the doctrine of finality, the will and the content of will belong to action. The action is a "subjective" and "objective" unity. If this is not accepted, one cannot, according to the finalists, speak of an action. The discussion of the merits of the doctrine has to a great extent focused on the negligence concept. Frequently the objection is raised that the doctrine of final action is not pertinent to negligence because finality does not play a role concerning the negligence delict.[118] To this finalists answer that the structure of the negligence delict cannot be understood unless finality is taken into consideration. Exner's and Engisch's classical works in the field of negligence had shown that the essential element of negligence did not belong to the guilt issue (die Schuld) but to "Unrecht". With the concept of action as their starting point the finalists tried to give this view an acceptable dogmatic basis. The finality concerning negligence is the "plichtwidrige Nichtbedenken" of the nonfinal effect,[119] or depends on the conrete final achievement.[120] The unlawfulness of the action (der Handlungsunwert) can only be stated objectively. It is the "Verstoss gegen die objektive Sorgfaltspflicht".[121] The effect has only a restrictive and limiting significance. "Der Handlungsunwert als solcher kann weder durch das Hinzutreten des Erfolgsunwertes gesteigert, noch durch dessen Ausbleiben gemindert werden."[122]

Though the discussion of finality and negligence in German criminal law has undoubtedly contributed to the clarification of the concept of negligence, I believe it is a basic doctrinal misconception to promote the concept of action to the rank of the basic concept in the doctrine of criminal law. The German doctrines of action are artificial products based on the unrealistic assumption that from the understanding of what an act is it is possible to infer the minimum requirement for criminal guilt.[123]

If then the conduct theory does not seem fitted to describe negligence in an accurate manner, it is none the less important inasmuch as it points to the most essential part of the concept, the non-conformity with standards accepted in the community. This part is determined generally ("objectively") and no attention is here paid to the individual harmdoer.[124] That this part of the concept is basic and must be considered the essence of negligence is often overshadowed by the uncertainty and manifoldness of the negligence terminology as well as by historically-conditioned systematics where negligence is put side by side with intention as one of the "subjective" requisites for culpability. Terminologically, expressions like "bonus pater familias", "reasonable man", "inadvertence", "standard of care", "due care", etc. are unfortunate because they tend to preclude the basic rationale of negligence.

In recent American penal codes the Model Penal Code-inspired formulation: "substantial (or gross) deviation from the standard of care which a reasonable person would exercise in the situation" is commonly adopted. See, e. g., Criminal Code of Illinois § 4–7, Colorado Criminal Code 40-1-601 (9), Connecticut Penal Code § 53a–3(14), Kansas Criminal Code § 21–3405, Kentucky Penal Code Sec. 14 (4), New York Penal Law § 15.05.4, Oregon Criminal Code Article 2 Sec. 7(10), and New Hampshire Criminal Code 626:21(d).

7. Recognizing basic principles, here above all the *principle of legality,* criminal lawyers are accustomed to work with objective, at least reasonably precise, descriptions of the prohibited acts or passivity *(Tatbestand).* According to the prevailing view these descriptions should be "subjectively covered" in order to justify the imposing of a penal sanction. This "principle of covering" is universally recognized in the criminal law of Western civilization. It is a principle designed to safeguard basic human rights. Though it is nowhere accepted without important exceptions[125] and is certainly not unchallenged,[126] I think that, pragmatically, we must admit that it has not been successfully contested as a basic principle of criminal law. Let us see where we shall end up if we apply this principle to the negligence concept.

Criminal law works mainly with two different types of delicts.

a. danger delicts (e. g. careless-driving statutes).

b. effect delicts (e. g. negligent-homicide statutes).

Regarding *a.,* the punishable area is as a rule limited only by the use of the negligence requisite. The description of the prohibited act primarily contains a reference to the requirement of punishability – it is required that the action of the accused shall have deviated from the accepted pattern of action in traffic. As to *b.,* the effect is an essential part of the description of the prohibited act but is not decisive for the negligence issue. In this case, too, the negligence requisite is the decisive part. Another element, the bringing about of a certain effect, is here added. It must be shown that there exists a causal relationship between the negligence act and the effect. In other words the negligence must be considered relevant to the effect. From the point of view of the accused's action, the effect was brought about owing to a pure coincidence. If the accused had had only another tenth of a second at his disposal the overtaking would not have resulted in

the fatal accident. But it would still have been a typical example of careless driving. The act is precisely the same. The difference between *a.* and *b.* is only that in *b.* another element is introduced as a limiting factor. In both *a.* and *b.* the decisive element of the description of the prohibited act is the negligence requisite.

As we have seen, there is a well-founded requirement for a thoroughly determined description of the prohibited act. With only a reference to the negligence requisite as in *a.* and *b.* it cannot be maintained that this requirement has been met. Everything depends on the construction of the negligence requisite. And the requirement is well met if the negligence concept is generally or "objectively" stated. But if we are satisfied with a kind of "objective" negligence requisite, we have in reality not reached above the level of strict liability. In order to comply with the requirement of the conformity principle, the negligence requisite must also take account of the accused as an individual. Could the accused, through the use of his faculties, have acted otherwise?

This leads us to the following hypothesis. Because the description of the prohibited act should be carried out in a general or "objective" manner, the first step is to judge, using different sources, whether the act at hand deviates from the standards accepted in the community. If the answer to this is in the affirmative, the second step will be to consider in a general way ("objectively" and not judging from the accused's point of view) whether there are individualizing circumstances that should exclude liability. The third and last step should be to inquire into whether the accused could, through the use of his faculties, have acted otherwise.

In the following chapters we shall describe in more detail the approach thus suggested, and shall also confront it with the case law. Before doing this, however, it is desirable to judge the hypothesis in the light of legal writing.

8. An important feature of legal writing in German-speaking countries is its striving towards an acceptable arrangement of the concept under discussion within the impressive system of legal doctrines. This is certainly one of the reasons why at least the

vast literature concerning negligence not infrequently leaves the area of practically important analysis and turns into a conceptual systematization of little or no value. Since the turn of the century, when it became evident that the characteristic features of negligence could not be treated as a guilt *(Schuld)* problem only, the correct place of the "care concept" *(Sorgfaltsbegriff)* has been doctrinally uncertain and much discussed.[127] *Exner* and *Engisch* assigned "Sorgfalt" to "unlawfulness" *(Rechtswidrichkeit).*[128] Gradually the idea was developed in German case law that "die objektive Pflichtwidrigkeit des Verhaltens sei eine *Vorfrage* des Verschuldens".[129] The view that negligence also covers an element of "unlawfulness" *(Rechtswidrigkeit)* has been accepted in the case law of criminal law.[130] An essential part of negligence is the act's character of falling short of the requirements of care that the law states without taking into consideration the capacity of the individual. For the act to constitute a crime of negligence, however, an additional element, guilt *(Schuld),* is needed. The guilt issue regarding negligence delicts centres around the consideration of the individual's capacity – his "können" as separated from the general issue of the standards accepted in the community – a question of "sollen". If it is possible at all to make broad generalizations concerning German negligence law, this rather brief outline states the prevailing theory in a rather schematic manner.[131] A corresponding view seems to prevail in German tort law.[132] In the case law of tort the following pronouncement has been made by the Federal Supreme Court (BGH) that ". . . bei verkehrsrichtigem Verhalten eines Teilnehmers am Strassen- oder Eisenbahnverkehr eine rechtswidrige Schädigung nicht vorliegt".[133]

This development in case-law and the progress that has taken place in legal thinking means that negligence is viewed as a question of "Tatbestand, Unrecht and Schuld". The basic negligence issue has moved away from the area of guilt to the general question concerning the unlawful act. "Die zentrale Problematik der fahrlässigen Delikte liegt nicht im Bereiche der Schuld, sondern in dem Tatbestandes, und zwar in der Bestimmung der tatbestandsmässigen Handlung."[134] The main issue seems in this respect to be the dogmatic treatment of the care concept (*der Sorgfaltsbegriff*), the nature of the care concept, its determination and its place in the dogmatic system. The prevailing view regarding the nature of the concept is that it

should be defined as external and appropriate conduct.[135] This is also called external care *(äussere Sorgfalt)* as opposed to internal care *(innere Sorgfalt).*[136] As has already been pointed out, the term care *(Sorgfalt)* is unfortunate and misleading. In the next chapter we shall try to explore what is really meant by these commonly used expressions. It is interesting to note that, during the many decades that have elapsed since the publication of Engisch's work *Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht* and Mannheims even older work *Der Masstab der Fahrlässigkeit im Strafrecht,* no basic further development of the issue concerning the determination of care has been achieved. The literature has almost exclusively paid attention to the problem how to fit the concept in the different criminal-law theories.

As in German criminal law, there is in Anglo-American criminal law a need for a fresh appraisal of the concept of negligence. As we have already stressed, the doctrinal heritage of German law is one of the greatest obstacles in this connection. A corresponding obstacle in Anglo-Ameican law seems to be the more practical question of criminal procedure. The jury system in particular is, as I see it, a hindrance to a full appraisal of the concept.

The most important contribution in the direction of a reappraisal of the negligence concept has been made by Hart in his essay "Negligence, *Mens Rea* and Criminal Responsibility".[137] Although this work scarcely seems to have received the attention it deserves,[138] I think there are good reasons for believing that Hart's analysis marks the beginning of a more realistic view regarding such concepts as *mens rea*, intention recklesssness and negligence.

The analysis attacks two opposed ideas deeply entrenched in the different theories of criminal law. One is the view that it is bad law to punish an individual who does not "have in his mind the idea of causing harm to someone". The other is the theory of "objective liability".[139]

Hart points out that excessive confidence in the respectability of "having the thought of harm in the mind" as a ground of resposibility has its roots in a common misunderstanding. It is an oversimplification of the character of the "subjective element" required in those whom we punish.[140] What is crucial is not whether the accused had "in his mind the idea of causing harm to someone" but

that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.[141]

He then formulates the conformity principle:

... persons should not be punished if they could not have done otherwise, i. e. had neither the capacity nor a fair opportunity to act otherwise.[142]

But this justification of the desirability of excuses involved in the negligence requisite does not solve the basic issue concerning the "unlawfulness" of the act in question. To the picture there must be added an evaluation of the act in order to find out whether the agent violated in the community accepted standards of behaviour. The solution proposed by Hart is the adoption of a "two-way" technique.

(i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?
(ii) Could the accused, given his mental and physical capacities have taken those precautions?[143]

The first question asks whether the actor deviated from an "invariant" standard of care, while the second takes into consideration the "individualized conditions of liability". In suggesting this approach Hart is repudiating the theory of "objective liability". The conditions of liability should be adjusted to the capacities of the accused. If they are not, the individuals will be held liable for negligence although they could not have helped their failure to comply with the standard. The suggestion also solves a paradoxical approach that is brought about by the use of the reasonable man standard. Hart states the problem thus:

We may find ourselves asking whether the infant, the insane, or those suffering from paralysis did all that a reasonable man would *in the circumstances* do, taking 'circumstances' (most queerly) to include personal qualities like being an infant, insane or paralysed.[144]

He avoids this unhappy approach by asking "What *would* the reasonable man with ordinary capacities have done in these circumstances?" and, when this question in answered, inquiring into whether the accused "*could* ... with his capacities have done that".

It is interesting to notice the influence of Hart's approach on American legal writers in the last ten years. *Dubin*, when distinguishing between "proscriptive" negligence, "negligence as an element of a proscribed harm", and "conformative" negligence, "negligence as a factor in the determination of the accused's ability to have conformed to the requirements of the law he is alleged to have violated", is unmistakally inspired by Hart's analysis.[145] It is difficult to see, however, that the division into two different kinds of negligence is systematically advantageous. The distinction does not seem to pay due attention to the fact that the negligence concept is a concept of considerable vagueness. What is needed, therefore, is a conceptualization that, while taking this fact into account, will facilitate the negligence evaluation.

In a later work *Griffiths* in a lucid discussion stresses the "invariable" and "individual" elements of the negligence concept. He maintains in polemics against *Packer* that "negligence is neither a state of mind nor the absence of one . . . – it is as a characterization of conduct, behavior which fails to meet a prescribed standard . . ., and, as a mode of culpability, the recognition of some excuses against responsibility for an untoward occurence, but not of others. Before one can decide how liability for negligence fits into an account of the practice of punishment, one must keep absolutely distinct its mode of culpability aspect from its standard of conduct aspect: the reasonable man, for example, and all the dispute about him, is relevant only to the latter aspect of negligence."[146]

This theoretically clear and practical "two-way" approach has not been generally accepted; nor, on the other hand, has it been expressly repudiated. In a recent comparative study, *Fletcher* sets out to explore the "nature" of negligence.[147] Contrasting what he terms the "objective standard of liability" in Anglo-American criminal law and the "subjective standard of responsibility" in continental European criminal law, he discusses whether negligence is sufficiently distinguishable from that of intentional conduct to merit the label "objective" rather than "subjective". Already at the outset of his essay he seems to remove himself from the systematical approach of modern continental European criminal law – an approach which in principle is that advocated by Hart – and distinguishes the issue concerning the agent's personal characteristics from the question of the "nature of negligence". The first-mentioned issue is said by Fletcher to be only a "policy question".[148] But later in the essay it becomes evident that he reaches the conclusion that negligence is by nature both "subjective and objective". "The objective issue is whether the risk is justified under the circumstances; the subjective issue is whether the actor's taking an unjustified risk is excusable on the ground of duress, insanity, or some other condition rendering his conduct involuntary and thus blameless."[149]

To understand the "nature" of negligence one must bear in mind that the standard for imposing liability "consists of an objective, rule-oriented dimension (legality) and a subjective, individualized dimension (culpability)".[150] Thus in reality Fletcher has come very close to the approach suggested by Hart. It is hard to understand why the "personal characteristics of the defendant" should not be considered as an integral part of the concept when assessing the "nature" of negligence. Another question is, of

course, that the determination of which excuses should be relevant may primarily be looked upon as a "question of policy".

If we are able to dispel doctrinal clouds, we can see that the approach proposed by Hart is in principle in accord with modern continental European criminal-law theory and that it fits in well with the prevailing view in Scandinavian criminal law.[151] This trend towards a realistic and fruitful approach regarding the negligence concept is extremely important. It is a great step in the right direction. Negligence should not be looked upon as a moral-philosophical problem. This is a consequence of the approach chosen in this work concerning the concept of responsibility. We have seen that it is futile to inquire into the material content of this concept. The same is the case regarding negligence. A moral-philosophical analysis would result in the adherence to certain consequences for the concept that some now prevailing philosophical schools would bring about. Our approach is instead more limited – a dogmatic-descriptive one. The aim is to find out how the negligence requisite is constructed in certain particular legal systems. Having reached answers to that particular question, moral philosophy enters the picture with regard to the issue whether the results from legal policy views are sound or not. For the sake of clarity it would seem essential to keep this last issue separate from the more technical issue that we are primarily concerned with in this work.

If, then, the analysis of the responsibility concept has facilitated the very approach to our difficult problem, the basic principle of conformity has provided us with a theoretical basis for constructing a workable approach in criminal-negligence cases. What remains is a closer examination of the three different parts of the negligence evaluation. Concerning the first part, which deals with deviation from the in community accepted standards, a most unhappy development has been brought about by the analysis of this part with the use of the construction of the reasonable man or bonus pater familias.[152] What primarily interests us in this book, however, is the third part of the suggested approach – the part dealing with individual elements. At least in European criminal law it is not uncommon to find statements in legal writing that "subjective" circumstances are

taken into consideration to a greater extent in criminal law than in tort law. But surprisingly enough the issue has been paid very little attention in criminal law, whereas it is my impression that it has been considered in more detail in tort law.

[1] *Williams,* Mental Element, 31–32.
[2] The concept of recklessness is not, however, equivalent to advertent negligence (bewusste Fahrlässigkeit). As defined in Model Penal Code (sec. 2.02 (2)) it covers both bewusste Fahrlässigkeit and dolus eventualis. See supra.
[3] See *Davis,* 224.
[4] 9 Halsbury's Laws of England (2nd ed.), 445.
[5] Among the vast number of cases the following may be mentioned: *Rex* v. *Williams,* 3 Car. & P. 635, 172 Eng. Rep. 579 (1807); *Ferguson's Case,* 1 Lewin 182, 168 Eng. Rep. 1005 (1830); *R.* v. *Timmins,* 7 Car. & P. 498, 173 Eng. Rep. 221 (1836); *Regina* v. *Finney,* 12 Cox C. C. 625 (1874); *Tinline* v. *White Cross Insurance Association, Ltd.,* [1921] 3 K. B. 327, 330; *R.* v. *Bateman,* [1925] 19 Cr. App. R. 8, 28 Cox C. C. 33, and *Andrews* v. *D.P.P.,* [1937] W. N. 69 (C.C.A.), A.C. 576, 2 All E. R. 552.
[6] See, e. g., *Perkins,* Criminal Law, 755–756, *LaFave & Scott,* 211–214, *Wechsler & Michael,* 720–722. As to the case law, see the discussion in *Com.* v. *Welansky,* 316 Mass. 383, 55 N. E. 2d 902 (1944), and *Commonwealth* v. *Pierce,* 138 Mass. 165, 52 Am. Rep. 264(1884).
[7] See *Moreland,* Negligence, 10–16, *Riesenfeld,* 37ff., and *Davis.*
[8] *People* v. *Schwartz,* 298 Ill. 218, 131 N. E. 806.
[9] *State* v. *Lester,* (1914), 127 Minn. 282, 149 N. W. 297.
[10] *Jones* v. *Com.,* 213 Ky. 356, 28 S. W. 164.
[11] *State* v. *Goetz,* 83 Conn. 437, 76 A. 1000.
[12] *State* v. *Dorsey,* 118 Ind. 167, 20 N. E. 777.
[13] *People* v. *Adams,* 298 Ill. 339, 124 N. E. 575.
[14] *Andrews* v. *D.P.P.,* (1937) 2 All E. R. 552.
[15] Criminal Law, 124.
[16] See *Erenius,* 53.
[17] See *Kenny,* 194, *Russel,* 724ff., Cf. *Perkins,* Assault, and *Livingston Hall.*
[18] 149 Pa. Super. 298.
[19] 149 Pa. Super. 298, 300f.
[20] 177 Ind. 619, 98 N.E. 640.
[21] (1931) 232 App. Div. 90, 249 N. Y. S. 180.
[22] (1915) 87 N. J. L. 15, 93 A. 112.
[23] See *Com.* v. *Cocodrelli,* 74 Pa. Super. 324 (1920), Note, 22 MICH. L. REV., 718ff., and 53 DICK. L. REV. 147.
[24] See regarding homicide, e. g., in England the Road Traffic Act 1960, sec. 1, and in the United States the Model Penal Code, sec. 210.4., and Study Draft, § 1603. Concerning assault and battery there is no negligent offence in English criminal law. See *Cross & Jones,* 166. In the United States, however, we find negligent-injury statutes in the Model Penal Code, sec. 211.1(1) (b), as well as in the Study Draft, § 1611 (1) (b).
[25] Only in Mississippi, Nevada, South Dakota, Tennessee, West Virginia and

Wyoming was no overall revision being planned as recently as 1972.
[26] See Criminal Code of Illinois, (1961) § 4–7, Colorado Criminal Code (1971) 40-1-601(9), Connecticut Penal Code (1969) § 53a–3(14), Kentucky Penal Code (1972) Sec. 14 (14), Lousiana Criminal Code (1942) § 12, New York Penal Law (1967) § 15.05.4., Oregon Criminal Code (1971) Article 2, sec. 7 (10) and New Hampshire Criminal Code (1971) 626:2I(d).
[27] Model Penal Code Tentative Draft 4, 126. Cf. Working Papers I, 127, where *Lloyd Weinreb* suggests that "[t]o ask a jury to determine also whether his conduct violates standards of conduct "grossly" or only "simply" is very likely to entrust to it the power to judge the conduct at large without standards".
[28] See, e. g., StGB § 138 (3) and § 311 (3). Cf. Entwurf 1962 § 18 (3), "Leichtfertig handelt, wer grob fahrlässig handelt".
[29] StGB § 222.
[30] See *Erenius,* 82–85, and *Andenæs-Hauge,* Uaktsomt drap.
[31] See *Andenæs-Hauge,* and *Andenæs,* Negligent homicide, 232ff.
[32] See, especially concerning Swedish case law in tax evasion cases: Skattebrotten, 181–185, and SvJT 1955 rf p. 74, and 1971 rf p. 49. See Also *Thornstedt-Eklund,* 48–52, and *Thornstedt,* NJM, 1960, 127.
[33] See *supra* p. 75ff.
[34] *Feuerbach,* Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts. 9 Aufl. Giessen 1826, § 60 p. 57. See *Exner,* 19, and *Himmelreich,* 22–24.
[35] See *Exner,* 58–75.
[36] See *Exner,* 75 when referring to *Birkmeyer.*
[37] See *Exner,* 75.
[38] *Binding,* Normen IV, 357ff. See, concerning Binding's negligence theory, *Exner,* 59–64.
[39] *Mezger,* Strafrecht, 355.
[40] *Ibid.* Cf. *Mezger,* Unrechtselemente, 254, where Mezger declares that the conscious violation of a duty is "der eigentliche Angelpunkt für das Verständnis der Fahrlässigkeit".
[41] So, e. g., *Maurach.* See note. Cf. *Gössel,* 114–118.
[42] See *Ørsted,* Grundregeln 251.
[43] See Allmän Criminallag. Motiver. Straff Balk, 21.
[44] See *Hagströmer,* 176, 212–213, and *Thyrén,* Principerna II, 1–2, and III, 1–5. For a more exhaustive exposition, see *Erenius,* 73–76. Cf. the penal code drafts Förslag till strafflag, 113, and Förslag till brottsbalk, 378.
[45] See, concerning the theories of v. Almendingen, Rosshirt, Temme, Zerbst, Hertz, Stübel and Thon, *Exner,* 67–71. Cf. *Himmelreich,* 22–30, and *Arthur Kaufmann,* Schuldprinzip, 156–165. In later years Arthur Kaufmann has, with reference to the theories of Kohlrausch, Baumgarten, Galliner, Busch and Germann, denied the guiltcontent og negligence. See Schuldprinzip, 162–163. Cf. *Jerome Hall,* Negligent Behavior.
[46] *Exner,* 173.
[47] *Id.* at 177.
[48] *Id.* at 165.
[49] See *Engisch,* Untersuchungen, 470 and 475, *Nowakowski,* Fahrlässigkeit, 104–105, and *Jescheck,* Aufbau, 21–22 and 26.

[50] See v. *Bar,* Schuld, 443–444, and *Welzel,* Strafrecht, 149–150.
[51] See *Himmelreich,* 36–37, and *Welzel,* Strafrecht, 150–151.
[52] See *Himmelreich,* 38, and *Welzel,* Strafrecht, 151.
[53] Concerning this theory see *Welzel,* Strafrecht, 149–150.
[54] *Schönke-Schröder,* 448, *Arthur Kaufmann,* Schuldprinzip, 161–162, *Mezger,* Strafrecht, 259, and *Himmelreich,* 39.
[55] See *Andenæs,* Criminal Law, 217–218.
[56] *Himmelreich,* 40. See against this view *Müller-Dietz,* Schuldgedanke, 70.
[57] *Erenius,* 81.
[58] *Jerome Hall,* Negligent Behavior, 635.
[59] *Id.* at 636. See also Negligence, where the "choice model" theory of criminal guilt is presented in detail, and *Wasserstrom, Mens Rea,* 103–104.
[60] See *Jerome Hall,* Criminal Law, 136–139, and Negligent Behavior.
[61] Besides *Jerome Hall* see *Turner* in *Kenny,* 52–53. See also *Edwards,* 216.
[62] Negligent Behavior, 636.
[63] Jerome Hall's works, cited in note 60 and *Wasserstrom, Mens Rea,* 103, and Negligence, 974.
[64] See *Fletcher,* Negligence, 415–423, especially 418, 419, 420 and 421. A warning example of where the logical confusion may lead is Negligence, where the 'choice model' of criminal guilt is placed in a contrasting relationship to the 'capacity model'. This is rather confusing and seems to be due to a failure not to make clear the difference between the desirability of excuses and the permissibility of punishing.
[65] *Henry Hart,* 417.
[66] Criminal Law, 122–123.
[67] *Jerome Hall,* Negligent Behavior, 641–642, and *Fine & Cohen,* 751. Cf. *Keedy,* Ignorance and Mistake in the Criminal Law, 84.
[68] *Wechsler & Michael,* 750–751.
[69] Model Penal Code, Tentative Draft 4, 126–127, and Working Papers I, 127.
[70] See *Williams,* Criminal Law, 123–124, and *Erenius,* 68–72 and 86–88.
[71] *Ross,* Hensigt, 359, and *Brett,* 98.
[72] The Mental Element in Crimes at Common Law, 207. Cf. the same author in 6 Camb. L. J. 31, 39.
[73] *Id.* at 211 and in 6 Camb. L. J. 31, 40.
[74] Ibid.
[75] Hart maintains that the word "negligently", in legal as well as non-legal use, refers to "an omission to do what is required" (by an ordinary reasonable man). See *Hart,* Negligence, 148.
[76] *Ibid.* Cf. *Ryle,* 147, and *Brett,* 98–100.
[77] *Ross,* Hensigt, 359.
[78] *Helen Silving,* Crime, 246. Cf. *Collings,* 285–286.
[79] *Helen Silving,* Crime, 246–248.
[80] *Id.* at 249.
[81] *Id.* at 250.
[82] *Id.* at 251.
[83] *Wasserstrom,* Strict Liability, 743.
[84] *Id.* at 744.
[85] *Ibid.* See also *Packer,* Limits, 128–129.

[86] *Wasserstrom,* Strict Liability, 745.
[87] *Griffiths,* note 38.
[88] *Id.* at 1398.
[89] See citation referred to above in note 84.
[90] The opposite view is maintained not only by Wasserstrom but also by Griffiths. See *Griffiths,* note 38, p. 1399.
[91] For the terms, see *Griffiths,* 1399.

[93] See, *Welzel,* Strafrecht, 149–150, *Himmelreich,* 45–47, and *Lersch,* 599, 602–603 and 609.
[94] See, e. g., *Fletcher,* Negligence, 418 and 423–426.
[95] See *Himmelreich,* 47–50, and *Oehler,* Zweckmoment, 21–50. Cf. *Oehler,* Rechts- und Pflichtnormen.
[96] See *Hart,* Intention, 133–134, and Negligence, 136, *Brett,* 98, and *Fletcher,* Negligence, 415–426.
[97] See *Edgerton,* 857 note 2.
[98] *Seavey.*
[99] *Jareborg,* Uppsåt, 350–351.
[100] The prevailing view in German legal literature as well as German case law is that this determination should be made without considering the individual qualities of the actor. See, e. g., *Jescheck,* Lehrbuch, 382–386, and *Aufbau,* 8 and references there given, as well as the case BGH VRS 14, 30. This view is, not, however, unchallenged. See *Schönke-Schröder,* 535, and *Oehler,* Fahrlässigkeit, 246.
[101] The discussion of this question in 'objective-subjective' terminology is risky and may, especially in comparative analysis, lead to obscurity and sometimes to entirely wrong conclusions. To state, e. g., that common law has adopted an objective standard as opposed to the subjective standard of liability of Continental law (see *Fletcher,* Negligence, 405–406) does not give a true picture of the different views on the negligence concept.
[102] This mental view varies slightly from author to author. See *Edgerton,* 850–852.
[103] *Salmond,* Torts, 266, and *Salmond,* Jurisprudence, 389–390.
[104] *Salmond,* Torts, 267. The expression points clearly in the direction of advertent or conscious negligence.
[105] *Ibid.* Cf. *James,* Negligence, 275–276.
[106] See *supra* p. 118ff.
[107] Edgerton says in this respect that this aspect emanates from "the nineteenth-century attempt to Romanize the common law by making all liability rest, not simply and directly upon the social advantage of discouraging certain conduct and compensating certain harms, but upon a guilty mind or will." *Edgerton,* 869.
[108] "Is it not another such postulate that in civilized society men must be able to assume that their fellow men, when they are in a course of conduct, will act with due care, that is, with the care which the ordinary understanding and moral sense of the community exacts, so as not to impose an unreasonable risk of injury upon them? Such a postulate is the basis . . . of our doctrine of negligence". *Pound,* 86.
[109] *Edgerton,* 852.
[110] *Edgerton,* 854.

111 From the broad proposition that no merely mental fact about the harmdoer is material Edgerton makes an exception for "knowledge". He asserts, however, that knowledge is a mental fact of "a peculiar sort" and suggests that it could be stated in "an objective form". See *Edgerton,* 857.
112 *Edgerton,* 857.
113 See *James,* Negligence, 276 note 6.
114 The last alternative seems to be compatible with the views of Edgerton, who seems primarily to turn against the idea of negligence *as* a particular mental condition. See *Edgerton,* 868. Cf. *Waaben,* Forsæt, 104–105, and *Jareborg,* Uppsåt, 154.
115 See *Edgerton,* 852–853.
116 *Jareborg,* Uppsåt, 88.
117 See *Binavince,* Fahrlässigkeit, 1–14, *Arthur Kaufmann,* Handlung, 39–45, *Jareborg,* Uppsåt, 86–89, and *Bustos,* 14–60.
118 *Arthur Kaufmann,* Handlung, 42, *Nowakowski,* Zu Welzels Lehre von der Fahrlässigkeit, JZ 1958, 335, 337, *Mezger-Blei,* 194, *Schönke-Schröder,* 459, and *Jescheck,* Lehrbuch, 167f.
119 *Niese,* 62.
120 *Welzel,* Bild, 10–13.
121 *Niese,* 64. Cf. *Welzel,* Bild, 11, and Fahrlässigkeit, 12f.
122 *Welzel,* Fahrlässigkeit, 20. Cf. *Welzel,* Bild, 36.
123 See *Waaben,* Forsæt, 105–106, and *Jareborg,* Uppsåt, 87–88.
124 I think it is important in this connection to note that the conduct theory is initiated within the law of torts. In the absence of the limiting penal provision of the criminal law there is a need for stating the limits of the sanction in a general way. See the arguments for the justification of the conduct theory in, e. g., *Edgerton,* 865–870, and *James,* Negligence, 278.
125 The vast and seemingly growing area of strict liability should here be noted.
126 See, in Anglo-American theory, the works by Holmes and Barbara Wootton and, in continental Europe, *Salm* and *Frey.*
127 See *Engisch,* Untersuchungen, 276f.
128 *Exner,* 193, and *Engisch,* Untersuchungen, 278.
129 VRS 8, 64, and *Welzel,* Fahrlässigkeit, 12.
130 BGH VRS 14, 30.
131 See *Jescheck,* Aufbau, 7–9 and *Lehrbuch,* 436ff, *Stratenwerth,* 288–300, and Die Bedeutung der finalen Handlungslehre für das schweizerische Strafrecht. SchwZStr 81 (1965) p. 205., *Engisch,* Unrechtstatbestand, 428, *Gallas,* 42, *Karl Alfred Hall,* 22, *Armin Kauffmann,* 45, *Maihofer,* 184ff., *Niese,* 61, *Welzel,* Strafrecht, 127ff, Bild 31ff, and Fahrlässigkeit, and *Nowakowski,* Fahrlässigkeit, 507 and *Roeder,* 52–53. Regarding older German writing, see *Leonard,* 24. For a contrary view, see *Schultz,* 141. Cf. *Roeder,* 53 note 23, and for civil law *Deutsch,* 23–54, and *Bokelmann,* 8–13.
132 See *Deutsch,* 235ff., and v. *Caemmerer,* 132.
133 BGH Z 24, 26.
134 *Welzel,* Fahrlässigkeit, 15 and 35.
135 *Engisch,* Untersuchungen, 275–276, and *Welzel,* Fahrlässigkeit, 16–17.
136 Concerning the last concept, see *Exner,* 78–85.

137 First published in Oxford Essays in Jurisprudence. (ed. Guest 1961).
138 This is, not surprisingly, very true concerning the case law. In the legal writing the essay does not seem to have been contradicted as far as the negligence concept is concerned. On the contrary it has been favourably received by some scholars. See *Dubin,* 390, *Brett,* Chapter IV, and *Griffiths,* 1446–1447. When it comes to the basic question whether negligence should be a ground of criminal liability, Hart's essay has been taken as advancing a theory as "a general account of the notion of criminal guilt". See Negligence, 961. Cf. *Wasserstrom, Mens Rea,* 102–104. I think this assumption is incorrect. The criticism that is based on this assumption seems to be due primarily to two factors: a failure to make clear the distinction between the issues of the desirability of excuses and the permissibility of punishing, as well as an insufficient recognition of the conformity principle. As examples of the influence of the essay regarding the basic liability issue of negligence, see *Smith & Hogan,* 57, *Cross & Jones,* 48, *Brett,* 99–100, and *Fletcher,* Negligence, 415–426.
139 Regarding the term and for a thorough discussion of the theory, see *Jacobs,* Chapter 5.
140 Negligence, 152.
141 *Ibid.*
142 *Id.* at 153.
143 *Id.* at 154.
144 *Id.* at 155.
145 *Dubin,* 391.
146 *Griffiths,* 1447.
147 *Fletcher,* Negligence.
148 *Id.* at 407.
149 *Id.* at 429.
150 *Ibid.*
151 Concerning Swedish law see *Erenius,* Chapter II, *Strahl,* Straffrättens allmänna del, 78, and *Agge-Thornstedt,* 153. Concerning Danish law, see *Hurwitz-Waaben,* 246–247, and concerning Norwegian law, *Andenæs,* Strafferett, 238–241, and Criminal Law, 221–224. Cf. in the law of torts most recently *Nygaard,* 45–50 and 90–91.
152 I have dealt more exthaustively with this issue in an earlier book. See *Erenius.*

VI

Il n'est peut-être pas, en droit pénal, de théorie encore plus remplie d'obscurités que celle du délit par imprudence.

Roux

A. We will now inquire into the structure and building up of the negligence evaluation. For this purpose let us first turn to some "paradigm" examples from the case law.

1. *The Prosecutor* v. *Gustafsson,* NJA 1966 p. 70. The accused, a district leader of the home guard, had arranged and conducted a field target practice. During the practice a ricochet bullet hit and fatally wounded a person who was not taking part in the practice. The prosecutor charged the accused with negligent homicide on the ground that he had not taken adequate precautionary measures.

The Supreme Court of Sweden (HD) pointed out in the judgment that the accused had arranged the practice in consultation with the leader of the local rifle club. It was made clear, however, that the practice had been carried out without observing the rules applicable in a situation like this under the safety instructions for the army. The court found that the relevant instructions were complicated both as to their wording and as to the disposition of the rules. The accused had not received any particular training regarding the conducting of target practices. Nor had he acquired any knowledge of the contents and practical application of the rules. Having regard to his limited education the accused might be assumed to have been lacking in the capacity to assimilate the contents of the rules on his own.

The court, on the basis of various facts stated in the judgment, concluded that the accused did not lack reason for his assumption that the safety regulations for the practice were complied with and that a special check by him in this respect was not necessary. In view of this and also because the lack of precautionary measures might be ascribed to organizational deficiencies within the home guard, the court did not apply the so-called "Übernahmegrundsatz".[1]

It seems as if in this case the HD first sets out to establish whether from a general point of view "negligence" can be found – whether the accused deviated from the community-accepted standards. In this particular case the standard was that set by the safety instructions for the army. This circumstance made it easier to determine whether the accused had deviated from standards

accepted in the community. The court merely had to answer the question: Did the accused contravene the instructions! *Not until this matter is solved* does the court consider whether in the particular case it may be required that the accused should act in conformity with the rules in question. On this matter the court's judgment is a *purely individual consideration.* The issue is: What was the possibility (in this particular case) for the accused to comply with the pattern of action delineated in the rules? After reaching the conclusion that the individual conditions for such an action were not met, the court turns to the question whether, despite this, the accused should be deemed guilty in view of the fact that he had deliberately entered a field of activity for which he lacked adequate qualifications. This question, too, was answered in the negative, and the accused was acquitted.

This case should be compared with the German case *BGH St 17, 223(2).* The accused was driving a lorry on the Autobahn at a speed of 43 km per hour. He approached from behind another lorry which was driving slowly on the righthand side of the road. When the vehicles were about 10 metres apart, the accused began to pull out to the left in order to overtake, but as he did so the speed of the lorry in front fell rapidly. The righthand front portion of the accused's lorry struck the lefthand rear portion of the vehicle in front. A passenger in the accused's lorry was fatally injured. The accused was prosecuted for negligent homicide.

The BGH first establishes that the keeping by a driver of a safe distance from the vehicle in front may prevent an accident caused by his vehicle running into the one in front. Then the court further develops this idea and finally points out that the keeping of a safe distance is an important basic rule in the road traffic area. Everyone learning to drive a car is made familiar with this rule and it is well known to every experienced car driver. Therefore a driver acts "verkehrswidrig" if, having regard to his own speed as well as to other circumstances, above all the condition of the road, he does not keep a safe distance from the vehicle in front even though it is possible for him to do so. The court then expresses the important rule: "Wer schuldhaft gegen eine wichtige Regel des Verkehrs verstösst, hat für die daraus erwachsenen Unfallfolgen strafrechtlich einzustehen, auch wenn

er sie im einzelnen nicht voraussehen kann, es sei denn, dass diese Folgen völlig ausserhalb aller Verkehrserfahrung liegen."[2] (A person who in a guilty manner violates an important traffic rule is responsible for the consequences of an accident emanating from his act, even if he cannot anticipate them, that is to say these consequences lie completely outside all experience of traffic.) "Es genügt, dass ihm nach seinen persönlichen Kenntnissen und Fähigkeiten sein Verhalten als verkehrswidrig erkennbar war und dass er es vermeiden konnte."[3] (It is sufficient that, considering his individual knowledge and capacity, his action was perceptible by him as being "verkehrswidrig" and that he could have avoided it.)

From this case it seems clear that the first and most crucial question at issue is: Did the accused violate a rule of action accepted in the community? Was his act "verkehrswidrig"? If this question is answered in the affirmative the following consequential question must also be answered. Was it possible for the accused to comply with the standard accepted in the community? It is sufficient that his act was perceptible by him as being "verkehrswidrig", and that it would have been possible for him to avoid it.

This way of reasoning is not explicitly to be found in Anglo-American case law. The utilizing of concepts like "an ordinarily prudent or careful man under the same circumstances",[5] "lack of due care"[6] or "duty of care"[7] seems to preclude a reasoning similar to that of continental European law. As a "paradigm" example, let us look at the case of *Commonwealth* v. *Pierce.*[8]

Pierce had been found guilty of manslaughter, on evidence that he publicly practised as a physician, and, being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for about three days, as a result of which she died. There was evidence that he had ordered similar treatment with favourable results for other patients, but that in one instance the effect had been to blister and burn the flesh, as happened in the present case.

The main issue in the case was: Is an actual good intent and expectation of good results an absolute justification of acts,

however foolhardy they may be if judged by the presumed external standard, and is the defendant's ignorance of the effects of kerosene administered in the way it was an excuse for so administering it?

Holmes, J., speaking for the court, stated:

So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation.

The court goes a step forward in advocating the application of this rule in criminal law:

. . . there would seem to be at least equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard, or at least general negative limits, of conduct for the community, in the interest of the safety of all.

If a physician is not less liable for reckless conduct than other people, it is clear, in the light of admitted principle and the later Massachusetts cases, that the recklessness of the criminal no less than that of the civil law must be tested by what we have called an external standard. In dealing with a man who has no special training, the question whether his act would be reckless in a man of ordinary prudence is evidently equivalent to an inquiry into the degree of danger which common experience shows to attend the act under the circumstances known to the actor.

It is further maintained as a "general proposition"

that a man's liability for his acts is determined by their tendency under the circumstances known to him, and not by their tendency under all the circumstances actually affecting the result, whether known or unknown.

This knowledge of the dangerous character is coupled with the "common experience" of the actor. The relation is stated thus:

. . . if the dangers are characteristic of the class according to common experience, then he who uses an article of the class upon another cannot escape on the ground that he had less than common experience. Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril.

The court concludes in this case:

The defendant knew that he was using kerosene. The jury have found that it was applied as the result of foolhardy presumption or gross negligence, and that is enough.

The technique here used is, I think representative of the way of carrying out the negligence evaluation in Anglo-American law. The "frame of reference" is the "man of ordinary prudence" or "reasonable man". Even though the highly developed society of modern times presents an increasing number of firmer and more easily comprehensible standards of conduct, these are not as a rule acknowledged separately but are taken into consideration as a part of the reasonable man standard. This in its turn gives rise to many difficulties, especially regarding the analysis of the case law. The knowledge that the standard of conduct in negligence law is "at once subjective and objective"[9] does not add more information for the analysis of the negligence concept than does the "empty" construction of the reasonable man itself.

In more recent cases, however, the reasonable man may not be explicitly mentioned. Especially in cases concerning medical treatment, he is not infrequently left out and replaced by such expressions as "approved medical treatment", "accepted and established remedies and methods of treatment", etc.[10] As a rule, however, the negligence evaluation, even in medical cases, is phrased in Anglo-American judicial practice in a "reasonable man terminology" or terms having in principle the same meaning.[11]

2. In the preceding chapter I have asserted, primarily focusing on the area of road traffic, that the negligent actor is not to blame for a lack of attention or due care – the attention or care of a reasonable man under the circumstances – but for non-conformity with the patterns of action developed within the field of action in question. Let us here develop this idea further.

Concepts like "noticing", "taking care", "attending", etc., are termed by *Ryle* "heed concepts".[12] These concepts are brought under the vague heading of "minding". When we say that a person has been careless, we are stating that he was not minding what he was doing.[13] Ryle further asserts that it makes good sense to talk about different degrees of minding. A person may be driving with great, reasonable or slight care.[14] Ryle thereby repudiates the "mind as a blank" theory in negligence law. He further emphasizes a rejection of Cartesian dualism when he asserts that

[d]oing something with heed does not consist in coupling an executive performance with a piece of theorising, investigating, scrutinising or "cognizing".[15]

Ryle points out that the concept of heed is not a cognitive concept. He then turns to clarifying the use of such pairs of active verbs as "read" and "attend" or "drive" and "take care". The use may "suggest that there must be two synchronous or perhaps coupled processes going on whenever both verbs are properly used". Ryle maintains, however, that it is quite idiomatic to replace the heed verb by a heed adverb:

We commonly speak of reading attentively, driving carefully and conning studiously, and this usage has the merit of suggesting that what is being described is one operation with a special character and not two operations executed in different "places", with a peculiar cable between them.[16]

If we concentrate on the verb to "care", it is clear that entails being *prepared* for certain sorts of emergencies, but to say that someone has done something paying care also implies that he was *ready* for the task with which he actually coped.

The description of him as minding what he was doing is just an explanatory report of an actual occurrence as a conditional prediction of further occurrences.[17]

And Ryle further asserts:

To describe someone as now doing something with some degree of some sort of heed is to say not merely that he has had some such preparation, but that he is actually meeting a concrete call and so meeting it that he would have met, or will meet, some of whatever other calls of that range might have cropped up, or may crop up. He is in a'ready' frame of mind, for he both does what he does with readiness to do just that in just this situation and is ready to do some of whatever else he may be called on to do. To describe a driver as taking care does not entail that it has occurred to him that a donkey may bolt out of that side street. He can be ready for such contingencies without having anticipated them. Indeed, he might have anticipated them without being ready for them.[18]

Ryle mentions this after considering the problem of learning. He points out that

[w]e should not say that the child had done more than begin to learn his multiplication tables if all he could do were to go through them correctly from beginning to end.

And he further says:

[nor] is a man a trained rock-climber who can cope only with the same nursery climbs over which he was taught, in conditions just like those in which he was taught, and then only by going through the very motions which he had been then made to perform.[19]

Learning is becoming capable of doing some correct or suitable thing in *any* situations of certain general sorts. It is becoming prepared for *variable* calls within certain ranges.[20]

Through this process of learning, man becomes ready to cope with different situations in daily life. Certain patterns of action are developed in different situations. In the complicated world of today, man is met by such a great number of impressions of different kinds that it would be practically impossible for him to analyse and rework every situation anew as it arises. Particularly as to negligence in the criminal law this fact gives rise to a bundle of difficult problems – problems that appear unduly difficult when we apply 19th-century negligence theory to today's negligence problems. Here I think the philosophers and psychologists can be of great help in clarifying the issue. Considering the analysis by Ryle as stated above, it seems to be advantageous to see what the psychologists can tell us.

From physiology we have learned that many of man's acts are performed automatically. We all know about reflex actions. If we stop to think a moment, we shall soon realize the immense importance of these consciously acquired movements, without which today's fast-moving traffic, e. g., would have been impossible. In the case of the learner, every movement at the steering wheel is cautiously deliberated, whereas the actions of the trained driver are only seemingly deliberate and controlled.[21] The attention of the experienced car driver in traffic is quite different from the attention of a person reading a book.

Der Kraftfahrer wird bei der notwendigen "Hinwendung zum Verkehr" die meisten Umwelteindrücke unbewusst oder – nur am Rande des Bewustseinsfeldes aufnehmen, d. h. diese Vorgänge besitzen keinen Merkwert und hinterlassen keine reproduzierbaren Gedächtnisspuren, sind aber bei dem routinierten Fahrer geeignet, zweckmässige automatische Reaktionsabläufe auszulösen. Die Blickwendung eines Fussgängers, seine Schrittverhaltung, die Bewegung eines Radfahrers oder eines spielenden Kindes sind vielfach bereits Anlass für reflektorische, vom Willen unabhängige Verhaltensweisen, ohne dass es dem Fahrer bewusst würde.[22]

The experienced driver has acquired a series of different rules of action. In fast-moving traffic he is not able to rely on a conscious attention to the traffic situation. He simply cannot *consciously* comply with the great demands of the traffic.

> Er muss vielmehr ein *unbewusstes Eingestellsein auf die Objekte seiner Handlung* fördern und ein Gleichsam automatisches Reagieren durch Übung ausbilden, erweitern und vervollkommen.[23]

It is impossible continuously to act and react with sustained intensity.

> [U]m die eigene soziale Initiative nicht zu lähmen und sein eigenes Verhalten im sozialen Raum "sachgemäss" einzurichten, die Handlungsart einüben, die man im entscheidenden Augenblick nötig hat, damit sie dann gleichsam wie von sich selbst richtig abläuft.[24]

What is here pointed out is certainly not peculiar to the area of road traffic. It may be applied to all areas of human life.

B. If, then, the community demands of the citizen a certain readiness to cope with different situations, how is this readiness determined? In order to deal with this issue, let us first focus on the construction of the negligence statutes.

In the criminal codes of the Scandinavian countries, as well as of Western Germany, no definition of negligence is to be found. Thus the negligence provisions in these countries concerning, e. g., negligent homicide are drafted in a rather simple manner. An example is § 222 of the German Penal Code:

> Anybody who negligently causes the death of a human being shall be punished. . .[25]

The meaning of "negligently" has to be supplied from other sources outside the code, such as case law and legal writing. In American criminal law, on the other hand, it is more and more common that negligence is expressly defined in the criminal code. But here, too, the specific negligence provision such as, e. g., "negligent homicide" is drafted in a rather simple manner. The Model Penal Code, sec. 210.4.(1), states:

> Criminal homicide constitutes negligent homicide when it is committed negligently.

The wording refers both to "criminal homicide" as defined in sec. 210.1.(1) and to negligence as defined in sec. 2.02.(2)(d).[26] By these references the provision of negligent homicide is qualified in a certain manner. We must now ask: What does the qualification concerning negligence in the code add to the negligence judgment? Does it really add anything to the process of negligence evaluation?

To answer these questions, we must inquire into the meaning and usefulness of the statutory definition of negligence. It seems safe to take the definition of the Model Penal Code as a paradigm example for criminal legislation in the United States. The definition reads:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.[27]

The first sentence of this definition states why the negligent actor is to blame. His blameworthiness consists in his not having noticed or acquired knowledge of the risk that a certain material element exists or that his action involves a risk of the bringing about of the result mentioned in the particular penal provision. Further, the actor's failure to perceive the risk should involve a gross deviation from a certain standard of care. Thus far, the definition does not appear to be problematic as far as principles are concerned.[28] It seems basically to be in accord with what I consider a sound doctrinal view. But I think that, when it comes to the determination of the standard mentioned, many problems arise. In this respect the Model Penal Code definition adheres to the reasonable man formula. In my opinion the use of this formula, old and universally well-known as it is, creates more problems than it solves.

1. Negligence is often referred to as a "legal standard"[29] – a rule of law that refers to a general or specific norm of action among people in the field in question.[30] *Knoph* speaks of "the negligence standard".[31] This legal construction refers to a gauge

that is to be used in the evaluation. It is assumed that the judge knows the gauge and that it is a help to him in his evaluation. The gauge is commonly referred to as "the reasonable man", "the man of ordinary prudence", etc. These expressions fall back on the Romans' *bonus pater familias.* This togaed individual, shrouded in mist, has been the target for severe and damaging attacks. He has also been a favourite object of ridicule. I have no intention of contributing in this respect. We will here deal primarily with the issues concerning the meaning and function of bonus pater familias.[32]

The analysis in Chapter 5 should make it easier for us to discover the reality behind the nebulous bonus pater familias. As we have seen, the vital part of the concept is a normative one. The concept is not in the first place psychological. The relevant issue is essentially whether the action to be judged is in accord with the standards of action accepted in the community. It is a question of comparing the act in question with what is accepted in the community.

Already at this stage the bonus pater familias standard gives rise to certain difficulties. The basic meaning of the standard seems to be a comparison of the action in question with the pattern of action *actually* prevailing in the community. People normally act in this or that way in daily life, whereas this or that action is unusual and contrary to the custom in question. The standard points at the pattern of action actually followed in the community. But legal factors, too, are among those that influence man's actions. If, then, the law uses responsibility for negligent acts, too, as a means of upholding a certain pattern of action, the definition is an example of circular reasoning. This is sometimes asserted to be a serious shortcoming of the bonus pater familias determination of negligence.[33] I think, however, that this criticism is too general to constitute a really damaging attack on bonus pater familias. We know very little about the relation between the standard of care and the responsibility for negligent acts. The interaction between fact and law in this area is certainly not unique. There are parallels to be found in many other sectors of the law.

The objection to bonus pater familias has in this respect also

been presented in a somewhat different way. The standard is said to be used even where there is no possibility that an actual pattern of action is to be found. The judge is meant to say how the person ought to act from the point of view of a bonus pater familias. The pattern accepted in the community must not be mixed up with the pattern of action that actually in general prevails in the community. That the pattern of action actually prevailing is also regarded as the standard accepted in the community may have been the case in the less complex communities of former times. But in today's highly developed society this is not always the case. A custom, even if common, could certainly not be accepted as a standard by the courts if it is unreasonably dangerous.[34]

If the judge, then, determines an act as negligent without taking into consideration whether or not this type of action is in harmony with the standard prevailing in the community, the criterion for the negligent character of the act seems to be the responsibility for negligence. Consequently we are here facing an obvious logical circle.

If the first objection here mentioned is not a serious one, it should nevertheless give rise to a thorough analysis of the standard of care concealed behind bonus pater familias. On the other hand, the last-mentioned objection – that in reality bonus pater familias does not reach further than to what the judge himself regards as unreasonable behaviour – should give us reason to investigate further into the negligence evaluation. The first objection implies that the bonus pater familias determination in fact refers to a more or less fixed standard of care, while the second objection implies that the courts are not bound by certain rules as to the negligence judgment but that this determination may be made more or less "freely". We may then ask where, on the line between these opposing views, do we find a correct description of the court's negligence evaluation?

The reference to a reasonable and experienced individual – a bonus pater familias – is a simple and easily comprehensible formula. It is a handy formula: only one formula for every possible situation. Since no two acts of negligence are precisely the same, the advantage inherent in the flexibility of the

reasonable man standard is commonly stressed.[35] Because of its flexibility it is applicable to the "primitive chariot or the modern aeroplane".[36] But this advantage obviously conflicts with the need of the individual to know his rights before he acts. In addition, it is disputed whether the standard holds any significance for the judge or jury as a guide for the evaluation.

The usefulness of the negligence standard is due to the fact that most people have a notion of what is just and correct, even if they do not always act accordingly.[37] It is therefore important that the negligence standard should not be removed too far from that which is commonly prevalent in the community. As far as possible the individual should be able to perceive whether the act in question is justifiable or not. The standard should not only be of help to the judge but should also serve as a guide to the individual. As a means of achieving this, the bonus pater familias seems at first hand suspiciously vague. It is often asserted that the reference to a bonus pater familias is in reality devoid of content. Bonus pater familias, it is alleged, becomes a bloodless abstraction, a creation of the imagination that has no other features than that it acts carefully.[38] Particularly in Anglo-American law we find numerous endeavours to make the bonus pater familias more concrete.

So, e. g., we find this incomparable attempt: "the ordinary reasonable man, the man in the Clapham omnibus, as Lord Bowen phrased it" (*Mc Quire* v. *Western Morning News Co. Ltd.* [1903] 2 K. B. 100, 190, per Collins M. R.). "He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules, although Lord Bramwell . . . occasionally attributed to the reasonable man the ability of an acrobat and the foresight of a Hebrew prophet." (*Winfield On Tort,* 18f.) Judge Forbes said in *Stansbie* v. *Troman* [1948] 2 K. B. 48: "I have to envisage the standard of care of that inscrutable person, the ordinarily prudent man, the reasonably prudent man, the man in the street, or (as the Clapham omnibus does not run to Birmingham) the man whose description Greer L. J. took on a sort of lend-lease from America . . . 'the man that takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves'." (Those interested in the reasonable man's wonderful transformations are referred to *R. E. Megarry,* Miscellany-at-Law, A Diversion for Lawyers and Others, London 1955, 260ff.)

These endeavours have certainly not been successful. They have merely served to reinforce the notion that the paragon is too general to be of any significance. That they were made at all

seems to be due to the linguistically misleading nature of the expressions bonus pater familias and reasonable man. The expressions are misleading because the courts do not generalize to the extent indicated by these terms. What is relevant for the comparison is not a reasonable and experienced member of the community in general, but a person in the actor's position. But not even this qualification has rendered the standard sufficiently concrete.

In order to save the standard as a principle it has been suggested that the standard for comparison should be the degree of care exhibited by a certain group of people and that this group should be delimited in another way than through a reference to the degree of care shown by those people. In that form the bonus pater familias comparison is still accepted by some modern legal writers. It must be admitted that the approach constitutes a step forward as regards realism. A consistent adherence to this view, however, will reveal that in reality the determination of negligence is far more complicated.[39] The qualification under discussion does not in principle carry us any further than the comparison with the acts of the average citizen. An application of such a method for the negligence evalution almost leads to the conclusion that it is impossible to penetrate the negligence standard. This discovery, in its turn, has led to mainly two different views maintained in the literature. First, we meet the view that the method using a comparison with an ordinary reasonable man usually involves an introspective process rather than a behaviouristic registration.[40] The judgment of the reasonable man is very often "a mere projected shadow, cast by the judge's own moral views or those of his own social class".[41] This view obviously implies a refusal of the classical bonus pater familias evaluation and it is not very clear what is left in its stead. Secondly, we encounter the view that bonus pater familias is a fiction and as such, is devoid of independent content. Such content as it has is derived from a number of different sources. An example of this view is found in the *Restatement of Torts.*[42] The standard of conduct adhered to is that of a reasonable man, while the standard of conduct of a reasonable man is primarily established by legislative enactments or administrative regulations

or by judicial decisions. If there are no enactments, regulations or decisions, the trial judge or the jury is freer in its evaluation. Although the reasonable man standard thus seems to be almost devoid of any independent content, the drafters of the Restatement still adhere to it, at least formally.

> The chief advantage of this standard of the reasonable man is that it enables the triers of fact who are to decide whether the actor's conduct is such as to subject him to liability for negligence, to look to a community standard rather than an individual one, and at the same time to express their judgment of what the standard is in terms of the conduct of a human being. The standard provides sufficient flexibility, and leeway, to permit due allowance to be made for such differences between individuals as the law permits to be taken into account, and for all of the particular circumstances of the case which may reasonably affect the conduct required, and at the same time affords a formula by which, so far as possible, a uniform standard may be maintained.[43]

This endeavour to outline the advantage of the reasonable man standard seems to me illuminating. I do not think it could be more clearly expressed that no independent content is to be found in this standard. The main reason why it is nevertheless still adhered to is, I think, explained in a convincing way by Holmes:

> [T]he forms of the law, especially the forms of pleading, do not change with every change of its substance, and a prudent lawyer would use the broader and safer phrase.[44]

2. The development in Swedish criminal law in the field during the last 100 years is, illuminating. There has been a process of evolution from adherence to a comparison with the average normal individual – a bonus pater familias – to endeavours to modernize and give greater precision to this gauge, and finally to an avoidance of referring to the standard when describing negligence. The commentary to the new Swedish Criminal Code, BrB, seems to express an attitude of realism.[45] As a general starting point the commentary refers to "the current view or linguistic usage among people of sound judgment".[46] At the same time, however, it is stressed that "preventive provisions"[47] and the technics render guidance for the negligence evaluation and that the opinion of the judge or jury concerning what is or is not careful is given a certain significance.[48]

The idea behind the bonus pater familias formula is the creation of a gauge that can serve as a guide for the negligence evaluation. We have found, however, that it is extremely doubtful whether the formula is fitted to serve as a guide. It is, then, a reasonable assumption that the courts do not in reality use this formula, even though the terminology used by the courts points in the direction of bonus pater familias. Hence it should be an important task to analyse the case law regarding negligence. This would be a first step towards the formulation of a negligence concept rooted in judicial practice. My thesis is here that preventive provisions and case law are the primary sources for the evaluation. If in a particular case these are not available, the evaluation becomes more discretionary. How the court then reaches its decision is something that cannot be recapitulated in a simple formula. It is a process requiring a detailed analysis. Let us now attempt to develop this thesis a little further.[49]

The term *preventive provision* embraces a large number of provisions which cover widely separated areas of life. Such provisions range in nature all the way from unwritten or written rules concerning games to legal enactemts, such as, e. g., the rules of traffic law. The preventive provision is aimed at prohibiting certain acts because, according to the evaluation lying behind the provision, they could easily become dangerous. Characteristically the provision also contains a prohibition or a decree regarding a type of action that is considered harmful or dangerous. But, in addition to this type of provision, we not infrequently meet a kind of provision that prescribes or prohibits a certain action in order to prevent danger arising at all. This type of provision is rather common in the area of traffic law. Here we come a step closer to the provisions where the aim, primarily at least, is not to ward off injury or danger but to uphold a certain order.[50]

Of these types of preventive provision, the first two will be relevant for the negligence evaluation. Hence the courts have to eliminate provisions of a pure "order-upholding" character. This is achieved by establishing the *aim* of the provision in question. When this is not evident from the wording of the provision, one is forced in the first place to consider the proposal leading to the particular provision and, if this does not give guidance, to the decisions of the courts.

A systematization of the preventive provisions relevant to the negligence evaluations[51] reveals that the provisions include examples both of descriptive and of general provisions as well as forms that fall somewhere between these categories. Concerning the more generally formulated provisions, such as, e. g., traffic rules that prescribe in general terms the observing of care and attention, we find that these provisions are not of much help regarding the negligence evaluation. If an interpretation of the provision does not give more exact guidance the court is forced to determine negligence more or less freely. To a great and increasing extent we find specific rules of an easily applicable character. Where this type of provision is at hand the negligence evaluation is limited to a relatively simple subsumption under the provision of the facts relevant in the particular case. The first step in the negligence evaluation is here only to establish whether the actor has violated the rule in question. It is, however, important to stress that this is only a first step, though I believe a most essential one, in the negligence evaluation. If the actor has violated a relevant preventive provision it still remains to be considered whether – still from an objective point of view – he should be excused for his violation. We shall return to this question when we consider "individualizing elements".[52]

Where the legislator,[53] after an evaluation of the elements of risk within a particular area of human activity based primarily on legal-policy deliberations, has instituted specific rules of action and prohibition, it is hard to see why these provisions should not form the basis for negligence evaluation rather than the carrying out of a concrete general evaluation that in principle is unique for every single case. In criminal law it is essential that the method of negligence evaluation here advocated shall be in harmony with the so-called principle of legality.

A full appreciation of such a view in Anglo-American criminal law seems to be precluded by the requirement of a particular quality of the criminally relevant negligence. *Perkins* maintains that

> [t]he violation of a statute enacted for the safety of persons or property may be negligence *per se*. *Kisling* v. *Thierman*, (1932) 214 Iowa 911, 243 N. W. 552. But it is not criminal negligence *per se*. *People* v. *Barnes*, (1914) 182 Mich. 179, 148 N. W. 400.

Referring to *Minardo* v. *State,* (1932) 204 Ind. 442, 183 N. E. 548, he continues:

> The violation of law is not ignored in such a case. It is one of the factors to be considered by the jury in determining whether or not defendant's conduct amounted to criminal negligence.

In this connection, however, Perkins mentions *State* v. *Cope,* (1932) 204 N. C. 28, 31, 167 S. E. 456, 458, where it is held that "an intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence."[53a]

The next source to be considered in connection with the evaluation of negligence is the case law. Unquestionably, case law is an important source in this connection. In a field like this, however, where the circumstances often vary from case to case, how can earlier cases be significant for the deciding of negligence cases?

We may start out from the thesis that "like shall be treated alike". We have reason to assume that the courts aim at regularity in the application of law. This means not only that the highest judicial court decides cases in conformity with its earlier decisions but also that the lower courts follow the decisions of the higher court. The difficulty is to find out in practice what is meant by saying that the courts treat like cases alike. It would seem that the only way courts can do this is to base their comparison on a selection of the circumstances obtaining in situations of a similar kind that have earlier been examined by the courts. The problem is then to find out which circumstances have been relevant for the evaluation.

One difficulty is that the relevant case material may consist of decisions handed down during a relatively long period of time. It seems unnecessary to point out in this connection that a precedent may lose its importance as time passes. What is decisive is not the time factor. Instead it is the evaluation that was decisive for the judge. The question is therefore whether the evaluation that formed the basis for the decision is still prevalent in the community. Another difficulty is that it sometimes happens that the decision does not clearly state the minimum

condition for the judgment. To be able to state the pattern of action that the courts have labelled negligent it then becomes the task of the interpreter to supply the fact that is not mentioned in the earlier decision or perhaps sort it out from an exuberance of facts that may be presented in the court's decision. It will be correct in these cases to talk about an interpretation of the judgment (the ultimate order of the court). It is only where such an interpretation of *the decision as a whole* has been carried out, thereby finding the facts or constellation of facts which have been determinative for the negligence evaluation, that case law can be said to be of importance in determining the negligence concept.

There is reason to believe that an experienced judge looks upon the individual negligence decision in connection with earlier decisions of the same kind. During his career the judge creates one or more models concerning the type of situation he has to decide. In arriving at his decision he is therefore primarily concerned with determining how similar the situation under adjudication is to the model that he already has in his mind. For the creation of such a model, case law is of the greatest importance. It not infrequently happens that case law creates its "own" patterns of action. In situations where case law does not have this "law-creating" effect, it may serve as a limiting factor to the otherwise "free" discretion or, where only rather general preventive provisions are available or a rather general custom is prevalent, it may have the effect of deepening the provision or custom and making it more concrete.

In legal systems like those of continental Europe and Scandinavia there is reason to believe that the decisions of the courts are not regarded as a collection of casuistic judgments. On the contrary, there is a tendency among the judges to look upon their decisions as links in a system of decisions having a certain degree of generalization. The nature of the negligence concept, however, makes this tendency towards generalization rather weak. Above all it must be stressed that the generalization of the case law takes place within more or less separate fields and that these fields cannot be compared with one another because the care requirement in the different areas may vary.

Particularly in traffic cases it becomes evident that what the courts are inquiring into is not care or whether the actor in question acted like an average reasonable man but very often whether the action under consideration was technically correct.[54] Systematically, this method may be assigned to the means of the courts to determine the standard of action accepted in the community in the particular field in question. This is quite in harmony with the view maintained in this work concerning the negligence concept.

When a court is forced to decide whether an act was reasonable or not, its activity is sometimes described as a weighing of different interests, an "interest weighing".[55]

It must be admitted that this way of looking at the negligence evaluation appears natural. Certainly a great many different circumstances of a heterogeneous nature are taken into account in deciding what is negligent. In cases where the authorities have not already carried out this weighing process by means of statutes, regulations, etc., to what extent do the courts make use of this "interest weighing"?

A "free" weighing of opposed interests against each other involves a great many difficulties. If the problem is likened to a mathematical operation, in the form of subtraction, one of these difficulties will arise from the very beginning. What is the subtrahend and what is the minuend? The factors which have bearing on the concept of "utility" and "harm" are not always "commensurable quantities". A simple weighing of utility against harm is out of the question. If this difficulty can be overcome, there remains the scarecely less formidable task of finding the standard for measuring the value of the different interests. Even if these difficulties could be resolved by the courts, there would still remain the problem for the individual to make a correct prognosis concerning the result of a possible future "interest weighing" which would be carried out by courts if his conduct were to be reconsidered.

The most serious objection to the significance of an "interest weighing" in this respect by the courts is, however, that the case law does not seem to render any support whatsoever for such a theory.[56]

We have now considered a number of possibilities of determining negligence. It is obvious that these possibilities do not cover the whole field of negligence. It is unavoidable that several cases fall outside the methods of negligence determination mentioned here. In such cases the negligence determination becomes more or less discretionary. An analysis of this discretionary evaluation is, however, outside the scope of this book.

C. Even if the outcome of a determination carried out according to the outline above shows that the standard in question has not been followed, there may be an excuse that "objectively" excludes responsibility. The "objective" or general part of the negligence evaluation is not complete unless consideration is paid to circumstances of the case that are of a general nature. Here I am thinking of circumstances that cannot be influenced by the actor. As far as the traffic area is concerned, we may mention, e. g., the condition of the road surface, the weather, technical difficulties regarding the vehicle, or that the driver was dazzled, etc.[56a] An essential factor to be considered in this respect is the time factor. Did the driver have a sufficient amount of time at his disposal in the traffic situation that had arisen?[56b] These circumstances, which enter the negligence judgment as a second element after it has been established that the actor has violated a certain standard of conduct upheld in the community, I prefer to call *individualizing elements.* The taking into consideration of these elements is a part of the negligence evaluation. If the action, although violating the standard accepted in the community, is excused because of a certain relevant individualizing element, the action is *not* negligent.[57]

D. If the comparison between the standard accepted in the community and the action in question reveals that the actor has violated the standard and if individualizing elements do not excuse the actor, this is not enough to constitute negligence. The principle of legal policy that we call the conformity principle gives another dimension to the negligence concept. Thus an actor should not be considered negligent if he had not the capacity or opportunity to comply with the requirements of the law – to act in accordance with the standard accepted in the community. Given his mental and physical capacities, could the accused have complied with the standard?

The general sense of justice makes a distinction between what the perpetrator "can help" and what he "cannot help". It is only the former which forms the basis for *reproach* and thus, for a judgment of *guilt.* We blame a person because he exhibits carelessness, recklessness or lack of consideration, but not because he is stupid, colour-blind or easily frightened. The judgment of negligence in criminal law builds on this general way of

thinking. But the distinction becomes more problematical upon closer analysis. Is not the carelessness of the perpetrator the outcome of heredity and environment, just as his other qualities are? From a deterministic point of view, it is unreasonable to say that a person can help one trait more than another.[58]

On the face of it this determinist objection as expressed above by Andenæs would seem to be a severe blow to the rationale of a negligence concept. The objection, however, is in its turn based on the unprovable thesis that the postulate regarding the regularity of nature may be carried over to the purely mental phenomenons.[59] It is hard to see why the hypothesis of a "uniform nature" which seems to be essential for science should be relevant for human guilt and responsibility. When confronting the frequently made deterministic objection, the jurist may derive comfort from the thought that the determinists have not proved their case.[60]

1. This issue of the importance of mental and physical capacities for the negligence evaluation is as a rule only briefly discussed in the criminal-law literature, whereas in tort law it has been more fully penetrated. The discussion is mostly carried out within the boundaries of the reasonable man formula. In itself this approach is more limiting than illuminating. If one is not to destroy the general or "objective" features of the reasonable man formula, it is an almost impossible task to state adequately the relevant factors that should influence the determination. We may distinguish two main lines along which legal writers try to qualify the reasonable man formula.

One way is to sift out certain situations where the formula should not be applied. These situations are rather limited in scope. Common examples are situations where the accused is a child or where the accused suffers an unforseeable affliction of a physical or mental character. In such cases as a rule the accused's conduct is not judged by the standard of an ordinary person. This approach thus leaves the formula intact in its traditional form.

Another way of solving the problem connected with the reasonable man formula is widely used. Here the formula is further developed and qualified by a reference to "the circumstances". In negligence law the expression "under the circumstances" is frequently referred to as involving something essential and sometimes as one of the most important phrases in negligence law.[61] The "circumstances" are taken to include natural phenomena in all their variations, as well as the knowledge, experience, capacity and attitude of the accused, etc.

In his critical analysis of the negligence ceoncept, Hart points out that the inclusion of at least some disabilities and incapacities in the "circumstances" presents some problems. Hart's starting point is the two-stage test suggested by him.[62] This test would give unsatisfactory results in cases where those who, "while unable because of some personal disability to take the same precautions against harm as a normal 'reasonable man', yet could, and would, if reasonable, have taken some other precaution to avoid the same harm. This is so because certain incapacities or abnormalities can be intelligibly treated as factors or parts of the circumstances which a reasonable man would take into account in determining what was demanded by way of care."[63] Hart says:

> Thus if a blind man of normal mentality walks out of his house into a busy road and knocks over a child passing on a bicycle at that moment, this might well be thought grossly negligent on his part; for though he could not have taken the same precautions as the ordinary sighted man (e. g. looked, seen, and waited), he could, and if thoughtful, would have, avoided the harm in other ways (e. g. by asking to be conducted across the road). But the two-stage test . . . would exempt all those who could not take the precautions which a sighted man would have taken.[64]

Hart's remedy for this is simply to include in "the circumstances" the physical capacities in question. His reason for this is that in relation to such physical incapacities there may "either be stocks of common knowledge concerning the ways in which persons suffering from such disabilities do and can behave, or a judge or jury might, by imaginatively placing themselves in his position, intelligibly speculate as to the way in which a reasonable man, so afflicted, would behave."[65] Concerning mental and psychological disabilities, however, the reasonable man formula does not give room for a solution mutatis mutandis. The reasons for this are, according to Hart:

> (i) Very severe mental abnormality, or even gross stupidity, cannot without absurdity be treated as factors with which the reasonable man would reckon; for they are inconsistent with the minimum meaning of the supposition that he is reasonable, even though it is true that 'reasonableness' for this purpose is not purely a matter of intelligence.
>
> (ii) Though lesser mental abnormalities might be attributed without absurdity to the reasonable man, judgments as to the way he would, in spite of his afflictions, have behaved in order to avoid harm will, in most cases, be impossible for others to make, at least until medical science has built up

some stocks of knowledge on the subject, comparable to those which guide judgements on negligence in ordinary cases. In the case of mental disability a judge or jury's speculation as to how they would have behaved themselves, if similarly afflicted, would in most cases be worthless.[66]

Hart envisages two possibilities in this connection. According to him there is a choice between

(a) exempting from criminal liability for negligence all those whose mental disabilities were such to prevent them from taking the precautions that the ordinary man would have taken, thus foregoing any speculation as to whether they could, in spite of their affliction have taken some different but adequate precaution, or

(b) exempting from criminal liability for negligence all persons suffering from specified types of mental abnormality.[67]

To use Hart's own terminology, this view leads in effect to a determination of the objective part of the negligence concept using subjective criteria. If the advantage of the two-stage test is not to be destroyed altogether, it becomes necessary to distinguish between different kinds of subjective criteria so that physical incapacities and mental disabilities are treated differently. Although I approve in principle of the two-stage test, I submit that as phrased by Hart it leads to unnecessary confusion. I further submit that the adherence to the reasonable man in constructing the test is the cause of this confusion. As pointed out above, incapacitations and abnormalities can be treated as parts of the circumstances which a reasonable man would take into account in determining what was demanded by way of care.[67a] But this is not a reason *why* they should be taken into account in this respect.

What Hart here seems to have in mind is a "form" of negligence that is rather common. We may call it *culpa praecedens* (preceding negligence). If, e. g., the accused fell asleep while driving a car, he is in principle guilty of an offence of negligence if he was negligent in not stopping the car before he fell asleep. On the other hand, if he had, e. g., been struck by a sudden illness he would have been acquitted because he had not been negligent. In several cases it does not matter whether it is an *actio libera in causa* or an *omissio libera in causa* that is deemed negligent in relation to the effect or description of acts. The criminal action here refers to an earlier stage of the process of

action. We may speak of a negligence that *precedes* and consumes the involuntary action or omission – a preceding negligence.[68]

Closely related, as to principle, to this idea of *culpa praecedens* is the German doctrine *Übernahmegrundsatz* or *Übernahmeverschulden.*[69] If, having regard to the actor's qualifications, experience, etc. his very entering into the activity in question constitutes a violation of standard accepted in the community the negligence evaluation becomes less complicated. With respect to both physical and mental incapacities, the question whether the actor could have conformed to the standards is not raised in such cases, the negligence determination being complete already at an earlier stage.

It must here be mentioned, however, that this formulation must be qualified further in order not to violate the conformity principle. It is, of course, possible that the actor was not able to understand his lack of ability to engage in the activity in question. Consequently, we must require that it was perceptible to the actor that he had not the necessary qualifications to enter into the activity.

Except for the reasonable man formula there does not seem to be any reason why physical incapacities should in this respect be treated differently from mental disabilities. If they cannot be treated alike within the reasonable man formula we must find other systematical ways of analysing them. With such an approach as is advocated here, where the reasonable man formula is not determinative for the negligence evaluation and where due consideration is paid to the *Übernahmegrundsatz,* the problem as stated by Hart does not arise.

If the court has reached the conclusion that the act in question did not comply with the standards accepted in the community and if the situation is not such that *Übernahmegrundsatz* should be applied, the relevance in the case of the individual elements should in principle be investigated when asking the question: Could the accused, given his mental and physical capacities, have conformed to the standard in question? I think it is an important task for jurisprudence to analyse the legal writing concerning individual elements and after systematizing the case law in this respect, to confront the analysis with the case law.

What, then, are the further consequences of not discussing the

relevance of individual elements in a bonus pater familias terminology? As we have seen, bonus pater familias is regarded as a test or a standard. As such it is inevitably more or less objective. It should function as a test or standard. Within this framework the individual elements are not allowed to be recognized fully.[69a] They are, so to speak, bound by an objective "dead-weight". The determination within the framework of a reasonable man becomes consciously or unconsciously objectivating. In the very selection of the relevant individual elements the question is, implicitly or explicitly, asked whether the element under consideration would be of any significance to a bonus pater familias. When not bound by the reasonable man framework these elements may be analysed as excuses. The question asked is limited. The equation is simplified. Above all we are given a possibility of establishing a connection between the individual elements and the particular crimes. The type of action being dealt with is, as will be seen, an important factor in this respect.

2. Up to the present point in this work, we have frequently used the term individual element without defining it fully. Nor, I think, has it been necessary to supply such a definition, since hitherto we have used the term mainly as a means of delineating the structure of the negligence concept. As we have seen, it was in fact necessary to introduce a term of this kind in order to describe the negligence judgment in a realistic way. I have chosen to use the term "individual element". Now, however, I think it is time to give an account of the meaning I attach to the expression "individual element" as a *terminus technicus.* And the meaning is simply the following: By individual element I mean the quintessence of an, in principle, unlimited amount of factors *related to the actor as an individual* – every possible assortment of qualities and characteristics of the actor. Thus far the only limitation is that the element shall be intimately related to the actor *as an individual* apart from the particular, individualizing, circumstances of the case, such as, e. g., the weather, the condition of the road, etc. With such a broad definition of the term, a vast number of individual qualities and characteristics are included.[70]

This, however, tells us nothing concerning their relevance. That is a totally different issue.

3. This part of the negligence evaluation does not seem to have received due attention as an independent ground for excluding liability. It cannot be a reason for this that the individual elements are treated within the bonus pater familias formula. As we have already seen, this is not possible. Therefore there does not in reality seem to be a risk that the issue is "hidden" in the formula. A more plausible reason why they very seldom come to the surface in the case law is, I think, that they frequently appear as giving "color to some more important factor, or bundle of factors".[71] In other words, they are treated among "the circumstances of the case". As we have seen, not even this explanation sufficiently explains a "hiding" of these elements. Some of them cannot simply be treated within "the circumstances". It also might be suggested that, as the issue involves a bundle of difficult questions, the courts are not able to consider it otherwise than in isolated and rare instances. Even if the task of the courts is primarily a rather practical one, the suggestion mentioned does not appear to be a valid argument for not recognizing the individual elements to a full extent. An important reason for not discussing their relevance in a particular case is, of course, the application of the Übernahmegrundsatz.[72] Considering further in which fields of law the negligence concept is most important, it must be borne in mind that in the vast majority of cases the issue of individual elements simply does not come to the surface. This does not mean, however, that due attention is not paid to the issue, but, as was stated in a German case,

> ob der Angeklagte nach seinen persönlichen Fähigkeiten und Kenntnissen zur Anwendung der erforderlichen Sorgfalt auch in der Lage gewesen sei, Tatsachen betrifft, die bei einfacher Sachlage als selbstverständlich angesehen werden.[73]

It is thus not necessarily the case that in the traffic area the silence regarding individual elements is due to an egalitarian tendency to judge every driver by the same standard – subjectively as well as objectively.[74] The fact that these elements are seldom mentioned in certain types of cases does not mean

that they are not considered. A closer analysis may, however, reveal that in the field in question individual elements are, for legal-policy and other reasons, limited to certain elements.

A common feature in at any rate the criminal law literature concerning negligence is that the individual elements are regarded as relevant to the negligence evaluation *within* the structure of negligence. A closer look at the literature reveals that in the main two basically different views are to be found. They may be stated briefly thus:

a. The liability is objective, but some rather limited exceptions are permitted.

b. The conformity principle is in principle adhered to. For various reasons – mainly policy considerations – the significance of individual elements is, however, limited.

Holmes is the best known of the legal writers representing alternative *a:*

> The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.[75]

Holmes justifies the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbours on two grounds:

> . . . the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law.
>
> . . . when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare.[76]

Exceptions may be made from this rule if "clear and manifest incapacity" is shown.

> When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them.[77]

Holmes's examples are here blindness and infancy. These "infirmities" are manifest "incapacitations". But where insanity is concerned the matter is more difficult. Only if the insanity is

of a pronounced type may it be regarded as an excuse.[78] Hence, when Holmes allows certain limited exceptions to liability, he does not withdraw from his basic position, that of objective liability. The rule is still that "the standards of law are external standards". Only an incapacity that is *clear* and *manifest* can fit in with this theory and thus be considered as an excuse.[79]

The majority of criminal-law jurists may, I think, be regarded as representing the second alternative. The conformity principle is explicitly or implicitly accepted as the main rule, though there are differences of opinion as to the weight of the different arguments for departures from this rule.

The principle, as expressing legal-policy views, is accepted though it would seem that it will necessarily involve a diminishing of the efficiency of the machinery of justice. It is accepted because the law is not considered

> a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least the costs they have to pay if they act in certain ways.[80]

The individual is thus regarded as a *choosing* fellow-creature. The basic evaluation that one cannot accept a state of affairs where the authorities have unlimited powers to force suffering on the citizens and make it impossible for them to decide how they want to live their lives is closely linked to the conformity principle. But viewed realistically, the principle cannot be regarded as indispensable.[81] There may be good reasons for exceptions to it. Thus, generally speaking, more cannot be said than that the principle should not be departed from except for very strong reasons. And the exceptions should be stated as exactly as possible.[82]

The most important arguments in favour of exceptions from the conformity principle are typically arguments of efficiency and social utility. By and large, these arguments are the same as those that could be voiced in favour of criminal liability independent of guilt.

It must be admitted that it is efficient to leave the individual elements out of consideration as excuses. It is easier to determine the existence of an objective error than to analyse the reason why the error was made. Here the difficulty of proof enters the

picture. If individual elements are left out of consideration, the application of the rules of liability is much easier. In addition, the elimination of these excuses may very well enhance the deterrent effect of the sanction. Several arguments may, however, be found which gainsay these considerations of efficiency and utility.

Fletcher[83] points to two such arguments: "one is based on respect for the autonomy of the individual; the other, on the principle of equality under the law. As the first argument goes, it is inconsistent with our respect for human dignity to subject an individual to sanctions if he has not had a fair chance to prevent the occurrence of the proscribed act. . . . The second argument maintains that it is discriminatory to single out one excuse bearing on culpability, be it mistake of law or intoxication, and decree that this class of nonculpable offenders must suffer sanctions while other nonculpable offenders, such as those acting under duress or in self-defense, are acquitted."

It does not seem to be of great use to discuss these arguments, as they all appear to be reformulations of the conformity principle. In this connection, it seems sufficient to establish that the arguments in favour of an objective adjudication of negligence are not strong enough to justify the ignoring of individual elements. By this we have, however, hardly even introduced the kernel of the rather problematic issue we are dealing with, namely the question *which* individual elements should be considered.

4. As has already been mentioned, the concept of negligence is very seldom defined in a criminal code. This also means that as a rule the codes are silent as to the significance of individual elements.

General provisions regarding the negligence concept were proposed by the Swedish Committee on Legislation (Lagkommittén) in its tentative draft of a Criminal Code (Allmän Criminallag).[84] It did not contain rules concerning individual elements except in so far as, among particularly mentioned examples of gross negligence (Chap. 4, sec. 3, of the draft), elements of individual character were mentioned.[85]

The Swedish Criminal Code of 1864, like BrB, has no definition whatsoever of the negligence requisite. Such is also the case with the corresponding codes in Denmark, Finland and Norway. The only Swedish statutory definition of the negligence concept is found in the draft by the Criminal Law Commission (Strafflagskommissionen), which except for linguistical differences, follows the proposal by *Thyrén*.[86] Chap. 3, sec. 3, of the draft refers in the second paragraph to the "situation" of the actor.

This can only be taken to mean that in the evaluation of negligence consideration is to be paid to individual elements also.[87]

Exceptions, however, may be found in continental European criminal codes. Although the criminal code now in force in the German Federal Republic contains no definition of negligence, the drafters of the latest proposal for a German penal code have deemed it appropriate to include a provision defining "Fahrlässigkeit und Leichtfertigkeit". The words of the provision, "seinen persönlichen Verhältnissen verpflichtet und fähig ist",[88] are undoubtedly intended to make sure that consideration shall be given to individual elements in the evaluation of negligence.

§ 10 of the Criminal Code of the German Democratic Republic expressly provides for a consideration of individual elements: "Schuldhaft (vorsätzlich oder fahrlässig) handel nicht, wem die Erfüllung seiner Pflichten objektiv nicht möglich ist oder wer dazu nicht imstande ist, weil er wegen eines von ihm nicht zu verantwortenden persönlichen Versagens oder Unvermögens die Umstände oder Folgen seines Handelns nicht erfassen oder die ihm unter den gegebenen Umständen obliegenden Pflichten nicht erkennen kann."[89]

The Swiss Penal Code refers in an almost similar manner to the elements in question.[90]

The new penal code of Austria, § 6, in force January 1, 1975, defines negligence as follows:

(1) Fahrlässig handelt, wer die Sorgfalt ausser acht lässt, zu der er nach den Umständen verpflichtet und nach seinen geistigen und körperlichen Verhältnissen befähig ist und die ihm zuzumuten ist, und deshalb nicht erkennt, dass er einen Sachverhalt verwirklichen könne, der einem gesetzlichen Tatbild entspricht.

(2) Fahrlässig handelt auch, wer es für möglich hält, dass er einen solchen Sachverhalt verwirkliche, ihn aber nicht herbeigeführen will.

The act in question is here compared with a purely "objective" gauge when it comes to the "Sorgfalt". According to the legal text, however, the gauge must as well be individualized. "In der Tat muss der Masstab individualisiert werden."[91] This individualization is taking part considering the mental as well as physical fitness of the actor.

Anglo-American legislative activity, though considerable and significant in the last two decades, is not very illuminating in this respect. Our interest is here linked to the formulation in the Model Penal Code – a formulation[92] that does not seem

explicitly to treat the individual elements. The formulation "the cirumstances known to him" may, however, also include the consideration of these elements.[93] The negligence formulation of the Model Penal Code is in principle followed in those states of the U.S.A. where the penal laws either have been revised or are in process of being revised. Hence the various codes and drafts are of no immediate interest in this respect.[94]

What has been mentioned above leaves us with the impression that the statutory definitions are not very illuminating as to the significance of individual elements. At best it only confirms the impression we already had, namely that these elements are considered. For a closer analysis the relevant statutes are of no avail. In order to construct an "interpretation model" for the case law as a basis for the analysis in the following chapter, we will therefore turn to legal writing.

5. The literature concerning negligence is abundantly rich. The concept is of great importance not only in criminal law but also in civil law, particularly in the law of torts and also, e. g., in the law of contracts.[95] It is therefore somewhat surprising that the literature touches to such a slight extent upon the significance of individual elements in the negligence evaluation. Quite often the subject is only casually mentioned in connection with an outline of the concept. The writers here sometimes confine themselves to the bald statement that consideration is also paid to individual elements.[96] Other legal writers give examples of elements of importance.[97] It is not here a matter of systematization or closer analysis. Not infrequently the examples are taken from the case law at random.[98] Thus the literature mentioned so far is not very illuminating.[99] However, it cannot be regarded as representative of the entire field.

Let us now turn to the sector of legal writing where we find an analysis or a more detailed treatment of the individual elements. A general survey of the literature already shows that a distinction is made between what we may call "plus and minus factors". Plus factors are such elements as, e. g., particular talents, skill or experience, while minus factors are such elements as, e. g., the possibilities of conforming to the standards of action accepted in

the community. Of these two kinds of factors the minus factors are the far more important from a practical point of view.

When we talk of plus and minus factors we refer, of course, only to factors that are relevant to the situation in question. Hence a superiority of some kind is of no interest in this connection unless as, e. g., a particular experience it has a bearing on the situation in question.

According to the three-way approach here advocated, if the first question – Does the action of the accused violate a standard accepted in the community? – is answered in the negative, the issue of individualizing circumstances and individual elements will not be raised. According to this view individual elements will be relevant as a possible excuse only if the standard has objectively been violated. Hence only minus factors will fit into this scheme. Although no inquiry is called for as to whether the accused could have done even better if he had kept within the standard, the plus factors may in some situations be of relevance for the negligence evaluation. Plus factors such as knowledge of local conditions, of the actual situation, etc., may be relevant. The actual knowledge then may enter the picture as a "subjective" qualification of the as "objectively" determined violation of the standard of action.[99a] For the analysis of the individual elements, however, the plus factors seem to be of very limited interest.

a. From one point of view the element of insanity seems to be uncontroversial. Almost without exception the legal writers on criminal law regard insanity as an excuse that is recognized.

In tort law, however, the picture is different. Here we find three different main views.

(1) Insanity on the part of the defendant is considered to exclude liability.
(2) Insanity is not considered to exclude liability.
(3) If the defendant is insane he is in principle not excluded from liability on that account. In a case like this the court, however, reaches its decision in accordance with what seems to be reasonable in the circumstances. Insanity may here enter the picture as a limitation on the liability.

View (1) seems to be of ancient origin; it is thought to emanate from Roman law. The view seems to have been accepted in old Scandinavian law.[100] Modern Scandinavian legislators, however, have formulated specific rules in this respect. The law has departed from the old view and the rules adopted may be assigned to alternative (3) above.

The Swedish Tort Liability Act of 1972 provides in Chap. 2, Sec. 3: "Any person who causes loss of life, personal injury, or loss of or damage to property under the influence of a mental disease or deficiency shall be liable to pay compensation for such loss, injury or damage if and to the extent it is deemed reasonable having regard to the tortfeasor's mental condition, the nature of the act or omission by which the damage was caused, the existence of any third party liability insurance covering damage, economic factors at large and other relevant circumstances."[101]

Systematically, the element of mental disability is here not taken into consideration as a *part* of the negligence evaluation. This evaluation is carried out in a purely objective manner.[102] In the comparison a mentally sound person is inserted. The mental illness enters the picture as a limitation of the tort liability having regard to what seems reasonable under the circumstances. Insanity is *one* of the circumstances to consider.

It seems obvious from this that the Swedish legislator has not chosen to treat insanity and other mental disabilities within the boundaries of the negligence concept. It is mentioned in the working papers of the act that compensation may be properly imposed even if, owing to the mental state of the tortfeasor, one cannot talk of intention and negligence "in the ordinary sense".[103] The provision cited above should be regarded as an independent provision regarding tort liability based on a free consideration of reasonableness.

The remaining alternative, (2), that insanity is not considered to exclude liability, seems to be adhered to in Anglo-American tort law. § 283B of the Restatement of torts provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under the circumstances".[104]

A closer look, however, at the field of criminal law here in issue reveals a bundle of intricate and unsolved questions. The issue concerning the relevance of insanity to the negligence offences is certainly not made any easier by the circumstance that there is a dearth of authority in the field. The M'Naghten and Durham rules[105] make no mention of the subject of negligence. Yet they are supposed to be exhaustive on the insanity issue. In addition, the reasonable man test, beloved of Anglo-American law, gives rise to some real obstacles when severe mental abnormalities on the part of the actor are introduced. Is the conduct of a lunatic necessarily negligent in so far as it differs from that of a sane person and results in damage?[106] This last question involves no difficulty, however, for an approach such as that advocated in this book. The silence as to the negligence issue of the Anglo-American insanity tests here mentioned, on the other hand, is closely linked to the difficulty of formulating the

criterion for the excusing condition in this respect. In the Anglo-American discussion the problems created by the use of psychiatry and psychiatric concepts in law have been widely recognized. It may seem natural to assume that the difficulty lies primarily in defining insanity.[107] In my opinion, however, the kernel of the problem is the difficulty of defining the principle that is the basis for the counterpart to impunity, viz. criminal liability.[108] If we had well-defined principles of liability and so were able to concentrate on particular qualities of the person to be punished, we should automatically be able to sift out those persons that should not be punished because they fell outside the aim of the punishment.

In the absence of well-defined principles of liability, the authorities differ as to the basis for the impunity of the insane. An old argument is that punishment would be useless.[109] But the contention that the threat of punishment has no effect on the insane person himself does not mean that the threat cannot have an effect on others and that the serving of a penalty cannot have an effect on the insane person himself. Undoubtedly a criminal law that does not consider the mental characteristics of the accussed will have an enhanced general-preventive effect. So if we apply a purely "utilitarian" view the criminal law should punish even the insane. Moreover, we have no reason to believe that all insane persons cannot be influenced by a threat of punishment.[110]

In reality what we have here is a conglomerate of moral as well as more practical evaluations. The Royal Commission on Capital Punishment states: "In our view the question of responsibility is not primarily a question of medicine, any more than it is a question of law. It is essentially a moral question, with which the law is intimately concerned and to whose solution medicine can bring valuable aid, and it is one which is most appropriately decided by the jury of ordinary men and women, not by medical or legal experts."[111] These moral evaluations are the same as those that form the basis for the conformity principle. The man in the street will probably justify the impunity of an insane person by saying that he could not help doing what he did. A jurist would express himself more elaborately and perhaps

maintain that the punishing of an insane person would violate the fundamental moral principle that persons without guilt should not be punished. Basically, however, he is expressing the same idea as the man in the street.

If the accused was unable to conform to the standard of action accepted in the community, he is not guilty of negligence. Severe mental disabilities like insanity are in this respect for the most obvious excuses. Whether or not the accused suffered from a severe mental disability is a question for the psychiatrist.[112] But the court has to answer the important question whether for more practical reasons of policy the conformity principle should be upheld in the particular situation. Generally there must be very strong reasons for deviating from the principle when insanity is present. It is hard to see what those reasons are. A very severe mental disability that has rendered the accused unable to conform to the standard of action upheld in the community should be considered in the negligence evaluation. A different matter is to answer the question why the issue of insanity is hardly ever raised in a negligence case. Mostly negligence offences are minor offences with a very limited punishment latitude. Fining is the usual sanction. And even in cases where imprisonment is more common, the length of the sentence is rather moderate. It is therefore to be expected that the accused often refrains from pleading insanity because he believes that a successful plea will carry with it a more severe sanction.

b. To approach the issue of the relevance of other disabilities such as less severe mental incapacities is to enter into a rather intricate field of negligence law where the authorities differ widely. The difficulty, and hence the discord amongst the legal writers, seems to be most pronounced concering the incapacities just mentioned. It is not just a question of which disabilities should be considered. It is not merely a policy issue regarding the desirability of recognizing this element and not recognizing that. The analysis is fundamentally influenced by the approach chosen. As already pointed out, the reasonable man formula carries with it some real obstacles in this respect. But even the common approach to negligence, using the concept of care, involves some difficulties in this connection.

Terms like care and attention tend to distort the fact that negligence is basically the violation of the standards of action accepted in the community. The comparison between the act in issue and the standards is a normative process. The purpose of imposing liability for negligence is to uphold the standards of action accepted in the community, not primarily to enforce attentiveness or care (whatever that may meen). It does not seem correct, therefore, to claim that if an objectively wrongful act is caused by a lack of attentiveness, then the scale is the same for all.[113] The justification for this should be that the actor may not claim that he is notoriously careless, since the purpose of imposing liability for negligence is precisely to enforce attentiveness. This argument, as we have seen, is not based on altogether valid premises. The concept of attention is, I think, here mistakenly accepted as a psychological concept and systematically placed together with the individual elements. Like other attention concepts, care is polymorphous. The specific form which it takes varies from task to task.[114]

> We could not know specifically what a person was doing merely from being told that he was taking care, or know what characterized his behaviour merely from the description that he was a careful man, any more than we could know what a person who was repeating himself must specifically be doing. Conversely, the behaviour which in certain circumstances or in a certain class of person would be properly described as 'careful' might not deserve this description in different circumstances or from a person of a different position.[115]

As pointed out by White, there is also an element in the notion of care which makes it more complicated than a simple polymorphous concept. There is a note of approval in the term "careful" and of disapproval in "careless".

> The careless man is considered not to have done what he ought to have done. This note of appraisal is often strengthened by the social fact that we approve of actions which do not injure others and disapprove of those that do.[116]

This evaluative element is of primary concern to the law. In fact we are now dealing with an issue that is the very essence of the negligence concept – the comparison with the standards of action accepted in the community. But the use of concepts such as attention and care without a necessary explanation of them

will not further our knowledge regarding the relevance of individual elements.

In the legal writing dealing with negligence, *knowledge* is often maintained to be highly material for the negligence concept. It is said to be "fundamental to liability for negligence".[117] Utterances of this opinion can also be found in the case law.[118] What, then, is meant by knowledge? Following Seavey's oft-quoted article, "Negligence – Subjective or Objective?", knowledge is often defined in the legal writing as the consciousness of the existence of a fact.[119] The question asked is, in short: How far is knowledge standardized? To phrase the issue using reasonable man terminology: Is liability created by conduct, which, upon the facts adverted to by the actor, is reasonable, but which would be unreasonable if the actor had adverted to facts which would be known to the standard man?[120] In asking these questions, the authors have in reality left the domain of analysis concerning knowledge and have started to inquire into the question which individual elements, should be relevant to the negligence judgment.[121] It seems, however, highly material to inquire into the question which meaning of the word knowledge is relevant to negligence.

A person who is not thinking of what he is doing is acting unconsciously, yet may very well know what he is doing. This is also the case with a person who does not realize or notice what he is doing. Against the background of the basic view regarding negligence that is adhered to in this book, these last-mentioned aspects of knowledge seem to be of the greatest interest.

The aspect of knowledge we call *realization* only concerns truths or facts. It is not possible to realize a fact that is not true. A person who realizes p has knowledge of p. Realizing in this sense is not something that someone is doing. Realization "dawns on us, strikes us, or sinks in", as White says in the following passage:

> Coming to realize is a datable occurence, though it is not an act, that is, something which one can be asked for a reason for doing or be interrupted at. Like coming to understand, it is something we can be quick or slow to come to, though not something we can be skilled at or trained in. It is not an achievement of our own but something that results for us. Realization, like understanding, dawns on us, strikes us or sinks in. Realization is not

necessarily linked to increased attention; it depends not so much on inspecting carefully, but on using the information one has obtained by inspection or by any other method. To come to realize is to gain, at some time or another, possession of a truth; to realize is to retain possession of it. So a man may have realized for some years and may now realize that such and such a course is hopeless.[122]

A person who realizes *p* does not need continuously or at a certain time think of *p*. To say that A realizes *p* is to say that he has grasped something that is true about something concerning which, through observation or in some other way, he already has a certain insight. To quote White once more:

To realize is to see not X, but its nature or its implications; to see that it is a Y and, hence, to see Y. It is to grasp something as it were hidden or contained in or implied by what appears to one.[123]

A person who realizes *p* knows *p*. But if he knows *p* it does not necessarily follow that he has come to realize *p*. As White says: "In realization the material is already at hand; what is needed is for it to click into place."[124]

A person may, however, be blamed for not trying to understand, but he cannot be blamed for not trying to realize. Others may not be blamed for not coming to realize *p*, as they may be blamed for not acquiring information that *p*. This is due to the peculiarity that words like "realize" and "understand" expressed in the present tense really represent a perfected action.[125] The negligence expression "ought to have realized" is better phrased "would have realized (understood), if the requisite "attention (care) had been exercised". As pointed out by White:

Some things are difficult to realize, some things can only be realized by those with special knowledge or training, though one cannot be skilled at realizing or trained to realize. Other things are what any fool would realize, if only he thought for a moment. We can realize fully or clearly, but not deeply or acutely. People can know that so and so is X but not realize that it is also Y. They can do X, knowing they are doing so but not realizing that they are thereby doing Y. They can see X and not realize that they have seen it.[126]

Realizing is coming to see something in a particular way – it has to come to us. It cannot, however, come to us if we are not biologically and educationally prepared.[127] The possibility of realizing the risk or the constellation of facts at hand thus

presupposes a certain prepardness or readiness, mentally and physically. A person who has not been able to realize the risk he was creating may certainly not be blamed for not realizing. According to the conformity principle he should not be held criminally liable. Basically this principle, as already pointed out, is grounded on ethical evaluations. Even though the negligence standard as such is ethically irrelevant, ethical considerations enter the negligence evaluation when it comes to the relevance of individual elements. These considerations, as well as the relevance of practical and policy reasons, will now be paid attention to.

For analytical purposes it seems to be favourable to treat less severe mental incapacities separate from other categories of individual elements such as physical incapacitites and age. As will become evident in the next chapter, this division has close affirmities with the treatment in case law. Case law also invites us to analyse whether particular areas of action exclude a recognition of individual elements or some of them.

Concerning the less severe incapacitating mental states – disabilities not amounting to insanity in a legal sense – they cannot easily be distinguished, systematized and legally analysed. The individual elements here in issue cover a vast number of abnormalities ranging from a minor intelligence defect to a mental disability bordering on "legal insanity". When we here mention lack of intelligence and want of calmness (nervousness, fear, panic), it is only an exemplification.[128]

The authorities in both criminal law and tort law seem to maintain that elements of this kind are not considered. The issue is more fully treated in tort law. So let us, to begin with, have a look at the arguments put forward by the legal writers on tort.[129] Here we meet a conglomerate of prevention, legal-technical and practicability arguments. It is maintained that if consideration was paid to elements of this kind the general rule of liability for negligence would become less effective. There would be no visible dividing lines as to what acts the citizen was allowed to do or not to do. At the same time the content of the rule would become rather uncertain.[130] In addition, purely legal-technical arguments are put forward. Above all, problems regarding evidence come into the forefront. But here the

simplicity of the rules is also mentioned.[131] Concerning the prevention argument, it has been maintained that a disregarding of these elements will not only enhance the preventive effect in the community in general but also in the individual case prevent the disabled person from engaging in activities he is not fit for or induce him to pay more attention to what he is doing.[132]

The same arguments may very well be, at least to some extent, valid even in the criminal law. But basically these individual elements should, according to the conformity principle, exclude liability. If they are deemed relevant to the possibilities for the accused to conform to the pattern of action accepted in the community they should be considered. However, the ethical reasons that lie behind the principle cannot be upheld in every situation or type of situations. Important exemptions have to be made.

It has not infrequently been claimed that the exclusion of liability due to mental disabilities is a consequence of psychiatric and psychological expert views. Often the significance of a purely expert criterion is stressed. In accepting the conclusions of the psychiatric and psychological experts, it is maintained that the rules concerning exclusion of liability become more "scientific". A suggestion in this direction is the introduction of the psychiatric concept of "mental age". The so-called intelligence tests should be utilized. If the tests show a "mental age" of less than a certain level, an analogy should be drawn from the treatment of children in this respect. If the argument in favour of psychiatric or psychological criteria depends on the importance of a purely expert role, I think it must be rejected. The rules regarding punishment must be constructed in such a manner that they correspond to the functions they are to serve.[134] But, of course, the expert role may, as giving a part of the information that is available, be of importance for the legal evaluations.

The trend towards special preventive sanctions is certainly a common feature in many western criminal legislative systems. A wholly consistent system of special prevention does not, however, seem to have been realized.[135] It is not possible to grasp the individual-preventive aspect as an independent factor behind the sanction. There will always be a weighing between the

individual-preventive aspects and other aspects, among them general prevention, that must be taken into consideration of the penal system. The consideration of individual elements concerning the person who is below normal intelligence or lacks calmness in, e. g., a critical traffic situation has, I think, no individual-preventive effect, though it can be argued that the non-consideration of the element in question may enhance the general-preventive effect. In general punishing without considering individual elements certainly involves general-preventive possibilities. Then we have here in mind the disabled person as an "instrument" for achieving a general-preventive effect. I am not, however, convinced that this effect is a reality regarding deficiencies of a mental kind. There is good reason to believe that the public will not identify themselves with the mentally defective "scapegoat". The person in general is more likely to reason in the direction that "this has happened to him but it will not happen to me".

We may, however, also look at the disabled person as an "addressee" for the threat of punishment and ask whether he was prepared for such a threat. It may then be argued that if the disabled person lacked the possibility of becoming influenced by the risk of punishment, he should not be held criminally liable. Such an argument, though it has a certain strength, does not carry us very far. It is a random emphasis of a single part of a rather complex issue.

If the individual- and general-preventive theories of punishment do not give us the key to picking out the individual elements of relevance to the negligence judgment, it seems as if the punishment theories of retribution and vengeance will also leave the question unanswered. These theories not infrequently try to justify the conformity principle. Such endeavours, however, turn out to be unconvincing constructions.[136]

It seems rather likely that general theories regarding the aim of punishment will not be of any help to us. Several aims and functions are combined. The issue concerning the relevance of individual elements in criminal negligence is basically a *moral* question. Legal, psychological and psychiatric aspects, however, also enter the picture as important factors.

Criminalization and the use of sanctions embody a moral

perspective. Everyone who is placed in an influential position assumes responsibility for what happens to other individuals. A criminal lawyer cannot avoid a confrontation with a moral responsibility. The moral evaluation regarding the individual may, however, very well change and another type of moral evaluation arise. The judge may, e. g., consider it natural that the individual should be sacrificed for the common good of the community. He is not only asking "Can the individual help the action he has done?" but also "Is the community's interest best served if he is punished?" or "May the individual be used as a means of serving as an example for the normal individual?"

In what way should the moral evaluations in the community be allowed to influence the rules of law? Frequently, especially in Anglo-American criminal law, it is maintained that questions of our type, whether individual disabilities should be considered or not, are moral questions to be "decided by a jury of ordinary men and women".[138] There are certainly also good reasons for aiming at a certain conformity between the sense of justice in the community and the rules of law. But it is essential to note that the courts have the possibility of applying a critical morale,[139] and try to elevate the principles of criminal law above that of the prevalent sense of justice in the community.

There is of course a possibility of "leaving the moral evaluations" to the experts, psychiatrists and psychologists, and link the freedom of punishment automatically to the concepts of these experts. Though many lawyers would hesitate to take this step, it cannot be denied that a solution along these lines will give a firmness to the judgment based on an empirical characterization of the defendant. Unfortunately, however, the area of mental disabilities not amounting to "legal insanity" is very large and very heterogeneous. It does not, therefore, seem possible to find defined psychiatrical and psychological concepts in this respect that are sufficiently well-defined to satisfy acceptable requirements of legal security if the courts should rely only on the experts' views.

Thus far our deliberation have left us only with the result that the court must make a concrete evaluation of the situation at hand in the individual case. Hence there is always a risk that the

judgment will be unsatisfactory. The extent of this risk also depends on other factors than those already mentioned.

In many situations, regard to the efficacy of the administration of justice is a strong and decisive argument. This argument is not infrequently coupled with a reference to difficulties regarding evidence. And it is obvious that, if the defence of mental disability was raised in every traffic case concerning dangerous driving, the efficiency of the administration of justice would suffer, and insurmountable difficulties for the persecutor would result. The argument of efficiency must not, however, be accorded too much importance. Even at the price of a reduced efficiency the community must, I think, afford to exclude cases of severe disability from the area of penal liability.

In addition to the type of individual element, the type of offence is decisive for the outcome. Besides these factors there is a third factor which, though important, has been almost entirely neglected in this connection. What I have in mind is the *type of sanction* in issue. For the vast number of negligence offences only a fine is imposed. Statistically, imprisonment and suspended sentence are here rather rare. In this book the significance of individual elements is treated within the negligence concept and thus as a part of the liability theory of criminal law. As we have seen, there are good reasons for this systematical approach. But this approach can lead to a too narrow analysis of the significance of the elements. The common view is that a recognition of an individual element should lead to an acquittal. It will preclude liability altogether. But there is, I think, good reason to ask whether it is self-evident that all sanctions should be treated alike. They are not justified in the same way and from the point of view of the convicted person they have not the same effect. It is not evident that a mental disability may have the same legal consequence in relation to imprisonment and a fine.

So, to the factors of the type of individual elements and the type of offence, we must add the factor of the type of sanction. In situations like these, when reasons of utility and moral evaluations are present, the type of sanction is of essential importance. As one of the factors, the contemplated sanction should be considered in such a way that the significance in the

case at issue of the individual elements will to a certain extent depend on which sanction is possible. The introduction of this factor in this connection will to some extent provide an explanation as well as a justification for not "considering" the element in issue.

c. The disabilities or deficiencies mentioned above are all commonly regarded as abnormal. The mental states here in question are deviations from what is considered normal in society. Not all relevant individual elements, however, are abnormal. There may very well occur deviations from the average that cannot be regarded as disabilities or deficiencies. To this category we must refer, e. g., age, sex and social class. In this respect age – youth as well as old age – may be of relevance. The significance of age has so far been much discussed in the literature on tort law. In the case law regarding tort the standard of conduct required by children and young persons has also been given great attention. Most of the cases concern contributory negligence of children. Very few concern children as defendants in civil actions for negligence.

A common view in Anglo-American law seems to be that, if the actor is a child, the standard of conduct is that of a reasonable person of like age, intelligence and experience under like circumstances.[140] In general, no fixed rules as to a minimum age below which the child is incapable of being negligent are given.[141] This does not mean that there should in reality be a minimum age below which negligence cannot be found. Owing, simply, to the great variations from child to child, such an age cannot be fixed.[141a]

Between the age where no negligence may be found and adult status, there are children with various capacities. To apply an objective standard in these cases has been deemed too harsh and the general rule accepted is that a minor owes that degree of care which a reasonably careful minor of his own age and intelligence would exercise under the circumstances. Although considering the minor's physical and mental development, this standard may very well be regarded as "objective" in its application – an objective standard of a different degree from that applied to an

adult.[142] Starting with the decision of *Dellwo* v. *Pearson* 143 the rule of individual standard of care for minors has, however, been "attenuated". The principle referred to in this book as the *Übernahmegrundsatz* has been applied to children engaged in adult activities. So if the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required, it will be held to the same standard of care as an adult.[144]

Our increased knowledge of child psychology has made us aware that when it comes to children aged up to 9–10 years or even above we must regard it as normal that, at least in particularly difficult situations, they should diverge to a great extent from the patterns of action common among adults. This is especially true regarding the behaviour of children in road traffic. The knowledge points in the direction of the standard mentioned above. In continental European and Scandinavian tort law this view is frequently advocated.[145] We may also find other reasons for applying a different standard to minors. Liability for minors will not increase the security of other people but be an undue hardship on them.[146] It has also been argued that life in the community should take into consideration the minor, who is a "normal" part of the community.[147] The community should be "adapted" to apply an individual standard in this respect. However, a purely individual standard is not here advocated. What is to be considered is the *type* in issue. What can reasonably be expected of the typical boy of 12 years, etc.

In legislation there has during recent years in Scandinavia been a tendency to drift away from this "individual" position. As an example we may mention the recent Swedish Tort Liability Act. In Chap. 2, Sec. 2, the act provides:

> Any minor under the age of eighteen who causes loss of life, personal injury, or loss of or damage to property shall be liable to pay compensation for such loss, injury or damage if and to the extent that it is deemed reasonable, having regard to his age and degree of maturity, the nature of the act or omission by which the damage was caused, the existence of any third party liability insurance covering the damage, economic factors at large and other relevant circumstances.

According to this provision and its Norwegian counterpart,[148] the tort liability for a minor is in a way a conditional liability.[149]

Among the conditioning facts mentioned are the individual's age and his degree of maturity. The basic requirement for liability is, however, that the minor acted intentionally or negligently. According to the legislative materials for the Swedish Tort Liability Act, the negligence judgment here should resemble that concerning an adult. The judgment should be made on the basis of more objective criteria, with less respect to individual factors.[150] This seems to mean that the legislator recommends less consideration to what the minor realized or ought to have realized. It seems as if here the legislator had traffic accidents particularly in mind. This position is, however, no novelty in Swedish tort law. Even before the act came into force, the *Übernahmegrundsatz* was adhered to in this respect.[151]

If tort law is considered from the viewpoint of prevention, age seems to be of the same importance in tort law as in criminal law. The legal writing on tort should thus be relevant for criminal law also. The relation is, however, in reality not close. There is reason to believe that the development goes in the direction of an even less close relation.

According to common-law rules there is a presumption that a child under seven does not have the capacity to commit a crime. Between the ages of seven and fourteen there is a presumption that an infant lacks criminal capacity. As regards their capacity to commit crime, children over fourteen are in principle in the same position as adults. In accord with this view the leading case of *People* v. *Squazza*[152] holds that a boy of eleven cannot be convicted of manslaughter in the second degree for having thrown a brick from a roof, killing a person below, without affirmative proof that he had capacity to understand the nature and quality of the act and knew that it was wrong.

It is obvious that children to a not insignificant extent commit acts that deviate from the patterns of action accepted in the community. That the significance of low age still has not been given more consideration in criminal law is, of course, primarily due to the rules concerning age limits for criminal liability that as a rule will be found in modern penal codes. According to the Swedish penal code (BrB), nobody shall be punished for a crime he has committed before the age of 15:

No one may be sentenced to a sanction for a crime he committed before he reached fifteen years of age.[153]

As appears from the wording, the text of the law talks about "crime", not "act". To constitute a crime the necessary subjective requisite is required. The law thus presupposes that even a child under 15 is able to commit a negligent act. The rule in BrB 33:1 may therefore not be regarded as an expression of the idea that from the age of 15 but not earlier a person should have reached such a maturity that he should be responsible for his acts. Instead the rule on exceptions seems to be based on practical and humanitarian reasons. To a certain though limited extent these practical and humanitarian reasons are beginning to exercise an influence even concerning children above the age of 15. Thus BrB also gives rules that consideration should be paid to children above 15 when it comes to the issue of the sanction.[155]

What is thus stated in the Swedish penal code regarding the taking into account of age in meting out a sanction leaves us with the question concerning the relevance of age as to the negligence evaluation. Of the arguments against individual elements that have been discussed above, none, however, seems to be of such weight that low age should be left out of consideration in the negligence evaluation. Where therefore it can be stated in the particular case that the age of the child has had an effect on the child's action, it is suggested that it should be considered as an element in the negligence judgment.

While the liability of a minor has been given great attention in legal writing, very little has been written about the relevance of old age. In view of the taking into consideration of infancy it seems logical that old age should also be taken into account.[156] Thus far the only argument against such a consideration that I have found in legal writing is that it is difficult to state the influence of old age on the part of the actor. Therefore a reliable "yardstick" would be lacking.[157] An argument like this does not carry us very far. I think that this issue is well worth an examination.

Considering the development towards an increasing proportion of old people in western societies at least, the issue concerning the relevance of old age and crime becomes more and more relevant.[158] Negligence delicts, especially in the field of road traffic, are to a great extent relevant to the aged. When an old person causes a traffic accident it is not usually because he

consciously took risks or deliberately violated traffic rules. His violation of traffic rules is not infrequently due to the fact that he is not capable of complying with them. A physical or mental weakness caused by changes arising from aging is often the reason for the elderly person's deviation from traffic rules. Very often he does not realize or want to realize his inability to act in accord with the pattern of action accepted in the community. This lack of realization makes elderly persons unable to cope with today's demands. As far as I can see, this inability ought to be taken into consideration by the courts and weighed as an element in the negligence evaluation. The changes due to aging and their importance for the acts of the individual seem to vary a great deal from case to case. It is therefore here a question of a purely individual judgment, where consideration must be taken to the individual conditions in the particular case. A meaningful "objectifying" of the individual element in such a way that certain typical situations can be crystallized is not easy to carry out. Considerations of efficiency of the legal system and difficulties of evidence are not so important regarding the influence on the negligence evaluation of the aged as concerning mental deficiencies.

d. When it comes to physical disabilities and characteristics, physical handicaps and infirmities, as well as physical illness the subjective standard is said to find its most complete acceptance[159] and the reasoning and the cases are said to be clear.[160] We are then talking about the *obvious* disabilities of a physical nature.

> It has been maintained that many accidents are due to obscure, latent or overlooked physical disability in traffic participants. There is said to be a large group of physically handicapped people who do not have obvious disabilities. They may be unaware or only "vaguely aware" that they are not up to par from a health viewpoint. In today's complex society, when people must rely on their emergency or conditioned responses to protect themselves when they venture out into the modern high-speed urban society, these people constitute a great hazard.[161]

In this respect I think there is a closer relation between tort law and criminal law than we have found concerning other individual elements. As pointed out by *James* and *Dickinson,* the

case for the subjective standard rests largely on the assumption that legal fault, as a basis of civil liability, should correspond as closely as possible to personal moral shortcoming.[162] It is an attempt to refine the fault principle.[163] It is held to be unfair to require the blind to see and the deaf to hear.[164]

From a more practical viewpoint, on the other hand, the tort law may not be of importance for the development of criminal law in this respect. It is a well-known fact that the overwhelming majority of tort cases in the field are concerned with handicapped plaintiffs. The infirmities of defendants are brought up for consideration in only a very few instances.[165] In addition, the cases dealing with the physical characteristics of defendants are confined almost exclusively to situations where the defendant has lost control of a vehicle through temporary illness or unconsciousness.

Prosser states the law in this way: "As to his physical characteristics, the reasonable man may be said to be identical with the actor. The man who is blind or deaf, or lame, or is otherwise physically disabled is entitled to live in the world and to have allowance made by others for his disability, and he cannot be required to do the impossible by conforming to physical standards which he cannot meet."[167] This idea may be formulated in different ways. The most common formulations are either that the court should consider what a reasonably prudent man would do under the circumstances or that it should consider the actor's conduct in the light of what a reasonably prudent man with a like infirmity would do.[168] The last-mentioned formulation has been adopted in the *Restatement of Torts*.[168a] It is not a question of a purely individual judgment. The formula takes into consideration what can be expected by the *typical* adult who is, e. g., deaf.[169]

The reasons for accepting an "individual standard" as to physical disabilities are many. Concerning the difficulties of proof it is evident that the considering of obvious physical disabilities and illnesses cannot be rejected because of difficulties of evidence regarding the existence of the element. There may, of course, be certain difficulties of proof concerning the power of the element in question to influence the person's possibility of acting in conformity with the standards accepted in the community.[170] This argument, however, does not seem to me to be of decisive weight. The same argument can be raised concerning

every individual element. A better argument is that the taking into consideration of prevention requires an "objective" liability. Personally, I do not consider this a decisive argument either. From the point of view of the jurist who adhere to the reasonable-man formula, it makes good sense to consider, e. g., a blind man from a "blind" reasonable-man standard; from the standpoint of what can reasonably be expected of a man with that disability. But it does not make good sense to talk about a mentally ill reasonable man. This is, however, a purely legal-technical mode of reasoning. The real arguments in favour of taking physical disabilities into consideration are of a legal-policy kind. As we cannot expect a child to act in another way than a normally developed child of the same age would have acted, we may apply this same rule to the physically infirm. As is the case regarding children, there must be room in the community for physically disabled persons.[171] It has been argued that the physically disabled must use a greater degree of care than one who is not so disabled. He should, so to speak, compensate for his infirmity by an increased amount of care.[172] As a fixed rule this seems to be inaccurate.[173] Whether the physical disability in question should be considered to absolve the accused is a complex issue where as a rule many facts are considered. A fixed rule that the physically infirm must compensate in a certain way for his infirmity leads to an unrealistic harshness. A different matter is that the accused's action may very well, just because he is physically disabled, be judged to be negligent. And this leads us over to the issue of the importance of the *Übernahmegrundsatz*.

If we leave behind the activities considered "normal" in society and enter upon fields where special knowledge and skill is required, the consideration of individual elements in the negligence evaluation becomes different. This type of situation should be viewed separately. If a blind man endeavours to drive a car, his very entering upon the activity is in itself negligent. The blind man cannot, of course, be held liable for not seeing a child that is crossing the street. But nevertheless he is negligent. The judgment is moved back to the very entering upon the dangerous activity. Considering that the cases involving physical disabilities on the part of defendants in tort and accused persons in criminal law

deal almost exclusively with physical illness, it is obvious that the *Übernahmegrundsatz* is of great practical importance in this respect. We may here talk about a *culpa praecedens,* a negligence that precedes and consumes the involuntary act; in our example, to run over the child in the highway.[174]

1 See *infra.*
2 At 226.
3 *Ibid.*
4 Cf. BGH Z 24, 21, where on page 26 we read that "bei verkehrsrichtigem (ordnungsgemässem) Verhalten eines Teilnehmers am Strassen- oder Eisenbahnverkehr eine rechtswidrige Schädigung nicht vorliegt." See *Jescheck,* Aufbau, 9 particularly note 14.
5 See, e. g., *State* v. *Barnett,* (1951) 218 S.C. 415, 63 S. E. 2d 57.
6 See, e. g., *Andrews* v. *D.P.P.* [1937] A. C. 576; [1937] 2 All E. R. 552.
7 *Commonwealth* v. *Welansky,* (1944) 316 Mass. 383, 55 N. E. 2d 902.
8 (1884) 138 Mass. 165, 52 Am. Rep. 264.
9 See *Commonwealth* v. *Welansky.*
10 See, e. g.,*Gian-Cursio* v. *State,* (Fla. Dist. Ct. App. 1965) 180 So. 2d 396.
11 The cases refer to such reasonable and ordinary care, skill and diligence, as physicians and surgeons in good standing in the same neighbourhood, in the same general line of practice, ordinarily have and exercise in like cases, *(Booth* v. *United States,* 140 Ct. Cl. 145, 155 F. Supp. 235, and *Inouye* v. *Black,* 238 Cal. App. 2d 31, 47 Cal. Rptr. 313.). It is often pointed out in these cases that the standard contemplated is not the actual average merit among all known practitioners from the best to the worst and from the most to the least experienced, but the reasonable average merit among ordinarily good physicians. *(Holtzman* v. *Hoy,* 118 Ill. 534, 8 N.E. 832, and *Carbone* v. *Warburton,* 22 N.J. Super 5, 91 A. 2d 518.)
12 *Ryle,* 135–136.
13 *Ibid,* and *Brett,* 98.
14 *Ryle,* 136.
15 *Id.* at 137.
16 *Id.* at 138.
17 *Id.* at 141.
18 *Id.* at 147.
19 *Id.* at 146–147.
20 *Id.* at 147.
21 *Luff,* 159, *Welzel,* Strafrecht, 151, and Fahrlässigkeit, 32ff., and *Deutsch,* 108–109.
22 *Luff,* 160. Cf. *Himmelreich,* 45–47.
23 *Himmelreich,* 46.
24 *Id.* at 47. Cf. *Luff,* 161.
25 German Penal Code, 116. Cf. The Swedish Penal Code, Chap. 3, sec. 7: "A person, who through carelessness causes the death of another, shall be sentenced for *causing another's death* to imprisonment . . .", the Danish

Criminal Code, § 241: "Any person who negligently causes the death of some other person shall be liable to simple detention . . .", and the Norwegian Penal Code, sec. 239: "Anybody who causes the death of another as a result of negligence, shall be punished . . ."

26 Cf. Study Draft, § 1603, and § 302(1)(d). This legislative pattern is adopted in almost all recent legislation and draft legislation in this field in the United States.

27 Model Penal Code, § 2.02.(2)(d).

28 I leave out of account the question of the desirability of the requisite "gross" and the ambiguity of the term "care".

29 *Knoph,* 11.

30 Concerning legal standards see *Pound,* particularly 58, *Knoph, Jareborg,* Begrepp 198ff., and *Winding Kruse,* 101–102, and references there given.

31 *Knoph,* 11.

32 It would certainly be interesting to inquire into the genesis and historical growth of a *bonus pater familias,* as well as the philosophical and fghjklghjkl sociological relevance today of this construction. Such an analysis would, however, fall outside the scope of my investigation. Besides, the author has not the philosophical and sociological training that such a task demands. The presentation here is therefore limited to comments on the purely legal-technical level. See *Leonhard,* 27–29.

33 See, e. g., *Lundstedt,* Obligationsbegreppet 195–210, and Culparegeln, 111ff.

34 See, e. g., *Andenæs,* Strafferett, 238, *Gomard,* 184, and *Morris,* particularly 1153–1155. The mere expression "negligence" or its equivalent seems to imply an exhortation to and an authorization for the judge and jury, in the negligence judgment, to take into consideration what is necessary regarding negligence. Sometimes the law expresses negligence as a lack of *sufficient* care. This seems to be one of the meanings behind the commonly accepted formulation ". . . considering the nature and purpose of his conduct . . .".

35 See, e. g., *Reynolds,* 426.

36 *Paton,* 160. For an eloquent defence of the reasonable man see *Reid,* 200–205. The contrary view is found in *Edward Green.* Cf. *Caspari,* 36–54, and 113ff., *Lee* and *Robertsson,* 37ff., and *Eppstein.*

37 *Gomard,* 184.

38 *Hellner,* Skadeståndsrätt, 71.

39 See *Hellner,* Skadeståndsrätt, 71, and *Erenius,* 156.

40 *Gomard,* 184.

41 *Hart,* Elimination, 171.

42 §§ 283 and 285.

43 § 283 c. page 13.

44 *Holmes,* 91.

45 The influence of the discussion in tort law is here unmistakable.

46 Brottsbalken I, 31.

47 Concerning the term, see *infra,* p. 159.

48 Brottsbalken I, 31. See *Erenius,* 153–154.

49 For a more detailed analysis, see *Erenius.*

50 These forms seem to be the main types of preventive provisions. In

reality, however, I think it is likely that we will find a great number of provisions that could easily be assigned to more than one of these forms.

51 See *Erenius,* 93–99.

52 See p. 164.

53 This is, *mutatis mutandis,* also true regarding agencies formulating more "private" provisions.

53a *Perkins,* Criminal Law, 75–76. Cf. *Cain* v. *State,* (1937) 55 Ga. App. 376, 190 S.E. 371 and *State* v. *Phelps,* (1955) 242 N.C. 540, 89 S.E. 2d 132.

54 *Strahl,* Anmälan, 114–115, and Förberedande utredning, 126, *Grönfors,* Trafikskadeansvar, 43, *Rodhe,* Lärobok, 130, *Conradi,* 316–318, *Hellner,* Skadeståndsrätt, 83, and *Erenius,* 169–172.

55 The term "interest-weighing" is used by me not as a technical term but as a collective term for the theories within or outside the field of negligence that seek to maintain a weighing between opposed interests – often the utility of the conduct, on the one hand, and the risk of harm, on the other.

56 See *Erenius,* 159–169 (particularly 164–169), and *Hellner,* Skadeståndsrätt 82.

56a See *Bockelmann,* 195–199.

56b See *Ørsted,* Strafferetlige skrifter, 197, and *Andenæs,* Strafferett, 239. Cf. the German concept of "Schrecksekunde". See *Schönke-Schröder,* 554 and *Sattler.*

57 In principle this view is neither new nor revolutionary. I think that my view is compatible with the general opinion in the field. What is new, besides possible terminological differences, is the systematical approach I have adopted – an approach that enables us to grasp the nebulous concept of negligence as we analyse it in close relation to the case law. Se NJA 1971 p. 499.

58 *Andenæs,* Criminal Law, 222–223.

59 See *Jareborg,* Uppsåt, 135–136, and references there given.

60 See *Brett,* 68, and *Jareborg,* Uppsåt, 135–140 and references there given.

61 See, e. g., *Green & Smith,* 1127. See, however, *Edgerton,* 857 where the circumstances are treated in a somewhat different way.

62 See p. 133.

63 Punishment and Responsibility, 261.

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

67a More accurately, the actions of the reasonable man in the circumstances turn out to be not those taken by the reasonable man actually in the circumstances, "but those which a man not in those circumstances imagines he would take if he were in them." See *tenBroek,* 917. That the judge or jury at the time of judgment may be reasonably ignorant about what these actions are is an inherent weakness of the reasonable man test that cannot be avoided.

68 See *Jareborg,* Uppsåt, 156–158.

69 *Schönke-Schröder,* 537, *Jescheck,* Lehrbuch, 450, and *Erenius,*

147–148. Cf. Restatement, second, Torts, § 283 comment c, and *Seavey,* 24.

[69a] *Leonhard,* 27–35, maintains that the bonus pater familias test concerned only the objective part of the negligence evaluation. Concerning the issue of individual elements the test was of no value.

[70] See, e. g., *Leon Green,* 1044.

[71] *Id.* at 1045.

[72] Cf. the German case BGH St 10, 133.

[73] BGH DAR 1954, 17ff., cited from *Jescheck,* Aufbau, 22.

[74] *Jescheck,* Aufbau, 22, and *Grünwald,* 132–133, where it is maintained that "[v]or allem im Verkehrsstrafrecht ist es gang und gäbe, dass aus der Unsachgemässheit eines Verhaltens ohne weiteres auf das Verschulden geschlossen wird. . . . [E]s besteht die Gefahr, dass die Rechtsprechung zum Verkehrsstrafrecht das Recht der Fahrlässigkeitsdelikte überhaupt korrumpiert, dass der Schluss von dem Regelverstoss auf die Fahrlässigkeit überall gezogen werden könnte."

[75] *Holmes,* 86.

[76] *Ibid.*

[77] *Id.* at 87. See in addition *Fuller,* 71–72.

[78] *Holmes,* 87–88.

[79] *Fletcher,* Negligence, 429–430, considers Holmes' exceptions contradictory to his theory of objective liability. He suggests that Holmes intuitively makes a distinction between legality and culpability. "In emphasizing the generality of standards, he acknowledged the dimension of legality in the structure of negligence. In sensitively assessing the role of excuses in defeating liability, he displayed appreciation for the individualization of negligence. This interpretation establishes the consistency of Holmes' views by providing an account of how the standard of negligence can, at once, be of general application and yet accommodate excuses based on individual incapacities." It is hard to see why Holmes' exceptions from the otherwise as a rule objective liability as advocated by him should involve a contradiction. Besides, it does not seem advisable to apply contemporary continental European legal theory in order to rationalize 19th-century American legal writings.

[80] *Hart,* Excuses, 44.

[81] *Hart,* Elimination, 183, and *Jareborg,* Uppsåt, 375.

[82] It seems that *Dubin,* 345, does not wish to allow any exception whatsoever from the principle.

[83] Negligence, 436.

[84] Chapter 4 of the draft dealt with negligence and contained provisions of a more formal nature. No attempt was made to give a definition of the negligence concept. See Allmän Criminallag, 8.

[85] Special knowledge was, e. g., mentioned as an aggravating circumstance. In Chap. 4, secs. 3, 6 and 7 the Übernahmegrundsatz is formulated. Cf. the Norwegian Criminal Code of 1842 Chap. 4, sec. 2, where corresponding provisions concerning gross negligence are given.

[86] Förslag till strafflag, 8, and *Thyrén,* Förberedande utkast, 55. Cf. an attempt at a definition by statute in § 41 in Udkast til Almindelig borgerlig Straffelov for Kongeriget Norge (the same definition was literally given

already in Getz's draft of a penal code, 1893, § 35), and § 21, 2, in Utkast til Almindelig borgerlig Straffelov.

87 Förslag till strafflag, 135. "Consequently one must not in the evaluation lose sight of the actor's mental capacity, e. g. his experience, knowledge, understanding and intelligence . . .". The Criminal Law Committee (Strafflagskommittén), the proposals of which formed the basis for the Swedish Criminal Code now in force, BrB, has in its comments (Förslag till brottsbalk, 378) concerning the elements in question only made the brief remark that, regarding the evaluation of negligence, one starts from "the mentality, experience, knowledge, intellect, talents, etc., of the actor".

88 Entwurf 1962, § 18 (1). (Cf. the German draft code from 1927, § 19.) The English translation of the provision runs: "(1) Anybody who fails to exercise that care which the circumstances and his personal condition require of him and of which he is capable, and for that reason does not recognize that he is effectuating all the definitional elements of a crime, acts negligently."

89 See Lehrkommentar, 99–100.

90 ". . . nach seinen persönlichen Verhältnissens . . ." Schweizerische StGB Art. 18 par. 3.

91 See "Erläuterungen" in the Regierungsvorlage 16.11.1971 of the Austrian Penal Code (StGB) 68.

92 Section 2.02.(2)(d).

93 Concerning the obvious circularity of the formulation, see *Fletcher,* Negligence, 430.

94 It should, however, be noted in this connection that the Kentucky Penal Code of 1972 (effective July 1, 1974) in section 14 (a) outside the definition of criminal negligence requires that for liability the actor shall have been "physically capable of performing" the act.

95 See, e. g., *Rodhe,* Obligationsrätt, § 29.

96 See, e. g., *Agge-Thornstedt,* 153, *Bergendal,* 142–143, *Grönfors,* Trafikskadeansvar, 43–44, *Hagerup,* 279, *Kjerschow,* 100, *Lassen,* Haandbog, 268–270, *Baumann,* 443, *Exner,* 177 and 217, *Wetter,* Straffrätt, 58, and Grundlinjer, 44, and *Stjernberg,* 164.

97 See, e. g., *Ørsted,* Strafferetlige skrifter, 196–197, *Hagströmer,* 214, *Strahl,* Straffrättens allmänna del, 79, *Thornstedt,* Företagaransvar, 10, Brottsbalken I, 32, Förslag till brottsbalk, 378, Förslag till strafflag, 135, *Hurwitz-Waaben,* 247, *Maurach,* 572–575, and *Jescheck,* Lehrbuch, 449–450.

98 See, e. g., the works by Maurach and Jescheck mentioned in note 97.

99 It must, however, be borne in mind that most of the works that deal with this issue are general works concerning criminal law or tort law and because of their scope they cannot be expected to deal with the issue more thoroughly. Nevertheless it seems remarkable that in the vast literature on negligence the question concerning individual elements is very rarely analysed.

99a As an illustration see the Swedish tort case NJA 1974 p. 99. Two MD:s, X-ray specialists, were sued for malpractice. In its decision HD stated that concerning all diagnostics one must to a certain extent accept as unavoidable mistakes due to an oversight. Nevertheless HD found the doctors negligent.

In so finding the court particularly stressed the fact that the doctors were experienced X-ray diagnosticians.

100 Ussing, Erstatningsret, 73, *Vinding Kruse,* 173–176, *Stang,* Skade, 249, and *Winroth,* Skadestånd, 102–103. Cf. the earlier legal writings in Anglo-American tort law: *Bohlen,* Liability in Tort of Infants and Insane Persons, 23 MICH. L. REV. 9, *Hornblower,* Insanity and the Law of Negligence, 5 COLUM. L. REV. 278, and *Cook,* Mental Deficiency in Relation to Tort, 21 COLUM. L. REV. 333.

101 Concerning the corresponding law in Norway and Denmark, see *Andersen,* 173–174, and *Ussing,* Erstatningsret, 73–74, *Vinding Kruse,* 176, *Jørgensen,* 77. But cf. *Øvergaard,* Norsk Erstatningsrett, 106, and Skyldbedømmelsen, 80–81.

102 See prop. 1972:5 p. 464–466.

103 Prop. 1972:5 p. 467 and *Karlgren,* 99.

104 Restatement, Second, Torts, 16–17, *Harper & James,* 927–928, and Supplement, 41, *James,* Qualities, 25–26, *Pedrick,* 354 note 3, and case law and references there cited, *Moreland,* Negligence, 75–77, and *Street,* 122. But see *Salmond,* Torts, 622–624.

In Scandinavian tort law Stang has advocated a view similar to that of the Restatement. He argues that it is impossible that life in the community can be adjusted to the needs of the insane. Regarding the insane, therefore, the negligence judgment must to a great extent be objective. See *Stang,* Skade, 258–259, and Erstatningsansvar, 132–133.

105 For an excellent exposition of these rules see the Working Papers I, 229ff.

106 See *Williams,* Criminal Law, 527–529, and Punishment and Responsibility, 261–262.

107 See, e. g., *Moreland,* Negligence, 79.

108 *Waaben,* Utilregnelighed, 48.

109 In the 18th century this was argued by Bentham in England and Feuerbach in Germany. See *Bentham,* chapter 13 § iii (3), and *Feuerbach,* Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts I, 162 and 186.

110 *Ross,* Forbrydelse, 282–284, and *Waaben,* Utilregnelighed, 48–52.

111 Report 1953, p. 100.

112 It may very well be a different matter to answer the question of the psychiatrist's role in forming a general criterion of imputability. See, e. g., *Ross,* Forbrydelse, 295–300.

113 See *Andenæs,* Criminal Law, 222. Cf. *Nygaard,* 90.

114 *White,* 78, and *Jareborg,* Uppsåt, 208.

115 *White,* 78.

116 *Ibid.*

117 *James,* Qualities, 5. Cf. *Edgerton,* 857.

118 See, e. g., *Green* v. *Atlantic Charlotte Air Line Ry.,* 131 S.C. 124, 133, 126 S. E. 441, 444, 48 ALR 1448 (1925), where it is said: "The foundation of liability for negligence is knowledge." Cited from *James,* Qualities, note 18.

119 See *James,* Qualities 5. Cf. *Seavey,* 17. See also *Edgerton,* 857.

120 *Seavey,* 17.

121 See the discussion in *James,* Qualities, 5–15, and *Seavey,* 18–26.
122 *White,* 44–45. See also *Jareborg,* Uppsåt, 205–207.
123 *White,* 45.
124 *White,* 49. Cf. *Wittgenstein,* Philosophische Untersuchungen, 214: "Aspektblindheit wird *verwandt* sein dem Mangel des 'musikalischen Gehörs'." See also *Jareborg,* Uppsåt, 206.
125 See *White,* 50, and *Jareborg,* Uppsåt, 206. Cf. *Seavey,* 18.
126 *White,* 51. Cf. *Seavey,* 19.
127 *White,* 57.
128 See *Andenæs,* Criminal Law, 222, *Moreland,* Negligence 86ff., Restatement, Second, Torts, § 283 B and C, *Ussing,* Skyld og Skade, 38–39, Erstatningsret, 75, *Vinding Kruse,* 177, and *Nygaard,* 288ff.
129 Arguments like "the standard is in these situations objective because the reasonably prudent man cannot be a fool" are here left out of consideration.
130 See, e. g., *Ussing,* Erstatningsret, 75, and *Vinding Kruse,* 177:
131 *Ussing,* Erstatningsret, 75, Skyld og Skade, 45–46, and *Vinding Kruse,* 177.
132 *Seavey,* 12, *Ussing,* Erstatningsret, 76, and *Vinding Kruse,* 177.
133 See *Moreland,* Negligence, 95–96, and references there given.
134 *Waaben,* Utilregnelighed, 50.
135 The Criminal Law of Greenland has gone very far in this direction. See *Goldschmidt,* 147f. and 245, 258. Cf. *Waaben,* Utilregnelighed, 49, and the discussion between Hart and Barbara Wootton: *Barbara Wootton,* Crime and the Criminal Law (1963) and Punishment and Responsibility 177ff. and 193ff.
136 See *Waaben,* Utilregnelighed, 53, and *Jareborg,* Uppsåt, 371–376. Waaben gives an example of the type of reasoning that is common among retributive theorists: Punishment is the retribution or disapproval of the community regarding the person who has drawn guilt upon himself; guilt is the disobedience shown in the action of the rules of the criminal law; punishment may therefore be imposed only on a person who had the possibility of conforming to the rules; the criterion of impunity is therefore that a person may not be punished if because of abnormality he did not have the possibility of realizing the unlawfulness of his act and so of conforming his action accordingly. *Waaben,* Utilregnelighed, 53.
137 See *Waaben,* Utilregnelighed, 54, Waaben's exposition on pages 53–57 concerning the imputability concept is, I think, also highly material to the problem here discussed. To a great extent the views there given accord with those presented here.
138 Royal Commission on Capital Punishment, 100. Cf. *Waaben,* Utilregnelighed, 55.
139 *Waaben,* Utilregnelighed, 55.
140 See Restatement, Second, Torts, § 283A, *Prosser,* 154–157, *James,* Qualities, 22, *Harper & James,* 924–927, *Salmond,* Torts, 299–300, *Charlesworth,* 1033, *Street,* 122, and *Moreland,* Negligence, 70–75. Concerning the case law, the leading earlier decisions seem to be *Railroad Co.* v. *Stout,* (1873) 84 V. S. 657, *Charbonneau* v. *MacRury,* (1931) 84 N. H. 501, 153 A. 457, *Briese* v. *Maechtle,* (1911) 146 Wis. 89, 130 N. W. 893. See further 67 ALR 2d 570, and 174 ALR 1080.

141 Cf. the German BGB § 828 where a minimum age of seven is stipulated for civil liability.

141a *Stina Sandels,* Små barn, and Barns skadeståndsskyldighet, *Strahl,* Skadeståndsskyldighet, *Beckman,* Barn and Skadestånd, *Nordensson, Bengtsson, Strömbäck,* 90ff., and *Hellner,* Skadeståndsrätt, 203ff.

142 See *Schulman,* The Standard of Care Required of Children, 37 YALE L. J. 618, 625, Restatement, Second, Torts, § 283A at 16 says: "If the child is of sufficient age, intelligence, and experience to understand the risks of a given situation, he is required to exercise such prudence in protecting himself, and such caution of the safety for the safety of others, as is common to children similarly qualified."

143 (1911) 259 Minn. 452, 107 N. W. 2d 859.

144 See Restatement, Second, Torts, § 283A at 16, and Comments in 46 NEBR. L. REV. 699, 24 OHIO STATE L. J. 401, 1962 DUKE L. J. 138, 25 ILL. L. REV. 214 and 24 ARK. L. REV. 379.

145 See the German Supreme Court case BGH NJW 70, 1038 (cf. Böhmer MDR 64, 278) and *Palandt,* 808. As to Scandinavian tort law, see *Hellner,* Skadeståndsrätt, 206–207, *Karlgren,* Skadeståndsrätt, 95–96, *Stina Sandels,* Barns Skadeståndsskyldighet, *Strahl,* Skadeståndsskyldighet, *Ussing,* Erstatningsret, 75–76, *Vinding Kruse,* 177–178, *Borum,* 32–33, *Andersen,* 148–149, and *Stang,* Skade, 258.

146 See *Ussing,* Erstatningsret, 76.

147 *Stang,* Erstatningsansvar, 133.

148 Lov om skadeserstatning i visse forhold of June 13, 1969. Chap. 1, sec. 1–1.

149 See *Andersen,* 148.

150 See prop. 1972:5 p. 164, *Hellner,* Skadeståndsrätt, 207, and *Karlgren,* 96.

151 See, e. g., *Hellner,* Skadeståndsrätt, 208.

152 (1903) 81 N. Y. S. 254.

153 BrB 33:1.

154 A provision like § 501 in the Study Draft may, however, be interpreted differently. The provision holds that a person is not criminally responsible before the age of sixteen. Cf. Model Penal Code, sec. 4.10.

155 See BrB 33:4. "If some one has committed a crime before reaching the age of eighteen, a milder punishment than that provided for the crime may be imposed, depending on circumstances . . ."

156 See *Ussing,* Erstatningsret, 75–76.

157 *Borum,* 34, and *Vinding Kruse,* 178.

158 The relation between old age and crime has above all been treated in legal writing in the German language. See *Fopp,* and references there given. Cf. *Middendorff,* 43, and *Bockelmann,* 211–212. In Anglo-American law we may refer to *Moberg.*

159 See *James,* Qualities, 17, and *Harper & James,* 920.

160 *Seavey,* 22.

161 See "Overlooked Physical Disability Which May Be a Cause of Negligence", 2 CURRENT MEDICINE no. 10, p. 14.

162 *James & Dickinson,* 783.

163 *Holmes,* 87.

164 See *James & Dickinson.*
165 See *Harper & James,* 923 and note 15.
166 *Ibid.*
167 *Prosser,* 151–152.
168 *Harper & James,* 920, *James & Dickinson,* 785, *James,* Qualities, 18, *Moreland,* Negligence, 88, *Ussing,* Erstatningsret, 76, and *Vinding Kruse,* 178–179. A general reference should be made to *Weisiger* and *tenBroek.*
168a Second, § 283 C: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability."
169 *Ussing,* Erstatningsret, 76, *Weisiger,* 197.
170 *Borum,* 34–35.
171 *Vinding Kruse,* 179, and *Harper & James,* 921. Cf. *Stang,* Erstatningsansvar, 133, and *Borum,* 33.
172 *Prosser,* 152, Restatement, Second, Torts, § 283C and Appendix 335, *Harper & James,* 920–921, and *Moreland,* Negligence, 87. Cf. *Andenæs,* Criminal Law, 222.
173 See, however, the cases cited by *Harper & James,* 921 note 6.
174 See *Jareborg,* Uppsåt, 156–158.

VII

There is no standard by which to measure the soul and its development.
Dostoevsky

1. In *R.* v. *Prince,*[1] which has now been a leading case for 100 years, the objectifying of the criminal law seems to have been decisive for the holding of the case.[2] If the approach in the Prince case was an objective one, English courts seem to have taken another stand 90 years later in a case that is similar in principle.

In the case in question, *R.* v. *Hudson,*[3] the facts were briefly as follows. Hudson, a 22 year old man, had intercourse with an 18-year-old girl of very limited capacity. A charge was brought against H. of unlawful sexual intercourse with a defective under sec. 7 (1) of the Sexual Offences Act of 1956 as substituted by the Mental Health Act of 1959 sec. 127 (1)(a). The statutes made it a crime to have "unlawful sexual intercourse with . . . a defective". A defective was defined as "a person suffering from severe subnormality". According to sec. 7 (2) of the Sexual Offences Act of 1956, a man is not guilty of an offence under the section because he had unlawful sexual intercourse with a woman "if he does not know and has no reason to suspect her to be a defective". The Court of Criminal Appeal pronounced that the "proper approach to sec. 7 (2) is the subjective approach, that is to say, that, if an accused man succeeds in establishing to the extent known as the balance of probabilities test that he himself did not know and that he himself had no reason to suspect the woman to be a defective, then he succeeds in his defence . . ., in considering his state of mind, in the view of this court a jury is entitled and indeed bound to take into account the accused himself. There may be cases, of which this is not one, where there is evidence before the jury to show that the accused himself is a person of limited intelligence, or possibly suffering from some handicap which would prevent him from appreciating the state of affairs which an ordinary man might realize. That is a matter again which in the appropriate case would no doubt receive consideration in the summing up."

Here the court held that the proper approach to the defence of absence of knowledge is the subjective approach, viz. that if the accused is able to establish on balance of probabilities that he was not aware that the woman was a defective, then he succeeds in his defence.[4]

The subjective approach seems to have been upheld in a later decision concerning criminal negligence, when the court held that in determining whether a person was guilty of criminal negligence, the jury must be instructed to take into consideration the accused's beliefs with regard to material facts even though, in some circumstances, such beliefs may have been formed in circumstances amounting to criminal negligence.[5]

The accused, Lamb, had in jest pointed his revolver at his friend. The weapon went off and the friend was killed. Lamb knew that there were two

bullets in the revolver. But he did not know that when he pulled the trigger the cylinder would rotate so that one of the bullets would come into the bore and be hit by the striker. The trial judge in effect instructed the jury that the accused had done an unlawful and dangerous act, and his direction with regard to criminal negligence contained no reference to the accused's belief that the pulling of the trigger would have no effect on the position of the bullets. The Court of Appeal allowed the appeal. In the court's decision we read: "When the gravamen of a charge is criminal negligence – often referred to as recklessness – of an accused, the jury have to consider amongst other matters the state of his mind, and that includes the question of whether or not he thought that which he was doing was safe. In the present case it would, of course, have been fully open to the jury, if properly directed, to find the accused guilty because they considered his view as to there being no danger was formed in a criminally negligent way."[6]

On the other hand, in traffic cases where death is caused by reckless or dangerous driving,[7] it seems as if *mens rea* is not a necessary requirement for a judgment of negligent homicide.[8] The objective test is also adhered to in recent English decisions.

R. v. *Evans*[9] held that a person is guilty of dangerous driving if, through even the slightest negligence, he adopts a manner of driving which the jury thinks was dangerous. And in *R.* v. *Ball* and *R.* v. *Loughlin*[10] it was held that, once it is proved that the accused was driving dangerously, the only defence to a charge of dangerous driving or causing death by dangerous driving is that the accused was deprived of control of the vehicle by a sudden affliction of his person or by a defect arising in the vehicle without any fault on his part.[11]

In the traffic cases the crucial questions seem to be only whether the accused was in fact driving dangerously and whether the dangerous driving caused the death of the deceased.[12] This difference between cases within and outside the traffic area is not easily explained from a viewpoint of principle. In principle there should not be a difference. In reality, however, the facts of the case may not give reason for discussing the issue of individual elements.

An instructive instance is a German traffic case from 1953.[13] It concerned a street accident involving a tram and a car. The issue concerned whether the tram driver was guilty of negligent homicide. In the BGH the tram driver maintained that "der Begriff der Fahrlässigkeit verkannt sei, weil die Strafkammer nicht geprüft habe, ob der Angeklagte nach seinen persönlichen Fähigkeiten und Kenntnissen zur Anwendung der erforderlichen Sorgfalt auch fähig und in der Lage gewesen sei". In its decision BGH said: "Die Revision vermisst jedoch nur Festzustellen, die bei der einfachen

Sachlage, die keinerlei Besonderheiten aufweist, schlechthin selbstverständlich sind und deshalb keiner ausdrücklichen Erwähnung im Urteil bedurften."

The facts in most traffic cases are in this respect usually not relevant to the issue of individual elements, especially in view of the importance here of the *Übernahmegrundsatz.* We may, in addition, mention other reasons of a more technical nature that bar the full and open discussion of these elements in case-law. The issue, e. g., whether the accused lacked the ability to benefit from certain information is seldom brought before the court because of legal-technical constructions such as, e. g., the misdemeanour-manslaughter rule.[14] As a matter of fact, the cases in issue are on the whole rather rare in criminal law. Not surprisingly the fullest discussion on the question of principle in the case law is to be found in German case law.

An instructive case is RG St 58, 27 (30). The case concerned "fahrlässige Körperverletzung" (negligent assault). The accused had been attacked by a person, A. In order to protect himself he tried to hit A with his stick. Unfortunately, another person, standing close to A, was hit and injured. The court maintained that it must establish not only that the accused violated a standard of action accepted in the community but also that, considering the particular objective circumstances[15] and his personal qualities, he had the possibility of avoiding the accident (nach der besonderen Sachlage und seiner persönlichen Fähigkeiten zur Betätigung einer solchen Sorgfalt überhaupt noch imstande war). In this particular case the court found it relevant to consider "unverschuldete Erregungs- und Ermüdungszustände". Another German case, OLG Köln NJW 1963, 2381 (2383), dealt with negligent homicide. The accused had hit X. on the head with a log of wood. X. finally died from infection in the wound caused by the blow. Considering the issue whether the outcome, the death due to infection, was predictable *(Voraussehbar)* the court made an individual judgment where factors such as intelligence, education and experience were taken into consideration.[16]

The Swiss Bundesgericht stated in the case BGE 68 IV 165 (168f): "Vom Vorwurf der Fahrlässigkeit entlastet nicht nur, wer alles getan hat, was das Gesetz objektiv von ihm verlangt, sondern auch, wer in seiner Person liegende Entschuldigungsgründe nachweist."[17]

In principle the same reasoning is found in the decision by the Austrian Oberste Gerichtshof, OGH SSt XX (1949) No. 113, where the court concludes: "Es ist also ein objektiver Masstab für der Frage anzuwenden, welches Mass von Vorsicht anzuwenden ist. Ob dem Täter die Einhaltung des gebotenen Masses von Vorsicht zugemutet werden kann, ist subjektiv nach seiner individuellen Verhältnissen und seiner Persönlichen Intelligenz zu beurteilen."

The dearth of authority in the case law certainly does not

facilitate an analysis. The sparse and too little diversified material in criminal law is also an obstacle to a thorough and representative systematization. The three main groups as presented in the preceding chapter are here used in a very extensive meaning. Thus under the main group of mental disabilities we count not only severely incapacitating states such as insanity and feebleminded-ness but also intelligence defects and less severe incapacitating states where very often the individual element consists of an occasional emotional disturbance such as fear, panic and nervous-ness. All these disparate elements are under one heading. To the average man they have one aspect in common: they all involve the person's mind. In the same way the broad heading of physical defects and infirmities includes such disparate elements as physical illnesses of every kind, infirmities such as blindness, lameness, etc., and physically incapacitating states such as unconsciousness.

2. a. Cases dealing with the relation between criminal negligence and insanity seem to be extremely rare. In English law, e. g., no case has been found. There may be many reasons for this, but two are obvious. Of these the more important from the viewpoint of principle is the English court's adherence to the reasonable man formula.[18] The other is that the M'Naghten rules make no mention of the subject of negligence. In the legal writing, it is true, it is commonly held though that the defence of insanity is also relevant to negligence offences.[19] The grounds for this assertion, however, are stated in different ways. Some writers adopt a technical line of reasoning.[20] Others base their justification on the argument that there is no ground for upholding a contrary view.[21] In both cases the reasoning chosen falls within the framework of an established test of insanity defence. Yet another approach is to leave the domain of these tests altogether and in principle deal with insanity in the same way as mental deficiencies short of insanity. In this approach the deficiencies are then treated as an integral part of the negligence judgment and as a part of the negligence concept.[22]

As is the case concerning English criminal law, no American decision has been found as to the relevance of insanity for the negligence delict.

In the field of tort, however, I have found a fairly recent and rather instructive case.[23] The case dealt with a traffic accident. Mrs V. was driving her car westward in the eastbound lane and struck the left side of the plaintiff's car near its rear end while the plaintiff, Breunig, was attempting to get off the road to his right and thereby avoid a head-on collision. Breunig filed an action to recover damages for personal injuries. Mrs V.'s insurance company alleged that she was not negligent because just prior to the collision she was suddenly and without warning seized with a mental aberration or delusion which rendered her unable to operate the car. There was no question that V. was subject at the time of the accident to an insane delusion which directly affected her ability to operate her car. The psychiatrist testified that V. was suffering from "schizophrenic reaction, paranoid type, acute". He testified that V. told him that she was driving on a road when she believed that God was taking hold of the steering wheel and driving the car. She saw the truck coming and stepped on the accelerator in order to become airborne because she knew she could fly "because Bateman does it". To her surprise she did not become airborne before striking the truck but only after the impact. The Supreme Court of Wisconsin in its decision scrutinized the authorities that generally hold insanity not to be a defence in tort cases except for intentional torts.[24] It reached the conclusion that this holding is too broad. In this case, where V. was suddenly overcome without forewarning by a mental disability which incapacitated her from conforming her conduct to the standards of a reasonable man under like circumstances, this holding cannot be upheld. Citing the case *Thiesen* v. *Milwaukee Automobile Mut. Ins. Co.*, (1962) 18 Wis. 2d 91, 118 N.W. 2d 140, 119 N. W. 2d 393 the court held that not all types of insanity vitiate responsibility for a negligent tort. It depends on the kind and nature of the insanity. The insanity must be such as to affect the person's ability to understand and appreciate the duty which rests on a driver to drive his car with ordinary care or, if the insanity does not affect such understanding and appreciation, it must affect his ability to control his car in an ordinarily prudent manner.

It must be admitted that this case is limited in scope. The situation it concerns is rare indeed. Yet it seems to be significant in its approach to the negligence judgment. The individual element is treated as an integral part of the negligence concept and the test is whether the mental or other defect, whether technically called insanity or not, is in reality of such a kind as to bar a conformity to act according to the standard in question.

The only criminal case I have found in this respect is a Swedish one.[25] It is a negligent-homicide case concerning malpractice in medicine. Here the court avoids the relevant issue by applying the *Übernahmegrundsatz.*

A physiotherapist, Ö., used massage and "cleansing" in treating a 76-year-old patient who was suffering from pneumonia and chronic heart and kidney trouble. Ö. claimed that her treatment removed poison, worms, etc., from the body of the patient. A short time after the last treatment the patient died. The court found that there was a causal relation between the

treatment and the death. In undertaking the care of the patient, Ö. had incurred the responsibility to ensure that the patient got such treatment as "to a normal judgment" appeared appropriate having regard to the condition of the patient. The court found that Ö. did not realize that the treatment caused a danger to the life of the patient. Ö. ought, however, "with the exercise of normal care" to have understood that the method of treatment was in any case rather doubtful. She was therefore considered to have negligently caused the patient's death. The court found, however, that Ö. had committed the act under the influence of insanity *(psychosis manodepressiva).* Therefore no punishment was meted out.

It is, I think, rather doubtful to use the *Übernahmegrundsatz* in these cases.[26] If the accused was suffering from a severe mental defect, it is highly doubtful whether he had the ability to refrain from the act. In the rare instances when the issue is raised it must be even more rare that the accused possessed that ability. The majority of cases concerning negligence in criminal as well as civil law deal with traffic situations on land, at sea and in the air. This is, I think, an important reason for the dearth of authority regarding the relation between negligence and insanity. It should not, however, remain a reason for not investigating further into the issue. On the contrary, the development of modern traffic is facing the psychiatrist with many new questions. The relation between physical incapacity and traffic accidents is a relatively easy issue to investigate into compared with the connection between the mental structure of the person engaged in traffic and his behaviour in that traffic.[27]

b. When we turn to the field of mental defects short of insanity we are fortunate in that we can find rather more cases. As regards criminal law, most of these cases are Scandinavian or continental European. The rule in Anglo-American law seems to be that mental disorder, short of insanity, even of a very serious nature, is no defence concerning the commission of crime.[28]

The rule in tort law seems to be the same though the cases are difficult to place in our particular scheme. See *Taylor* v. *Richmond & D. R. Co.,* (1891) 109 N. C. 233, 13 S. E. 736, and *Bessemer Land Co.* v. *Campbell,* (1898) 121 Ala. 50, 25 So. 793. The leading cases are *Williams* v. *Hays,* (1894) 143 N.Y. 442, 446, 38 N. E. 449, 450 and *Feldman* v. *Howard,* 5 Ohio App. 2d 65, 214 N. E. 2d 235 (contributory negligence).[29]

The only case I have found that is not in harmony with this rule in Anglo-American criminal law is a Scottish one, *H. M.*

Advocate v. *Ritchie.*[30] The jury was here allowed to find that a state of dissociation which descended upon the accused while he was driving a motor car excused his apparently negligent driving.[31] I have found a few cases where the relevance of intelligence defects has been brought before the courts. The old case law did not take these defects into consideration.[32] A more moderate view, however, gradually gained ground. The leading case of *Worthington et al.* v. *Mencer*[33] held that if the defendant was merely a person of dull mind he was chargeable with the same degree of care as one of brighter intellect. But if, on the other hand, he was so absolutely devoid of intelligence as to be unable to apprehend apparent danger, he cannot be said to have been guilty of negligence because he was incapable of exercising care. In another later tort case, *Seattle Electric Co.* v. *Hovden,*[34] the plaintiff was an adult who lacked the intelligence and capacity to care for herself. The court held that the plaintiff was not answerable for negligence arising from "inherent physical or mental defects". The question whether the plaintiff was sufficiently deranged to avoid the consequences of her own contributory negligence was one for the jury.

In a decision from 1943[35] the Swiss Supreme court (Bundesgericht) acquitted a woman from a charge of negligent homicide, even though in performing an abortion on her 14-year-old daughter she had caused the girl's death by not using sterilized instrument, etc. The court stated that the accused had not complied with the standard of care accepted in the community ("die objektiv gebotene Vorsicht"). But this was not deemed sufficient to be regarded as negligent behaviour. The care required must "nach Intelligenz und Bildung, nach Lebenserfahrung und sozialer Stellung zumutbar gewesen sein". In this particular situation, realization of the need for sterilized instruments for abortion presupposed a special knowledge. The accused did not possess this. The court stated that she "stamme aus sehr einfacher Verhältnissen und mache auch in intellektueller Hinsicht einen primitiven Eindruck." She did not possess the necessary insight to realize the danger to which she exposed her daughter. The court concluded that the fatal outcome of the incision was not foreseeable *(nicht vorsehbar)* by the accused. It

must be admitted that the facts of this case are extraordinary. In a more normal situation it is likely that a court will apply the *Übernahmegrundsatz*. This was the case in the German decision BGH St 10, 133.

In this case from 1957 the Supreme Court of Western Germany (BGH) had to consider an objection concerning limited intellectual powers. The case concerned a newsdealer who was charged with having endangered the moral nurture of young persons by offering for sale periodicals that could involve such a danger. The objection that the accused, owing to his intellectual limitations, could not judge whether the content of the periodicals was of the alleged kind was not taken into consideration. BGH stated in this respect that the person who "dem selbständigen Betrieb eines bestimmten Gewerbes beginnt, von dem muss verlangt werden, dass er es gesetzmässig ausübt . . . Hat er sich einer Angabe freiwillig unterzogen, so muss von ihm vorausgesetzt werden, dass er ihr gewachsen ist. Verfügt er nicht selbst über die nötigen persönlichen und fachlichen Fähigkeiten dazu, so muss er sachkundiger Hilfe vergewissen."

Another illustrative case in this connection is RG St 22, 163, 164f., where the accused was shunting a train. In so doing he did not comply with certain instructions for the work and thereby he caused an accident. The court stated that the avoidance of the accident required a degree of caution that the accused lacked because of his limited intelligence. The court added: "Derjenige, welcher vermöge seiner Individualität ausser stande ist, die Voraussetzungen zu erkennen, unter welchen eine Dienstvorschrift anwendbar ist, darf nicht anders beurteilt werden wie derjenige, welchem die Möglichkeit gefehlt hat, von der Vorschrift überhaupt Kenntnis zu erlangen. Der eine wie der andere macht sich durch die Nichtbefolgung der Vorschrift keiner Nachlässigkeit schuldig."[36]

As to negligence, the courts do not utilize the technical concept of "mental age". In *State* v. *Dillon*, (1970) 471 P. 2d 553, 93 Idaho 698 the court decided a case concerning a 17-year-old boy. The defence had invoked the following statutory provision: "Persons capable of committing crimes. All persons are capable of committing crimes except . . . (1) Children under the age of fourteen (14) years . . .". The accused maintained that his mental age was under 14. The court held that "mental age" is an arbitrary "shorthand" term and that it is not to be considered as equivalent to "age" as the word is used in the provision.

Under this heading I think it is defensible to discuss cases involving a mental "incapacitating" state of a more or less temporary nature – nervousness, scare, panic, etc.

In traffic cases no allowance seems as a rule to be made for nervousness on the part of the driver. Mistakes due to the driver's nervousness have generally been considered negligence.[37]

A Norwegian case is an exception to the prevailing objective negligence judgment in this respect.[38] A 20-year-old man, T. who was driving a lorry was passing a bus parked on the same side of the narrow road. The space available for T's lorry, which was 2.15 m wide, was 2.65 m. In passing, T. struck the bus and the vehicles were damaged. T. was prosecuted for negligent driving. The court found that the accident happened owing to T's fear of hitting a stone on the other side of the road. Because of this nervousness, T. misjudged the road situation. The court concluded that it would be too severe to consider this misjudgment negligent to such a degree as to suffice for the quality of criminal negligence.[39]

The issue of nervousness is very seldom raised outside the field of traffic.

NJA 1922 B 17. In connection with an army field exercise, an order was issued to fix bayonets; the order also prescribed that covers should be put on the bayonets. Private G. did not hear the order. In connection with a sudden counter-attack, G. became aware that bayonets were being used. He then quickly put on his bayonet. Because of "war-eagerness" and owing to haste as a result of the attack G's bayonet was left uncovered. G. ran his bayonet into N. N died. Charged with negligent homicide, G. pleaded that in the fighting he became nervous and excited. All of the courts pronounced a verdict of guilty, on the ground G. had not complied with the order.

NJA 1923 B 524. L, who considered himself offended by X, took out his pistol while he was irritated and nervous. A shot was fired. X. was hit and killed. HR, the decision of which was not reversed, did not find that L. had intentionally assaulted X. with the pistol. L, who earlier had dealt negligently with the weapon, had in taking it out overlooked the danger that was connected with so doing. L. was considered negligent. No consideration was given to individual elements.

NJA 1901 B 582. K. thought that his life was threatened by I. One evening he sent for two persons to help him. Later I. appeared outside K's house. After I. had thrown through the doorway a stone at K, hitting him on the forehead, K. pointed his gun at I. In trying to take the gun from K, I. laid his hand on the weapon. During the struggle that occurred, a shot was fired, hitting I, who died. K. had become disconcerted due to the blow in his forehead. He had still been disconcerted during the tug-of-war over the gun. HovR, the decision of which was not reversed by HD, held that the circumstances under which the gun was pointed at I. were not of such a nature that K. should be punished for negligent homicide.

The same result could have been reached by applying the rules of self-defence. In the case there was, however, no plea of self-defence. Nor did the courts seem to have used this possibility. Since under the circumstances the consent of I. could not have led to the acquittal of the accused, it would appear that HovR took the individual elements into consideration in the evaluation of negligence.

As far as panic is concerned, the cases are almost exclusively confined to the field of traffic.

One exception is, however, the unusual situation that the courts had to consider in NJA 1959 C 1116. The graduate engineer L., who was a supervisor at a nitroglycerine plant in Grängesberg, Sweden, noticed in connection with nitration that an unusual gas had been generated. In connection with this there occurred a slight explosion, a so called "puff", and "redgas" began to be generated. L. concluded that an immediate danger of explosion was at hand. He immediately left the nitration house without taking the necessary precautionary measures and sounding the disaster alarm. (These measures take 10–12 seconds to carry out.) L. stated in defence that he had acted in a state of panic, that "puffs" as well as the generation of the "redgas" were to him unknown phenomena and that he had not received any instructions concerning the risk of an accident like this. HR found that L. should have discontinued the nitration when the first generation of gas was noticed. In this manner L. was negligent. When the "puff" occurred L. had a duty to stop the nitration and sound the disaster alarm. In failing to take these measures, L. was guilty of carelessness endangering the public. In view of the fact that L. had not received instructions concerning a situation like this and that he had no previous knowledge about "puffs" the crime was not considered severe. In meting out the punishment the court paid attention to the fact that L. had become frightened in a situation which was strange to him. HovR upheld the decision. One of the justices of HovR, however, was of another opinion: he was in favour of acquitting L. on the ground that having regard to the obvious danger to life one could not reasonably expect L. to have sufficient composure to take the precautionary measures. HD did not give permission to appeal.[39a]

To return to the traffic area, the cases there indicate that certain allowances are made in situations where a driver, acting in a sudden and unexpected emergency, makes a wrong move. The law does not require superhuman poise or self-control.

Three German cases are illustrative:

BGH DAR 1956, 106 (107). The accused was driving a bus which had defective brakes and which became involved in a serious accident. Several passengers were killed or severely injured. T. was prosecuted for negligent homicide and negligent assault. It was found that the accident was due to the defective brakes and a wrong manoeuvre by T. Regarding the wrong manoeuvre, BGH stated: "Der Angeklagte war durch das Versagen der Fussbremse kopflos geworden. Dass er in diesem Zustande eine nach Aussicht der Strafkammer falsche Massnahme zur Behebung der Gefahr wählte, kann ihm mit Rücksicht auf die Kürze der Zeit, innerhalb der er einen Entschluss fassen musste, nur dann als Fahrlässigkeit angeregnet werden, wenn die Ungeeignetheit der gewählten Massnahme sich ihm aufdrängen musste".[40]

BGH VRS 10, 213 (214). The accused was driving a car on an Autobahn at a speed of 120 km/h. Ahead at a distance of 500 metres, he noticed a

lorry that was travelling in the same direction at a speed of 40 km/h. When 80 metres behind the lorry the accused turned out to the left in order to pass the lorry. The driver of the lorry also turned into the left-hand lane. The two vehicles collided. The accused was prosecuted for negligent homicide and negligent assault. He was convicted in the first instance. BGH held that the accused had no reason to anticipate that the lorry driver would make such a dangerous move as to turn to the left when he was being overtaken. The court further stated: "Wenn ein Kraftfahrer in einer ohne sein Verschulden plötzlich auftretenden erheblichen Gefahrenlage, die sofortiges Handeln gebietet, infolge Schrecks, Verwirrung oder Überraschung ausserstande ist, das richtige Mittel zur Abwendung der Gefahr ergreifen, so kann ihm dieses Versagen nicht als Fahrlässigkeit angerechnet werden."

BGH St 12, 81 (84). The court said: "Ein Kraftfahrer braucht, wenn er keinen besonderen Anhaltspunkt dafür hat, nicht damit zu rechnen, dass ein mit Abblendlicht entgegenkommender Fahrzeugführer schon kurz vor der Begegnung das Fernlicht einschaltet und ihn auf diese Weise blendet. Er braucht seine Fahrweise hierauf nicht einzurichten." The court held that if the driver is dazzled in this way and consequently surprised and frightened: "Zur Überwindung dieses Zustandes, mit dem er nicht zu rechnen braucht, wird ihm in Übereinstimmung mit den von der Rechtsprechung entwickelten Grundsätzen eine verlängerte Reaktionszeit zuzubilligen sein, um die notwendigen Gegenmassnahmen ergreifen."[41]

The rule stated by the German Supreme Court is in principle adhered to in Swiss[42] and Austrian criminal law.[43] The same may also be true of American criminal law,[44] though I have not found any authority for this.

The principle that allowance should be made for panic reactions in situations of emergency is, I think, sound and well-grounded. I do not see any reason why allowance should not be made. It is true that evidential issues may in certain cases be rather intricate. But that is a rather different matter. It is therefore somewhat astonishing to find that in the Swedish case law the prevailing rule seems to be contrary to what we have found to be the law in continental European criminal law. The following cases may be presented.

NJA 1922 B 149. The car driver, F., did not have a driving licence. While practising driving for the first time he was seized with panic and drove the car onto the pavement, where two girls were struck. One of the girls was fatally injured. F. was sentenced to imprisonment for negligent homicide.

NJA 1964 C 12. Passing the brow of a hill, the accused noticed a lorry approaching in the opposite direction and on the same side of the roadway as himself. Fearing a head-on collision, the accused steered to the right. (At the time of the accident Sweden had left-hand traffic.) As the lorry at the same time was steered to the right the vehicles collided, and the accused's

wife, who was a passenger in his car, was fatally injured. The accused was charged with "careless driving" and negligent homicide. HovR took into consideration that the situation for the accused seemed to be extraordinarily dangerous and held that the accused's manner of driving could not reasonably render him guilty of a crime. HovR remarked that the accused had offended against one of the most important rules of the traffic law, and stated that this was excusable only where no other reasonable possibility was available. Since the accused could have driven the car over to the left-hand side of the roadway without the risk of too extensive damage, the court did not consider the accused justified in steering to the right in the existing situation.

FFR 1955 p. 362. The circumstances are here in effect the same as in the case from 1964. The accident occurred on a freeway. The accused turned to the right, as he considered this to be the best way of avoiding a head-on collision. Five persons were killed in the accident. HovR did not find the move of the accused defensible. The circumstances were however, considered mitigating. One of the justices wrote a dissenting opinion. He favoured acquittal, stating that the circumstances demanded an immediate decision. The decision of the accused to turn to the right, as he assumed that the driver of the other car had lost control over his vehicle, should not lead to such a severe judgment as dangerous driving.

In a later decision (Svea hovrätt, 5 avd., decision no. B 82/64) the same court that decided the last case reached a similar result in an almost analogous case. Here the accused was driving a lorry at a safe distance from the car in front. When he applied the brakes, they did not work, owing to a technical fault. To avoid running into the car in front and as there was a road barrier to the left, the accused steered out to the right, where he collided with an oncoming car. HR sentenced the accused for careless driving, and negligent homicide. The court stated that the accused's justification for his manner of driving could not be accepted, "for it must be a part of the pattern of action of every car driver that as far as possible he should avoid a so-called head-on collision" and the other alternatives of action that were available were to a great extent much safer than the one chosen. HovR also found that the accused had not exercised proper care. Having regard to the difficulties of the situation, the circumstances were deemed mitigating.[46]

Concerning the last-mentioned type of cases there has been created in German legal writing a special term – *Schrecksekunde,* thereby indicating that in certain situations the car driver or other person engaged in the traffic is allowed an extended reaction time.[47]

3. The individual elements we now turn to consider are brought under the wide heading of physical defects as distinct from mental defects. As was the case regarding the mental disabilities, this group of defects is rather heterogeneous. The case law,

however, singles out two main subgroups. In addition to the chronic incapacitations such as blindness, defective hearing, paralysis, etc. we find a number of incapacitating states which are due to, e. g., physical illness of an acute or chronic nature. Let us first consider cases regarding chronic incapacitations.[48]

a. The criminal law shows very few cases of this kind.[49] Concerning defective vision we find the following cases.

NJA 1962 C 1037. The accused, who drove his car out on to a priority road where he ran into a car driving along that road, could not be granted a driving licence because he lacked the stipulated visual acuity – a defect that could not be remedied by glasses. In the decision by HR, which was not reversed by HovR, it was stated that, having regard to the accused's knowledge of his diminished ability to see, he ought to have shown particular care when entering the priority road. Since the accused did not utilize or could not utilize the possibility of surveying the roadway, his manner of driving indicated negligence.

HRD in U 1900 p. 249. This Danish case concerns a coachman who drove a horse carriage along a street in Copenhagen. He collided with a pedestrian, who was fatally injured. The information was given that the coachman's vision was defective and that this was due to a disease of the eyes. His faculty of vision was impaired to a great extent. The court held that even if the coachman, owing to his defective vision, was not able to see the deceased, this could not free him from his liability because he had known of his disability for several years. He knew he was not fit to drive in the city with its heavy traffic.[50]

In the tort case *Winn* v. *Lowell,* (Mass. 1861) 1 Allen 177 the court held that the plaintiff's requested instruction that "if the plaintiff was a person of poor sight, common prudence required of her greater care in walking upon the street, and avoiding obstructions, than is required of persons of good sight," should not have been refused.[51] In *Keith* v. *Worcester B. V. St. R. Co.,* (1907) 196 Mass. 478, 82 N. E. 680, the Supreme Judicial Court of Massachussetts said: ". . . it is incorrect to say that a blind person must exercise a higher degree of care than one whose sight is perfect, but in another aspect, and [must] sharpen other senses, unnecessary for one of clear vision, in order to attain that degree of care which the law requires." Likewise in *Hill* v. *City of Glenwood,* (1904) 124 Iowa 479, 100 N. W. 522, the position of *Winn* v. *Lowell* was rejected and the appellate court held: ". . . plaintiff's blindness is simply one of the facts to which the jury must give consideration in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise when burdened by such infirmity; in other words, the measures which a traveler upon the street must employ for his own protection depend upon the nature and extent of the peril to which he knows, or in the exercise of reasonable prudence ought to know, he is exposed. The greater and more imminent the risk, the more he is required to look out for and guard against injury to himself, but the care thus exercised is neither more nor less than ordinary

prudence and experience may reasonably be expected to exercise in like circumstances."[52]

The holding in *Bennett* v. *McDonald* (Ohio App. 1962) 193 N. E. 2d 439, seems to be representative of a great many tort cases where the relevance of defective vision was in issue. The court held that one who suffers a physical infirmity, such as impaired eyesight, may use public streets without being guilty of negligence provided, in so doing, he exercises that degree of care which an ordinarily prudent person similarly afflicted would exercise under the same circumstances.[53] That a blind man is required to do what a reasonable man would do "under the circumstances" is often coupled with a requirement to use his remaining faculties with greater diligence in order to compensate as far as possible for his inability to see.[54] The general rule in the field of road traffic, however, seems to be that a person who operates a motor vehicle which became involved in an automobile accident and who has some physical defect is not, because he is driving in spite of the disability, rendered liable as a matter of law. The defect may be properly taken into consideration by the trier of fact in determining the question of negligence. The fact that a person involved in an automobile accident has some physical defect will not in itself fix liability as a matter of law but may be properly considered like any other fact in determining negligence and the question is one for the jury.[55] This rule has been applied in cases concerning defective hearing,[56] lameness[57] and other physical defects.[58]

As mentioned above, relevant cases regarding chronic incapacitations are very rare in criminal law. Concerning criminal negligence in, above all, Anglo-American law the attitude towards the consideration of individual elements is necessarily coloured by the requirement of a certain high degree of negligence. There would seem here to be no question that the fact that owing to physical disability the accused is not able to act in a normal way will in itself be sufficient to support a finding of criminal negligence. It appears, however, that the accused's disability may be taken into consideration in estimating the quality of the negligence. If the consideration of the individual element in this respect may lead to an acquittal, the result may equally well be the contrary. The element in question may either prohibit the negligence from reaching above the criminally relevant level[59] or, considered as a factor in an *Übernahmegrundsatz* reasoning, work the other way.[60]

It has often been maintained that Swedish case law in the field of tort makes allowance for physical defects. The well-known case NJA 1948 p. 489 is often mentioned as an example.[61] The facts of the case are briefly as follows: J. was occupied with clearing away the snow from a pavement. At the same time B. was approaching from behind. B. wanted to pass J. Therefore B. spoke to J. as she was approaching. When B. thought that J.

had noticed her she tried to pass him. J's hearing, however, was defective and he had not heard B. As he continued with his job, he unfortunately hit B. with his shovel. B. was injured and sued J. for damages. HD (3 justices against 2) dismissed B's action. It is, I think, remarkable that this case is considered an example of allowance for physical defects. Neither the wording of the motifs of the majority nor the opinion expressed by the minority seems to support this. The majority's grounds for the decision cannot reasonably be understood otherwise than as expressing that the tortfeasor, objectively speaking, had not been negligent. After considering this, there was no reason for the court to inquire into the relevance of individual elements. Whether or not the majority in HD, in deciding the question whether negligence was present, had in fact taken the physical defect into consideration, this is something that does not at any rate appear from the decision of the court.

b. We will now turn to acute physical disabilities. In this category sudden illnesses like heart attacks and epileptic fits dominate the picture. The cases are almost exclusively confined to the field of road traffic. The issue whether the accused in carrying out his act was acting voluntarily is here of no relevance. If, e. g., a person, A., falls asleep while driving and thereby causes another person's death, he is guilty of negligent homicide. He is negligent because he did not stop his car when he started to feel sleepy. Thereby he is causing a dangerous situation, which in its turn makes the non-stopping an omission. We may also say that A is negligent because of the danger to other road-users when he continues to drive when he is feeling drowsy. It therefore does not matter whether it is an "actio libera in causa" or an "omissio libera in causa" that is deemed negligent in relation to the undesirable state, or whether an "actio libera in causa" is said to be negligent owing to risks in connection with it or because of an omission.[62]

The leading Canadian case regarding operation of an automobile while unconscious is *Slattery* v. *Haley*.[63] There it is held that an operator of a motor vehicle who, while driving, suddenly becomes stricken by a fainting spell or loses consciousness from an unforeseen cause, and so is unable to control the vehicle, is not chargeable with negligence or gross negligence.

If a person is not driving voluntarily, as, e. g., when he is struck with a stone, attacked by a swarm of bees or overcome by a sudden illness which he could not reasonably have anticipated, he cannot be convicted of driving dangerously. *R.* v. *Jeffers,* [1964] 2 C.C.C., at 358.[64] [65]

If the accused is aware of drowsiness or knows that he is subject to attacks in the course of which he is likely to lose

consciousness he may be negligent.[66] The approach in the relevant cases is an antedating of the negligence judgment. We may here talk of a *culpa praecedense* (a preceding negligence). The accused will be held liable if at some earlier stage he had knowledge of his propensity to lose consciousness, etc., but nevertheless continued driving. The relevant issue here as to individual elements is then whether the accused could by the exercise of "reasonable care" have prevented his loss of conscious control over his movements from resulting in a breach of the law.[67].[68]

German case law has set out to rationalize the requirement of "reasonableness" in this type of situation. In the decision of the case BGH VRS 7, 181, 182 (DAR 1954, 208), BGH held that There is no "Erfahrungssatz, dass ein starker Ermüdungszustand nicht plötzlich auftrete". This was further developed in the case BGH DAR 1958, 194.

The accused was here driving a car on the autobahn in the middle of the night. After driving for 30 minutes he ran into a lorry in front of him. He was accused of negligent homicide. In the proceedings it was made clear that the accident was caused by the accused's suddenly becoming tired and losing his attention. BGH said: "Ein Kraftfahrer, der nachts eine Fahrt auf der Autobahn antritt, braucht nicht damit zu rechnen, dass er schon nach kurzer Zeit ermüdet". The court continued: "Für einer plötzlichen, sich vorher nicht wahrnehmbar ankündigenden Ausfall seiner Aufmerksamkeit darf ein Kraftfahrer nur dann verantwortlich gemacht werden, wenn besondere persönliche Mängel seine körperlichen oder geistigen Gesundheit, von deren Vorhandensein er Kenntnis hat oder hätte haben sollen, zu solchem Versagen führen."[69]

Except for this type of situation, the relevance of physical illness is very seldom tried by the courts. Thus far I have only found two cases. Both are Swedish. One of them is reported. The cases concerns tax evasion and, more precisely, carelessness in the filing of an income tax return. In NJA 1970 p. 244 the accused had not declared a quarter of his total income. He had filed his tax return while in hospital. The Supreme Court said, regarding the individual element: According to the information given [the accused] at the time in question feared that he was suffering from a severe disease. Because of this he was depressed and indifferent to other things than his state of health. Considering this, [he]

cannot be regarded grossly negligent in acting in a way specifically mentioned by the court.

This case should be compared with a similar one decided by Svea hovrätt, 1. avd. decision no. DB 52/73. This case also concerned tax evasion. The accused suffered from multiple sclerosis. There was expert medical testimony that the accused's ability to perform his duty concerning keeping accounts and filing a tax return was seriously impaired. HovR found that the accused was grossly negligent even if his physical illness was taken in consideration.[69a]

4. The issue whether age, minority as well as old age, is regarded as an individual element of the negligence judgment in criminal law is, it seems, not often brought before the courts. In systems like that of Sweden, where there is an age limit of 15 under which no criminal sanction may be imposed, the issue is of limited practical importance. Under the common-law system, with its age groupings of up to 7 years, between 7 and 14 years and 14 years and above and its limited possibility of regarding minority as a defence, the importance of this individual element seems to be small.[70]

The issue has, however, been considered in a few Scandinavian cases.

NJA 1929 B 238. An 18-year-old boy cycling past a hay stack, thoughtlessly threw away a match after lighting a cigarette and thereby caused a fire. The accused had no success in claiming infancy as a defence. On the contrary the negligence was considered gross and the accused was sentenced to imprisonment.

HRT in U 1914 p. 944. After returning home late one evening a 16-year-old boy lighted a candle and placed it on a box of matches in his room. He went to sleep before he had extinquished the candle flame. The candle burned down, and caused a fire. In the decision, in which the accused was acquitted, the court especially mentioned the age of the accused as an element to be taken into consideration.

NJA 1941 p. 661. A 15-year-old boy was playing with an airgun. After loading the gun with a tuft made of material from a so-called "tuft-arrow" he fired in jest against a person, who was hit in one eye by a piece of metal. The boy believed that in the barrel there was nothing else but the tuft. No allowance was made for the infancy.

NJA 1946 B 657. (FFR 1946 p. 185). L., a 16-year-old boy, and X. were playing in a military camp. X. a non-commissioned officer, was L.'s immediate superior. X. using an airgun loaded with water and soot had fired at L. and hit him in the face. L. had taken another airgun and in the belief that it was unloaded fired a shot at X., who was hit in one eye by an arrow. KrigsR sentenced L. for negligent assault. KrigsHovR did not reverse the

decision. Two of the five justices wrote a dissenting opinion and wanted to acquit in view, inter alia, of L.'s age. HD confirmed the decision. Two of the justices in HD wrote a dissenting opinion: they favoured acquittal on grounds similar to those of the minority in KrigsHovR.

NJA 1954 p. 500. A 20-year-old person who had omitted to declare one quarter of his income in his income tax return was sentenced for carelessness in filing a tax return. The courts did not make an allowance for the accused's age in the negligence evaluation.[71]

SvJT 1955 rf. p. 74. This case, too, concerned a 20-year-old person who had submitted an income tax return. He was charged with the same offence. HovR acquitted the accused in view of his youth and inexperience.[72]

NJA 1957 C 813 (FFR 1957 p. 254). A 15-year-old boy drove his motorcycle onto the freeway without having reduced his speed sufficiently. Owing to this he was not able to give the vehicles on the freeway priority. HR, the decision of which was confirmed by HovR, stated that the accident had occurred because the accused lacked the required traffic knowledge or driving ability. The accused's age was not taken into consideration in the evaluation of negligence.[73]

NJA 1963 p. 39. Four boys in the age group 16–18 years were playing with explosives. One of them was severely wounded. The HD:s majority held that the other three persons could not be punished for negligent assault: the injured boy had taken part in the play to the same extent as the other boys and ought in the same degree to have realized the danger of the experiment. HD obviously did not make allowance for low age.

In tort law the relevance of age – almost always low age – has been considered in many cases. These decisions, however, are not of immediate interest as to criminal law. It may, however, be relevant to give a brief comparative outline of the trends in tort law.

The holding in *Bailey* v. *Williams* (Tenn. 1960) 346 S. W. 2d 285, seems to be representative of the general rule widely accepted in Anglo-American tort law. The case concerned a 7-year-old defendant. The court said: "The rule with respect to a minor's capacity for negligence is that the question is to be judged in the light of his age, ability, intelligence, training and experience and the complexity of the danger with which he is confronted. Unless, under all these relevant circumstances, he has failed to exercise such care and prudence as may be expected of one of his years he is not guilty of negligence." In *Briese* v. *Maechtle,* (1911) 146 Wis. 89, 130 N. W. 893, the court held that the defendant – a 10-year-old boy – was only required to exercise the care which the "great mass" of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child.[74]

The rule concerning contributory negligence seems to be that the care required of any minor is not to be judged by the standard applicable to an adult, but by that degree of care which might reasonably have been expected of a child of like age, capacity and experience under the same or similar circumstances.[75]

The technological revolution, however, brought about a change in cases where the minor engaged in adult activities. To begin with a "subjective" standard was applied in these types of cases also, e. g., in the leading case of

Charbonneau v. *MacRury.*[76] The overwhelming trend of modern decisions is to the effect that when a minor engages in adult activities such as driving automobiles or other power-driven vehicles, he surrenders his status as a minor and is chargeable with the same degree of care for the safety of others in the operation of such vehicles as an adult. The leading case is *Dellwo* v. *Pearson.*[77] In Swedish tort law the trend seems to point in the same direction.[78]

5. The last part will deal with the significance for the evaluation of negligence of *poor education* or *insufficient experience.* In this respect the case reports show a greater number of decisions. Most of the cases here presented may be placed under the headings of road traffic, military conditions, and health service.

The following cases concern road traffic:

NJA 1955 C 98. The accused, who had caused a fatal accident, alleged that before the collision the windshield of the car had fractured and become opaque when the car ran into a tree. RR held that allowance could not be made for this because the accused, who "must have been aware of his lack of driving skill", had put himself in a situation that he was not able to master. HovR did not reverse the decision of RR. HD refused permission to appeal.

NJA 1956 C 422. The lack of driving skill on the part of the accused was considered in the negligence evaluation to be an aggravating circumstance.[79]

In the case U 1958 p. 1079, concerning negligent homicide, the Danish Supreme Court did not make allowance for the want of driving skill, because the accused, without any necessity had taken over the driving of the car. Illustrative of how little consideration is given to the want of experience in traffic cases is another Danish case, U 1963 p. 386, where a female driver, L., driving alone in city traffic for the first time after taking her driving licence, ran into a pedestrian at a crossing owing to lack of attentiveness and experience. L. was sentenced for negligent assault. The Supreme Court held that the offence was a manifestation of L.'s want of practice and experience and therefore not "grossly unwarrantable", on account of which the driving licence was not withdrawn.

This rather harsh and rigid practice is found in German criminal law also.

KG VRS 7, 184. The accused was driving a vehicle without having obtained a driving licence. His experience as a driver was very limited. He maintained a speed of 50 km/h. At the time a strong side wind was blowing. The accused was therefore forced to steer against the wind. When the wind suddenly changed the car swerved into the ditch and a passenger was injured. The accused was sentenced for negligent assault. The court said that although it was true that the accused could not be held liable on account of a wrong manner of driving (too high speed and too much steering against the wind), he was nevertheless negligent because he had involved himself in driving in spite of his inexperience.

A similar reasoning will be found in the tort case of *Hughey* v. *Lennox*, (1920) 142 Ark. 593, 219 S. W. 323. Here the court held that an unskilful or inexperienced driver is not to be excused from liability for injuries inflicted because of his inexperience and lack of skill. On the contrary, he should not frequent places where injury is liable to result from inexperience or lack of skill in handling a car. When a person drives an automobile along a public highway frequented by other travelers, he assumes the responsibility for injuries resulting from his own lack of skill in the operation of the car.[80] [80a]

A subjective approach is found in an Austrian case from 1936.[81]

The case concerned a person who was learning to drive. While driving he steered too far out to the right, became anxious and steered too far to the left. The car left the road, and a passenger was killed. The Austrian Supreme court stated that the accident was such as might happen to an inexperienced driver. Further it said that the special skill required by a car driver can only be acquired in the course of practice behind the steering wheel. It continued: "Es kann daher von einem Fahrschüler, auch wenn er bereits einigen praktischen Unterricht genossen hat, noch nicht verlangt werden, dass er den Wagen bei einer sich einstellenden kritischen Situation immer richtig lenke und dass er die unrichtigkeit und damit die Gefährlichkeit der von ihm in dieser Lage vorgenommenen Lenkhandlung erkenne." The court concluded that it was correct to hold the accused liable only if "das Gericht festgestellt hätte, dass der Angeklagte bereits fähig war, die Gefährlichkeit der von ihm ausgeführten Lenkhandlungen vorauszusehen".[82]

The following cases concern military conditions:

NJA 1945 p. 515. K. and H., while serving in the army, were ordered to show films. They did not comply with the given security regulations. The courts acquitted them from breach of duty and negligent homicide. HovR, the decision of which was not reversed by HD, stated that the accused had been ordered to their posts without having duly received instructions regarding the fire hazard in connection with the film shows and concerning the contents of the security regulations.

NJA 1946 B 141 (FFR 1946 p. 73). Sergeant M., after a shooting practice had not, as was his duty, inspected a machine gun and checked that there was no ammunition left in the weapon. M claimed that, having been given before the accident only 14 day's instruction regarding machine guns, he did not know the rules concering the inspection of the weapon. KrigsHovR, which reversed the decision of the lower court, found that the instruction given M. regarding the use of a machine gun was particularly incomplete. Having regard to this, the court held that M. could not reasonably be sentenced for negligence implying that he had neglected the security regulations. HD did not reverse the decision of KrigsHovR.

NJA 1946 B 142 (FFR 1946 p. 76). Serviceman X., cleaning a gun loaded with live ammunition, held the weapon horizontal. The gun went off and two servicemen standing close to X. were killed. KrigsR sentenced the

accused for negligent homicide but stated that the circumstances were mitigating considering that the accused was comparatively unfamiliar with the handling of the gun. One of the judges wrote a dissenting opinion in favour of acquittal on the ground that X. had received little instruction in the handling of a gun. KrigsHovR did not reverse the decision. HD refused appeal.

NJA 1946 B 801 (FFR 1946 p. 214). When the conscript sergeant X. was cleaning his pistol it went off and a person standing near him was injured. X. claimed that he did not know how to handle the weapon. The courts did not take this into consideration in the negligence evaluation. X. was sentenced for negligent assault.

In a Danish case, JD 1945 p. 228, the court took into consideration the accused's unfamiliarity with the weapon and acquitted him despite the fact that he had held the weapon pointed at the injured person while changing the cartridge holder. The court, which found that an objective breach of regulation had occurred, held that the imprudence was due primarily to the abnormally high degree of attention that the handling of the new and unfamiliar weapon must be assumed to have demanded. The accused had only received about 10 minutes instruction concerning the weapon.

NJA 1947 B 1080. Chief naval engineer A., and naval engineer B. were respectively, leader and administrator of the technical procedure in a deep-diving test. Engineer Z., the brain behind the diving procedure which was being tested, was sent down to a deep of 160 metres. He was brought back to the surface too rapidly and this caused his death through so-called decompression sickness. The reason why Z was brought up too rapidly was that one of the lines fixed on the control platform was hoisted up too rapidly. A and B were sentenced for negligent homicide because in planning the test they had not given the handling of the line sufficient attention and that they had not during the test checked the hoisting of the line. The Chief Justice of KrigsHovR wrote a dissenting opinion in favour of acquittal using the argument that the accused persons did not have a sufficient knowledge of diving to the depth in question and that it was therefore excusable that they did not realize the elements of risk involved in hoisting the line in question. HD did not reverse the decision of KrigsHovR, but two of its members declared themselves in favour of acquittal, albeit without stating their arguments for this.

NJA 1948 B 899 (FFR 1948 p. 215). A clerk, E., at the Swedish Infantry School was, after attending of a demonstration burning of ammunition that had been destroyed by damp, ordered to burn explosives together with two other persons. In so doing, however, he did not proceed according to his instructions. Owing to this an explosion took place and the other two persons were severely injured. KrigsR found that E. ought to have realized that the burning was attended by certain risks and in order to avoid an accident all persons present must remain at a proper distance from the fire. In permitting persons to stay close to the fire, E. had shown negligence and he was sentenced for negligent homicide. No allowance was made for the fact that E., who did not belong to the military personnel, had had no training whatever in explosives. KrigsHovR did not reverse the decision. HD refused appeal.

FFR 1957 p. 372. Serviceman O. found an unexploded hand-grenade, a so-called "dud", on a training ground. After he had handed the grenade to another serviceman, it exploded and the man was fatally injured. O. claimed that he had not been given a sufficiently thorough training to be able to know the danger of his act. O. was sentenced for negligent homicide. In the opinion of HovR it is stated that O. must have realized that the grenade was unexploded. Even if he had not received instructions regarding the occurrence of "duds", he must, having regard to the ordinary experience he had acquired concerning ammunition during his military service, have been aware of the risks connected with the handling of unexploded grenades.[83]

The following cases concern health service:

NJA 1963 B 383. A homaeopath, P., had for one year treated for "chronic pharyngitis" a patient who had a cancer lesion in his throat. The patient became gradually worse under the treatment and died. It was made clear that the patient could have been cured if instead of taking the medicine prescribed by the homaeopath he had been given radiotherapy. HR, the decision of which was not reversed by HovR and HD, sentenced P. for negligent homicide because he had not noticed the lesion in the mucous membrane of the patient's throat and that owing to P.'s treatment the favourable time for effective specialist treatment had been missed.

NJA 1957 C 229. B., assistant physician in a surgical department and K., assistant physician in an X-ray department, were prosecuted for negligent homicide. When B. was to inject contrast fluid in a patient for a so-called myelography examination, he asked K. about the fluid and injected according to K.'s instructions. The patient died because of a fault concerning the fluid. B. was acquitted. HovR sentenced K. for negligent homicide because in giving instructions concerning the fluid she must be considered to have made herself responsible for what was injected. K. gave instructions without having a thorough knowledge regarding contrast fluids for the examination in question and she could therefore not escape liability.[84]

NJA 1946 p. 712 B., an MD, was consulted by the patient A., who had a splinter of wood in one of his fingers. B. prescribed a compress. Though the general state of A. was impaired, B. did not prescribe anything else than a compress. Later the splinter was removed in a hospital. In spite of intensive treatment the finger could not be saved but had to be amputated. An amputation would not have been needed had A. received expert care in time. The National Swedish Board of Health stated that the incorrect treatment was not due to conscious carelessness but to insufficient knowledge concerning the treatment of such injuries from a surgical point of view. RR, the decision of which was not reversed, found that B. ought to have followed the case by making repeated thorough examinations and in any case when A. had seen him on the last occasion should have referred him to a hospital. For failing to do this B. was sentenced for negligent assault.

The holdings in these cases indicate that the *Übernahmegrundsatz* is important regarding the cases here in question.[84a]

In *State* v. *Heines,* (Supr. Ct. Fla. 1940) 197 So. 787, it was held: "If a person undertakes to cure those who search for health and who are, because of their plight, more or less susceptible of following the advice of any one who claims the knowledge and means to heal, he cannot escape the consequence of his gross ignorance of accepted and established remedies and methods for the treatment of diseases from which he knows his patients suffer and if his wrongful acts, positive or negative, reach the degree of grossness he will be answerable to the State."[85]

In this connection cases where a person, not being a licensed physician, assumes the tasks of a physician are often tried in the courts.

See *Comm.* v. *Pierce,*[86] *People* v. *Hunt,* 26 Cal. App. 514, 147 P. 476 (an osteopath performing an operation), *R.* v. *Senior,* 1 Moody C.C. 346, 168 Eng. Reprint 1298, *R.* v. *Rogers,* (1968) 65 W.W.R. 193; [1968] 4 C. C. C. 278 (an osteopath holding himself out to be a medical doctor), *Hardy* v. *Dahl,* (1936) 210 N. C. 530, 187 S. E. 788 (a person holding himself out to be a doctor of naturopathy) and *Kelly* v. *Carroll,* (1950) 36 Wash. 2d 482, 219 P. 2d 79 (a person who is apparently licensed as a drugless healer, but who does not have a license to practice medicine and surgery, is liable for malpractice when he sets himself up to act as a doctor, and is to be judged, with respect to those acts, as if he were a doctor.)[87]

The cases in issue from continental European systems do not as a rule differ in this respect. German cases of relevance are RG HRR 1938 Nr 187, RG St 64, 263 and RG St 67, 12. In the last case it was stated: "Mit der Übernahme der Heilbehandlung übernimmt . . . der nichtärztliche Heilbehandler ebenso wie der Artzt auch ohne besondere Erfolgszusicherung die Pflicht, in möglichst zuverlässigen Weise auf einen Heilerfolg hinzuarbeiten."

The Austrian case Österr. Rechtspr. 1910 No. 50 closely resembles the general pattern. Here OGH sentenced a woman for negligent homicide because in assisting at a confinement she had failed to tie the umbilical cord and to send for a doctor in time. The woman she was attending bled to death. The lower court had acquitted the accused and in so judging had taken into consideration her insufficient knowledge. OGH adheres in this decision to the *Übernahmegrundsatz* and states: "Denn sobald die A. (accused), wenn auch bloss in Ausnahmefällen, sich als Geburtshelferin verwenden liess, war sie auch verpflichtet, die hierfür notwendigen Kenntnisse sich anzueignen."[88]

6. If we expected to find reasonably firm rules concerning individual elements in the case law this chapter has thus far been a disappointment. The case law – meagre as it is – presents a picture of vagueness, uncertainty and, not infrequently, contradiction. As we have seen in the preceding chapters, this is not to be wondered at. The plain truth is that the courts are not working with adequate tools. Terms like, e. g., "due care" and

"reasonable man" are not suited to stress the real issue of the policy at stake. On the contrary, they tend to stand in the way of a sound theory.

The three-way approach recommended in this work will carry us a long way in the direction of such a theory. One of its merits is to give due weight to the conformity principle. As mentioned above, however, adherence to the principle cannot in modern society be without exception. Nevertheless there is in Western societies a certain trend which deserves particular attention, since it bears on the issue of the limitation on the conformity principle. This is the trend towards *integration of the disabled* into the "normal" life of the community. This trend is particularly noticeable, of course, in the more highly developed countries. It is therefore to be expected that the limitations on the conformity principle will diminish. In a community integrated in this sense the individual elements will receive increased attention.

[1] L. R. 2 C.C.R. 154 (1875). Prince was convicted under sec. 55 of the Offences Against the Person Act, 1861, which made it an offence unlawfully to take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the wish of her father or mother. The jury found that Prince honestly believed that the girl in question, though in reality fourteen years old, was eighteen. Prince was convicted despite the fact that his belief was deemed to be reasonable.

[2] See, concerning the case and the further development in English criminal law, *T. Brian Hogan,* Criminal Liability Without Fault, Cambridge 1969.

[3] [1965] 1 All E. R. 721.

[4] But see the case of *R.* v. *Ward,* [1965] 1 Q. B. 351; [1965] 1 All E. R. 565, a murder case, where the accused was of subnormal intelligence though not considered insane under the M'Naghten rules. The jury was instructed that it must ask itself whether the accused's acts were such that "he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child as a result of what he did". The summing up was, according to the Court of Criminal Appeal, unimpeachable. Lord Goddard, C. J., stated that "the test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would or would not contemplate".
This holding was upheld in the famous case of *D.P.P.* v. *Smith,* [1961] A. C. 290; [1960] 3 All E. R. 161. Later on, however, the case was repudiated as a precedent in England. See sec. 8 of the Criminal Justice Act of 1967. The decision in Smith met with severe criticism. On this matter see *Brett & Waller,* Criminal Law, 230–234. It was repudiated in, e. g., Australia. See

Parker v. *R.*, 111 C. L. R. 610, 1963 [A.L.R.] 524. The decision in Parker is also a radical step in the High Court's reappraisal of its own attitude to the decision of English courts. See in addition *Sir Garfield Barwick,* Precedent in the Southern Hemisphere, in 5 ISRAEL L. REV. 1, at 31–32.

[5] *R.* v. *Lamb,* [1967] 2 All E. R. 1282. But see the Canadian case *R.* v. *Coyne,* (1958) 31 C. R. 335; 124 C. C. C. 176.

[6] Cf. *R.* v. *Bateman,* (1925) 133 L. T. 730, where it was held that *mens rea* must be shown in order to convict for manslaughter by criminal negligence. See also *R.* v. *Markuss,* (1864) 4 F. and F. 356.

[7] Sec. 1. of the Road Traffic Act of 1960.

[8] Note, however, the famous decision in *Andrews* v. *D.P.P.,* [1937] A. C. 576, where it was held that the driver of a motor vehicle may be guilty of an offence under sec. 11. of the Road Traffic Act, 1930, although he is not guilty of manslaughter if he causes death by his dangerous driving. Cf. *People* v. *Dunleavy,* [1948] Irish Reports 95. Regarding the Andrews case see *supra* and *Brett,* Manslaughter and the Motorist, 27 AUSTR. L. J. 6, 89.

[9] [1962] 3 All E. R. 1086; [1963] 1 Q. B. 412; 47 Cr. App. R. 62. Cf. also *R.* v. *McBride,* [1962] 2 Q. B. 167.

[10] (1966), 50 Cr. App. R. 266.

[11] Cf. *R.* v. *Spurge,* [1961] 2 All E. R. 688.

[12] Sec. 3 (1) (careless driving) of the Road Traffic Act of 1960 is interpreted to imply an objective standard. The standard is considered to be the same for all motorists and no allowance is to be made for, e. g., a learner-driver on account of his inexperience. See *Simpson* v. *Peat,* [1952] 2 Q. B. 24; [1952] 1 All E. R. 447. In the case *McCrone* v. *Riding,* [1938] 1 All E. R. 157, it is held that the standard is objective, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience to be attained by the individual driver. As to Canadian case law see *Stapleton,* Dangerous Driving and *Mens Rea,* 16 M. N. B. L. J., 49, and *Hooper,* Dangerous Driving: What is Advertent Negligence? 10 CR. L. Q., 403.

[13] BGH DAR 1954, 17 No. 5.

[14] See *People* v. *Nelson,* (1955) 128 N. E. 2d 391.

[15] What I call individualizing elements.

[16] See also RG 39, 2 (5); 56, 343 (349); 58, 130 (234f).

[17] Cf. BGE 70 IV 29f.

[18] See *supra* and *Williams,* Criminal Law, 528–529.

[19] See *Williams,* Criminal Law, 529, *Gordon,* 228, *Moreland,* Negligence, 80, and *Moreland,* Homicide, 160.

[20] *Williams,* Criminal Law, 529.

[21] *Gordon,* 228.

[22] See for English criminal law *Hart,* Negligence, 154–155.

[23] *Breunig* v. *American Family Ins. Co.* (Supr. Ct. Wis. 1970) 173 N. W. 2d 619.

[24] See Restatement, Second, Torts § 283B and appendix.

[25] NJA 1956 C 332.

[26] Concerning the law of tort, see the American case *Johnson* v. *Lombotte,* (1961) 147 Colo. 203, 363 P. 2d 165. See in addition 41 Am. Jur. 2d 647. In *Criez* v. *Sunset Motor Co.,* (1923) 123 Wash. 604, 213 P. 7, the court said: "Our statutes are all-embracing, and prescribe certain fixed and positive

rules for the government of those who operate motor vehicles upon the public highways. These rules must be complied with by all, and want of mental capacity will excuse none. The plain intent of the law is that none shall operate upon the highways who are incapable of understanding and observing these rules, and the courts may not invite the mentally deficient to operate vehicles, capable of doing great damage when improperly handled, by fixing a rule which absolves from observation of the statutory mandate."

[27] A basic study of principle is to be found in *Hans Peter,* Die Psychiatrische Beurteilung von Motorfahrzeugführern. Bern and Stuttgart 1960. See also Den mänskliga faktorn i vägtrafiken. Trafiksymposium, SOU 1971:81.

[28] *Ross* v. *State,* (1962) 217 Ga. 569, 124 S. E. 2d 280; *Nail* v. *State,* (1959) 328 S. W. 2d 836, and *People* v. *Marquis,* (1931) 344 Ill. 261, 176 N. E. 314.

[29] See also 91 ALR 2d 393. Cf. Note, 31 KENTUCKY L. J. 80.

[30] 1925 S. C. J. 45, 1926 J. C. 45.

[31] But see the later case *H.M. Advocate* v. *Cunningham,* 1963 J.C. 80. See *Gordon,* 66ff. and 304.

[32] See *U. S.* v. *Cornell,* (1820) Fed. Cas. No. 14, 868.

[33] (1892) 96 Ala. 310, 11 So. 72. A tort case.

[34] (1911) CA 9 Wash., 190 F. 7.

[35] BGE 69 IV 228.

[36] Cf. RG JW 1928, 1505.

[37] NJA 1931 B 550 (Because of nervousness the driver had confused the accelerator with the brake pedal.) and NJA 1965 C 204 (Nervousness in a traffic situation due to unfamiliarity with lefthand traffic.)

[38] Rt 1951 p. 1028.

[39] On this case, see also *Andenæs,* Criminal Law, 224.

[39] This harsh and rigid approach in case law does not find support in modern writing. See, e. g., *Andersen,* 84–84, and *Nygaard,* 291.

[40] Cf. BGH VRS 5, 368.

[41] See also BGH St 17, 223, and BGH St 23, 378.

[42] See BGE 83 IV 84. "Es ist entschuldbar, wenn der Führer, der sich durch vorschriftswidriges Verhalten eines andern plötzlich in eine gefährliche Lage versetzt sieht, von verschiedenen möglichen Massnahmen nicht diejenige ergreift, welche bei nachträglicher Überlegung als die objektiv zweckmässigste erscheint." Cf. BGE 61 I 431, 63 I 59 and 66 I 320. See *Schultz,* Rechtsprechung, 35–38.

[43] See ZVR 1960 p. 57 No. 72, SZ XXIV 67, ZVR 1957 p. 153 No. 154, ZVR 1962 p. 132 No. 138, and ZVR 1963 p. 305 No. 313.

[44] See the civil cases *Tschirely* v. *Lambert,* (1912) 70 Wash 72, 126 P. 80, and *Massie* v. *Barker,* (1916) 113 N. E. 199, 224 Mass. 420.

[45] Cf. the Austrian case OGH SSt XVI (1936) No. 82.

[46] Cf. NJA 1962 C 226.

[47] See *Schönke-Schröder,* 554, and for the civil law *Sattler.*

[48] It is obvious that this division into subgroups of physical defects may very well be questioned. The groups cannot be distinctly separated from one another in every situation. As will be seen, however, the case material makes it natural to make this distinction.

[49] In tort law the picture is somewhat different. Most of the relevant cases here deal with contributory negligence. Cases where the physical characteristics are at issue are confined almost exclusively to situations where the defendant has lost control of a vehicle through an acute illness or disability.
[50] Cf. NJA 1965 C 1116, *People* v. *Okada,* (1936) 14 Cal. App. 2d 660, 58 P. 2d 967. and *Roberts* v. *Ring,* (1919) 143 Minn. 151, 173 N. W. 437, where it is said that the defendant's infirmities did not tend to relieve him from the charge of negligence. On the contrary, they weighed against him. Such infirmities, to the extent that they were proper to be considered at all, presented only a reason why the defendant should refrain from operating and automobile on a crowded street where care was required in order to avoid injuring other travellers.
[51] In the same direction *Karl* v. *Juniata County,* (1903) 206 Pa. 633, 637, 56 A. 78, where the following charge was upheld: "That if the jury believe from the evidence that the eyesight of John Karl, the plaintiff, was impaired on the night of the accident, the law required a degree of care upon his part beyond the usual and ordinary, proportioned to the degree of his impairment of vision." See also *Carroll* v. *Chicago B. & Q. R. R.,* (1900) Ill. App. 195 and *Armstrong* v. *Warner Bros Theatres Inc.,* (1947) 161 Pa. Super. 285, 54 A. 2d 831.
[52] See also *Florida Central & P. R. Co.* v. *Williams,* (1896) 37 Fla. 406, 20 So. 558, *Balcolm* v. *City of Independence,* (1916) 178 Iowa 685, 160 N. W. 305, *Weinstein* v. *Wheeler,* (1932) 141 Or. 246, 15 P. 2d 383, *Jones* v. *Bayley,* (1942) 49 Cal. App. 2d 567, 122 P. 2d 293, *Trumbley* v. *Moore,* (1949) 151 Neb. 780, 39 N. W. 2d 613, *Cook* v. *City of Winston-Salem,* (1954) 241 N. C. 422, 85 S. E. 2d 696 and *Ango* v. *Goodstein,* (1970) 438 Pa. 468, 265 A. 2d 783.
[53] See also *Campbell* v. *Walker,* (1910, Del.) 1 Boyce 580, 76 A. 475, *Steen* v. *Hunt,* (1943) 234 Iowa 38, 11 N. W. 2d 690, *Moses* v. *Scott Paper Co.,* (DC Ma) 280 F. Supp. 37, *Carman* v. *Harrison,* (Neb.) 362 F. 2d 694, *Hardy* v. *New Orleans Public Service,* (1929) 120 So. 271, 10 La. App. 72, *Schulte* v. *Railroad Co.,* 44 La. Ann. 509, 10 So. 811, and *Richie* v. *Elmquist,* (Supr. Ct. Minn. 1969) 168 N. W. 2d 332.
[54] See *Armstrong* v. *Day,* (1930) 103 Cal. App. 465, 284 P. 1083, *T. P. & W. Ry. Co.* v. *Hammett,* (1906) 220 Ill. 9, 77 N. E. 72 (deafness), *Dillenschneider* v. *Campbell,* (Mo. App.) 350 S. W. 2d 260 (impaired hearing), *Mahan* v. *State,* (1937) 172 Md 373, 191 A. 575 and, *Singletary* v. *Atlantic Coast Line R. Co.,* (1950) 217 S. C. 212, 60 S. E. 2d 305. (short stature).
[55] See *Tucker* v. *Ragland-Potter Co.,* (1941) 285 Ky. 533, 148 S. W. 2d 691.
[56] *Freas* v. *Campbell,* (1943, Pa) 48 Lanc. L. Rev. 464, *Bull* v. *Drew,* 286 App. Div. 1138, 146 N. Y. S. 2d 85, *Tomey* v. *Dyson,* (1946) 172 P. 2d 739, 76 Cal. App. 2d 212, and *McCollough* v. *Lalumiere,* (Ma 1960) 166 A. 2d 702.
[57] *Dianchetti* v. *Luce,* (1928) 222 Mo. App. 282, 2 S. W. 2d 129. Cf. *Goodman* v. *Norwalk Jewish Center Inc.,* (1958) 145 Conn. 146, 139 A. 2d 812.
[58] *Genovese* v. *Daigle,* (1944, La App.) 17 So. 2d 736 (torticollis) *Crunkilton* v. *Hook,* (1945) 42 A. 2d 517, 185 Md. 1, *Texas & N. O. R. Co.*

v. *Bean,* (1909) 55 Tex. Civ. App. 341, 119 S. W. 328, and *Wray* v. *Fairfield Amusement Co.,* (1940) 126 Conn. 221, 10 A. 2d 600. See generally Note 34 N. C. L. REV. 142 and 17 U. DET. L. J. 105.

59 See *People* v. *Williams,* (1946) 187 Misc. 299, 61 N. Y. S. 2d 252 (infantile paralysis resulting in incomplete mobility.).

60 *Bell* v. *Commonwealth,* (1938) 170 Va 597, 195 S. E. 675, U 1950 p. 360, *Jørgensen,* 227 and *Nygaard,* 287–288.

61 That the case has commonly been regarded as taking the physical defect into consideration is probably due to the fact that a prominent member of HD (not, however, one of the justices who decided the case) has stated in a paper that the tortfeasor's "deafness was considered to exclude negligence". See TfR 1950 p. 291f.

62 *Jareborg,* Uppsåt, 156–157.

63 52 Ont. L. 95 [1923] 3 D L R 156, 11 B R C 1036. Cf. *Cohen* v. *Petty,* (1933) 65 F. 2d 820.

64 See the German cases BGH VRS 5, 374, 375; 7, 181, 182; 14, 441. Cf. RG 60, 29, and *Bockelmann,* 199.

65 For further Anglo-American cases in tort and criminal law, see 28 ALR 2d 35 and 63 ALR 2d 983.

66 We may here find a large number of cases. See, e. g., *Freifield* v. *Hennessy,* (C.A. Pa 1965) 353 F. 2d 97, *Caron* v. *Guiliano,* (Conn. Super. 1965) 211 A. 2d 705, *People* v. *Decina,* (1956) 2 N. Y. 2d 133, 157 N. Y. S. 2d 558, 138 N. E. 2d 799, 63 ALR 2d 970, Rt 1933 p. 1134, NJA 1960 p. 430 and SvJT 1968 rf p. 52. Cf. the English cases *Hill* v. *Baxter,* (1958) 1 Q. B. 277, (1958) 1 All E. R. 193, *R.* v. *Sibbles,* (1959) CRIM. L. REV. 660 and *R.* v. *Spurge,* (1961) 2 Q. B. 205.

67 See *Hart,* Acts of Will and Responsibility, 112. (In Punishment and Responsibility, 90–112.)

68 A great many cases are reported. As to criminal law, see *Tift* v. *State,* (1916) 17 Ga. App. 663, 88 S. E. 41, *State* v. *Gooze,* (1951) 14 N. J. Super 277, 81 A. 2d 811, *People* v. *Freeman,* (1943) 61 Cal. App. 2d 110, 142 P. 2d 435, *Virgin Islands* v. *Smith,* (1960) 278 F. 2d 169, and further cases cited in 63 ALR 2d 983. In the tort case *Jackson* v. *CO-OP Cab Company,* 102 Ga. App. 688, 117 S. E. 2d 627 the reasoning in *Tift* was followed. See further Note, 13 N. Y. L. Q. REV. 126, Note, 1940 WIS. L. REV. 334, Note, 1 BAYLOR L. REV. 499, Note, 15 TEXAS L. REV. 387, Note, 30 KY. L. J. 220, and Note, 19 AUSTR. L. J. 191, See also *Kraig.* See also Rt 1963 s. 622 and *Nygaard,* 117 and 287.

69 See the Austrian case ZVR 1967 p. 133 No. 125.

69a See Skattebrotten, 181–182 and cases there cited.

70 *Com.* v. *Green,* (1959) 396 Pa. 137, 151 A. 2d 241 holds that a child under the age of 7 is conclusively incapable of committing a crime. A child between the ages of 7 and 14 is presumed incapable of committing a crime, but such presumption is subject to refutation by evidence that the child possessed criminal capacity. A child over 14 is *prima facie* capable of committing a crime. Thus in the case *People* v. *Squazza,* (1903) 81 N. Y. S. 254, the court held that a boy of 11 cannot be convicted of manslaughter in the second degree for having thrown a brick from a roof, killing a person below, without affirmative proof that he had the capacity to understand the

nature and quality of the act and knew that it was wrong. See also *Watson* v. *Com.*, (1933) 247 Ky. 336, 57 S. W. 2d 39.

[71] In NJA 1961 C 598 no allowance was made for old age in a similar case.

[72] See also SvJT 1971 rf. p. 49.

[73] NJA 1960 C 1095, SvJT 1954 rf. p. 14, and the Danish cases U 1963 p. 621, (A 16 year old moped driver. His age was not taken into consideration in the negligence judgment but was in determining the sanction.), U 1971 p. 155, and U 1972 p. 690.

[74] See Note, 79 U. PA. L. REV. 1153 and for further cases 174 ALR 1080 and 67 ALR 2d 570.

[75] See *Lehmuth* v. *Long Beach Unified School District,* (1962) 2 Cal. 279, 348 P. 2d 887, *Sams* v. *Pacific Indemn. Co.,* (D. C. Ark. 1959) 170 F. Supp. 909, *Schmatovich* v. *New Sonoma Creamery,* (Cal. App. 1960) 9 Cal. 630, and *McCain* v. *Bankers Life and Casualty Co.,* (Fla. App. 1959) 110 So. 2d 718.

[76] (1931) 84 N. H. 501, 153 A. 457, 73 ALR 1266.

[77] (1961) 159 Minn. 452, 107 N. W. 2d 859, 97 ALR 2d 866. See also *Baxter* v. *Fugett,* (Okl. 1967) 425 P. 2d 462, *Renegar* v. *Cramer,* (Texas 1962) 354 S. W. 2d 663, *Dawson* v. *Hoffmann,* (1963) 43 Ill. App. 2d 17, 192 N. E. 2d 695, *Neudeck* v. *Bransten,* (1965) 43 Cal. Rptr. 250, and *McWethy* v. *Lee,* (1971) 1 Ill. App. 3d 80, 272 N. E. 2d 663. See also *Galiher,* Note, 1962 DUKE L. J. 1938, Note, 24 OHIO STATE L. J. 401, Note, 24 ARK. L. REV. 379, Note, 46 NEBR. L. REV. 669, and Note, 25 ILL. L. REV. 214.

[78] See NJA 1948 p. 346, 1949 p. 171 and 1972 p. 397. For further cases see Brottsbalken III, 646ff.

[79] Cf. the above-mentioned case NJA 1957 C 813. As to tort law, the case NJA 1949 p. 171 may be mentioned. In this case HD, in the negligence evaluation, regarded the lack of experience on the part of a driver as an "aggravating" circumstance.

[80] Cf. *Opecello* v. *Meads,* (1926) 135 A. 488, 152 Md. 29, *Serratoni* v. *Chesapeake and Ohio Railway Co.,* (C.A. Mich. 1964) 333 F. 2d 621, and *Jones* v. *Dague,* (S. C. 1969) 166 S. E. 2d 99. Cf. Rt 1955 p. 771 and *Nygaard,* 286.

[80a] Clear statements of adherence to the Übernahmegrundsatz will be found in negligence cases involving air pilots. See *Boise Payette Lumber Co.* v. *Laren,* (9th Cir. 1954) 214 F. 2d 373, *In re Hayden's Estate* (1953) 174 Kan. 140, 254 P. 2d 813, *In re Kinsey's Estate,* (1949) 152 Neb. 95, 40 N. W. 2d 526, *Vee Bar Airport* v. *De Vries,* (1950) 73 S. D. 356, 43 N. W. 2d 396, and *Webb* v. *Zurich Ins. Co.,* (1967) 251 La. 558, 205 So. 2d 398. Cf. Note, 33 TEXAS L. REV. 1101 and Note, 39 CAN. B. REV. 104.

[81] OGH SSt XVI (1936) No. 82.

[82] Cf. BGE 80 IV 49 (d).

[83] In the same direction is NJA 1958 C 192 where a nurse who administered anaesthetics in a case concerning negligent homicide claimed that she had received an inadequate training regarding anaesthetics. No allowance for this deficiency in her training was made in the negligence judgment. The case should be compared with a Danish case, U 1963 p. 694, in which a head nurse of an X-ray department was charged for negligent

assault because in wrongly adjusting an X-ray unit she had caused considerable injury to a patient. She was acquitted on the ground that she when she took over the work in question she had not received sufficient instruction.

[84] Cf. *State* v. *Lester,* (1914) 127 Minn. 282, 149 N. W. 297.

[84a] But see the Norwegian tort case Rt 1919 p. 1 where insufficient knowledge in psychiatry was considered as an excusing circumstance for a doctor in a rural district. At the time of the doctor's medical studies psychiatry was, relatively speaking, a neglected subject.

In a more recent Norwegian case, Rt 1962 p. 994, also concerning a medical doctor, the lack of surgical training was not considered an excuse. See, on this case, *Nygaard,* 285–286. Cf. also Rt 1964 p. 966, and *Nygaard,* 145, 286.

[85] Referred to in the preceding chapter.

[86] But see *State* v. *Schulz,* 55 Iowa 628, 8 N. W. 469, and *Com.* v. *Thompson,* 6 Mass. 134.

[87] See comments on this case by Löffler in Österr. Rechtspr. 1910 p. 116.

LITERATURE CITED

Abbagnano — Nicola Abbagnano, Judgements of Responsibility in Ethics and in Law. In 11 Revue Internationale de Philosophie 33.

Abrahamsson — [P. Abrahamsson], Swerikes Rijkes Lands=Lag. Nu ånyo andra gången med Anmärckningar uplagd. Stockholm 1726.

Agge I — Ivar Agge, Straffrättens allmänna del. Föreläsningar. Första häftet. Stockholm 1959. (IFRF XXII).

Agge II — Ivar Agge, Straffrättens allmänna del. Föreläsningar. Andra häftet. Stockholm 1961. (IFRF XXX).

Agge-Thornstedt — Ivar Agge and Hans Thornstedt, Straffrättens allmänna del. Stockholm 1973.

v. Almendingen — H. L. von Almendingen, Untersuchung über das culpose Verbrechen. (Juristische und staatswissenschaftliche Schriften. 2. Band.) Giessen 1804.

Kjerschow — Almindelig Borgerlig Straffelov av 22. Mai 1902 . . . utgitt med kommentar av P. Kjerschow. Oslo 1930.

Alternativ-Entwurf — Alternativ-Entwurf eines Strafgesetzbuches. A. T. 2. verbesserte Auflage. Vorgelegt von Jürgen Baumann and others. Tübingen 1969.

v. Amira Grundriss — Karl von Amira, Grundriss des germanischen Rechts. Grundriss der germanischen Philologie. 3. Aufl. Strassburg 1913.

v. Amira Obligationsrecht — Karl von Amira, Nordgermanisches Obligationsrecht. Erster Band. Altschwedisches Obligationsrecht. Leipzig 1882.

Andenæs Strafferett — Johs. Andenæs, Alminnelig strafferett. 2. rev. utg. Oslo-Bergen-Tromsø 1974.

Andenæs — Johs. Andenæs, Negligent Homicide in

Negligent Homicide	Some European Countries – A Comparative Study. In Crime and Culture. Essays in Honor of Thorsten Sellin 221. Marvin E. Wolfgang, ed. New York 1968.
Andenæs Lovlydighet	Johs. Andenæs, Straff og lovlydighet. Trondhjem 1974.
Andenæs Formål	Johs. Andenæs, Straffens formål. In Avhandlinger og foredrag 69. Oslo 1962.
Andenæs Criminal law	Johs. Andenæs, The General Part of the Criminal Law of Norway. Translated by Thomas P. Ogle. New York 1965.
Andenæs-Hauge	Johs. Andenæs and Ragnar Hauge, Uaktsomt drap i de nordiske land. Oslo 1965.
Andenæs-Hauge Uaktsomt drap	Johs. Andenæs and Ragnar Hauge, Uaktsomt drap. In NTfK 1966 p. 1.
Andersen	Kristen Andersen, Skadeforvoldelse og erstatning. Oslo 1970.
Anners Europas rättshistoria	Erik Anners, Europas rättshistoria. Några huvudlinjer. Del I. Stockholm 1971.
Anners Straffteorierna	Erik Anners, Straffteorierna i svensk rättshistoria. In SvJT 1964 p. 241.
Anners Straffrättshistoria	Erik Anners, Svensk straffrättshistoria. 2. omarbetade upplagan. Stockholm 1973.
Antell	Herman Antell, Om dråpsbrotten. [I] Enligt attisk och romersk rätt. Lund 1894.
Armstrong	K. G. Armstrong, The Retributivist Hits Back. In LXX (1961) Mind 471.
Austin	John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law. Vol. I. Fifth ed., revised and edited by Robert Campbell. London 1911.
v. Bar History	Carl Ludwig von Bar, A History of Continental Criminal Law. The Continental Legal History Series. Vol. VI. London 1916.
v. Bar Schuld	Carl Ludwig von Bar, Gesetz und Schuld im Strafrecht. Band 2. Die Schuld im Strafrecht. Berlin 1907.

Baumann — Jürgen Baumann, Strafrecht. A. T. Ein Lehrbuch. 5. neubearbeitete Auflage. Bielefeld 1968.

Beck — A. Beck, Das Unrechtsbewusstsein in den deutschen Strafgesetzentwürfen. Breslau 1927.

Beckman Barn — Nils Beckman, Barns skadeståndsskyldighet. Försäkringsjuridiska föreningens publikation nr 7. Stockholm 1950.

Beckman Skadestånd — Nils Beckman, Barns skadeståndsskyldighet enligt svensk rätt. In TfR 1950 p. 273.

Bentham — J. Bentham, An Introduction to the Principles of Morals and Legislation. Ed. by J. H. Burns and H. L. A. Hart. London 1970.

Bergendal — Ragnar Bergendal, Lärobok i rättskunskap för blivande landsfiskaler. III. Straffrätt. Andra omarbetade och tillökade upplagan. Lund 1928.

Beschütz — Julius Beschütz, Die Fahrlässigkeit innerhalb der geschichtlichen Entwicklung der Schuldlehre. Teil I. Vom primitiven Strafrecht bis zur peinlichen Gerichtsordnung Karls V. (Strafrechtliche Abhandlungen, Heft 76.) Breslau 1907.

Binavince Fahrlässigkeit — Emilio S. Binavince, Die vier Momente der Fahrlässigkeitsdelikte. Bielefeld 1969.

Binavince Foundation — Emilio S. Binavince, The Ethical Foundation of Criminal Liability. In 33 FORDHAM L. REV. 1.

Binavince Negligence — Emilio S. Binavince, The Theory of Negligent Offenses in the Anglo-American Criminal Law. In 38 PHIL. L. J. 428.

Binding Grundriss — Karl Binding, Grundriss des Deutschen Strafrechts. A. T. Achte, mit siebten gleichlautende Auflage. Leipzig 1913.

Binding Normen — Karl Binding, Die Normen und ihre Übertretung. Eine Untersuchung über die rechtmässige Handlung und die Arten des De-

likts. Zweiter Band. Häfte 2 (II, 2): Der rechtswidrige Vorsatz. 2. Auflage. Leipzig 1916. Vierter Band. (IV) Die Fahrlässigkeit. Leipzig 1919.

Binding Vermutungen — Karl Binding, Rechtsvergleichende Vermutungen zu membrum ruptum, os fractum und iniuria der Lex XII Tabulorum. In ZSR, Romanistische Abteilung. Band 40 p. 106.

v. Birkmeyer — Karl von Birkmeyer, Schuld und Gefährlichkeit in ihrer Bedeutung für die Strafbemessung. Kritische Beiträge zur Strafrechtsreform. Heft 16. Leipzig 1914.

Bockelmann — Paul Bockelmann, Verkehrsstrafrechtliche Aufsätze und Vorträge. Schriftenreihe der Deutschen Akademie für Verkehrswissenschaft. Band 4. Hamburg 1967.

Bokelmann — Erika Bokelmann, Grobe Fahrlässigkeit. Ein Beitrag insbesondere zu Individualisierungstendenzen im Haftungs- und Regressrecht. Karlsruhe 1973.

Borum — O. A. Borum, Personretten. 4. Oplag. København 1963.

Brett — Peter Brett, An Inquiry into Criminal Guilt. London 1963.

Brottsbalken I — Brottsbalken jämte förklaringar. Utgiven av Nils Beckman m. fl. Band I. Brotten mot person och förmögenhetsbrotten m. m. Fjärde upplagan. Stockholm 1974.

Brottsbalken III — Brottsbalken jämte förklaringar. Utgiven av Nils Beckman m. fl. Band III. Påföljder m. m. Andra upplagan. Stockholm 1971.

Bruck — Felix Friedrich Bruck, Zur Lehre von der Fahrlässigkeit im heutigen deutschen Strafrecht. Breslau 1885.

Brunnenmeister Tödtungsverbrechen — Emil Brunnenmeister, Das Tödtungsverbrechen im altrömischen Recht. Leipzig. 1887.

Brunnenmeister Bambergensis — Emil Brunnenmeister, Die Quellen der Bambergensis. Ein Beitrag zur Geschichte des deutschen Strafrechts. Leipzig 1879.

Brunner Antwort — Heinrich Brunner, Antwort auf Fragen zur Rechtsvergleichung, gestellt von Th. Mommsen. In Zum ältesten Strafrecht der Kulturvölker p. 53. Leipzig 1905.

Brunner Rechtsgeschichte — Heinrich Brunner, Deutsche Rechtsgeschichte. Erster Band Zweite Auflage. (Systematisches Handbuch der deutschen Rechtswissenschaft. Zweite Abteilung, erter Teil, erster Band.) Leipzig 1906.

Bruns — Carl Georg Bruns, Fontes iuris Romani antiqui, Pars prior (I): Leges et negotia. Pars posterior (II): Scriptores. 7. Auflage von Otto Gradenwitz. Tübingen 1909.

Bustos — Juan Bustos, Finalität, Fahrlässiges Begehungsdelikt und Chilenisches Strafgesetzbuch. Bonn 1966.

v. Caemmerer — Ernst von Caemmerer, Wandlungen des Deliktsrechts. I DJT-Festschrift. Band II. Karlsruhe 1960 p. 49.

Carpzov — B. Carpzov, Practica nova imperialis Saxonica rerum criminalium. In partes III diuisa. Wittebergae 1652.

Charlesworth — Charlesworth on Negligence. Fifth ed. by R. A. Percy. (The Common Law Library No. 6.)

Caspari — J. T. Caspari, Formen und Grenzen strafbarer Fahrlässigkeit im amerikanischen Recht. Freiburg 1972.

Collings — Rex A. Collings, Negligent Murder – Some Stateside Footnotes to Director of Public Prosecutions v. Smith. In 49 CALIF. L. REV. 254.

Conrad — Hermann Conrad, Deutsche Rechtsgeschichte. Band 1: Frühzeit und Mittelalter. 2. Auflage. Karlsruhe 1962.

Conradi — Erland Conradi, Skadeståndsrätten och verkligheten. In SvJT 1969 p. 316.

Cross & Jones — Rupert Cross & Philip Asterley Jones, An Introduction to Criminal Law. Seventh edition. London 1972.

Dahm — Georg Dahm, Das Strafrecht Italiens im ausgehenden Mittelalter. Untersuchungen über die Beziehungen zwischen Theorie und Praxis im Strafrecht des Spätmittelalters, namentlich im XIV. Jahrhundert. Berlin & Leipzig 1931.

Danish Criminal Code — The Danish Criminal Code. Translated by Else Giersing. With an Introduction by Dr. Knud Waaben. Copenhagen 1958.

Davis — John L. Davis, The Development of Negligence as a Basis for Liability in Criminal Homicide Cases. In 26 KY. L. J. 209.

Deutsch — E. Deutsch, Fahrlässigkeit und erforderliche Sorgfalt. Eine privatrechtliche Untersuchung. Köln-Braunsfeld 1963.

Dreher — Eduard Dreher, Introduction. See The German Draft Penal Code.

Dubin — Gary V. Dubin, *Mens Rea* Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility. In 18 STANFORD L. REV. 322.

Dubs — Hans Dubs, Die Fahrlässigen Delikte im modernen Strafrecht. In SchZSt 1962, p. 31.

Düll — Rudolf Düll, Das Zwölftafelgesetz. Texte. Übersetzungen und Erläuterungen. 2. Aufl. München 1953.

Eckhardt Sachsenspiegel — Karl August Eckhardt, Sachsenspiegel, Landrecht, Land- und Lehnrechtsbücher, Germanenrechte. Neue Folge. Göttingen 1955.

Eckhardt Schwabenspiegel — Karl August Eckhardt, Schwabenspiegel. Kurzform I: Erster Landrechtsteil. Land-

und Lehnrechtsbücher. Germanenrechte. Neue Folge. Frankfurt 1960.

Edgerton — Henry W. Edgerton, Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence. In 39 HARV. L. REV. 849.

Edwards — J. Ll. J. Edwards, *Mens Rea* in Statutory Offences. London 1955.

Engelmann — Woldemar Engelmann, Die Schuldlehre der Postglossatoren und ihre Fortenwicklung. Leipzig 1895.

Engisch Unrechtstatbestand — Karl Engisch, Der Unrechtstatbestand im Strafrecht. Eine kritische Betrachtung zum heutigen Stand der Lehre von der Rechtswidrigkeit im Strafrecht. In DJT – Festschrift. Band I. Karlsruhe 1960, p. 401.

Engisch Konkretisierung — Karl Engisch, Die Idee der Konkretisierung in Recht und Rechtswissenschaft unserer Zeit. 2. Auflage. Heidelberg 1968.

Engisch Untersuchungen — Karl Engisch, Untersuchungen über Vorsatz und Fahrlässigkeit im Strafrecht. Neudruck der Ausgabe Berlin 1930. Aalen 1964.

Entwurf 1962 — Entwurf eines Strafgesetzbuches (StGB). E 1962 (mit Begründung). Bundestagsvorlage. [Bonn 1962].

Eppstein — A. L. Eppstein, The Reasonable Man Revisited: Some Problems in the Anthropology of Law. In 7 LAW & SOC. REV. 643.

Erenius — Gillis Erenius, Oaktsamhet. Studier i straffrätt. Stockholm 1971.

Exner — Franz Exner, Das Wesen der Fahrlässigkeit. Eine strafrechtliche Untersuchung. Leipzig & Wien 1910.

Feuerbach Anti-Hobbes — Paul Johann Anselm von Feuerbach, Anti-Hobbes oder über die Grenzen der

höchsten Gewalt und das Zwangsrecht der Bürger gegen den Oberherrn. I. Erfurt 1798.

Feuerbach Dolus und culpa — Paul Johann Anselm von Feuerbach, Betrachtungen ueber dolus und culpa ueberhaupt und den dolus indirectus insbesondere. In Bibliothek fuer die peinliche Rechtswissenschaft und Gesetzkunde. Band 2. Stueck. 1. Lit. A. Ziff. V. S. 193. Göttingen 1800.

Feuerbach – Mittermaier — Paul Johann Anselm von Feuerbach und C. J. A. Mittermaier, Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts. 9. Auflage. Giessen 1826. 14. Auflage. Giessen 1847.

Fine & Cohen — Robert P. Fine and Gary M. Cohen, Is Criminal Negligence a Defensible Basis for Penal Liability? In 16 BUFFALO L. REV. 749.

Fletcher Tort — George P. Fletcher, Fairness and Utility in Tort Theory. In 85 HARV. L. REV. 537.

Fletcher Negligence — George P. Fletcher, The Theory of Criminal Negligence: A Comparative Analysis. In 119 U. PA. L. REV. 401.

Fopp — Elisabeth Fopp, Die Straftaten des alten Menschen. Bern 1969.

Forsman — Jaakko Forsman, Bidrag till läran om skadestånd i brottmål enligt finsk rätt. Helsingfors 1893.

Freund — Ludwig Freund, Responsibility – Definitions, Distinctions, and Applications in Various Contexts. In Responsibility. Nomos III. New York 1960.

Frey — Erwin R. Frey, Reobjektivierung des Strafrechts im Zeitalter der Technik unter besonderer Berücksichtigung des Verkehrsstrafrechts. In Die Rechtsordnung im technischen Zeitalter. Festschrift . . . zum Zen-

tenarium des Schweizerischen Juristenvereins 1861–1961. Zurich 1961, p. 269.

Fuller — Lon L. Fuller, The Morality of Law, Revised edition. New Haven and London 1969.

Förslag till Allmän Criminallag — Förslag till Allmän Criminallag. Andra upplagan, med de förändringar, hwilka Lag-Commiteen wid slutlig granskning af Förslaget infört. Stockholm 1839.

Förslag till Brottsbalk — Förslag till Brottsbalk. Avgivet av straffrättskommittén. Stockholm 1953. SOU 1953:14.

Förslag till strafflag — Förslag till strafflag. Allmänna delen . . . jämte motiv, avgivna av Strafflagskommissionen. Stockholm 1923. SOU 1923:9.

Galiher — Richard W. Galiher, Degree of Care Required of Minors While Performing Adult Tasks. In 17 DEFENSE L. J. 657.

Gallas — Wilhelm Gallas, Zum gegenwärtigen Stand der Lehre vom Verbrechen. In ZStW 67, 1.

German Draft Penal Code — The German Draft Penal Code. E 1962. Translated by Neville Ross. With an introduction by Dr. Eduard Dreher. The American Series of Foreign Penal Codes no. 11. London 1966.

German Penal Code — The German Penal Code. Translated by Gerhard O. W. Mueller and Thomas Buergenthal. With an introduction by Dr. Horst Schröder. The American Series of Foreign Penal Code no. 4. London 1961.

Gessner — Carlo Gessner, Die bewusste Fahrlässigkeit. Saarbrücken 1959.

Goldschmidt — Verner Goldschmidt, Den grønlandske kriminallov og dens sociologiske baggrund. In NTfK 1954 p. 133 and 242.

Gomard — Bernhard Gomard, Forholdet mellem erstatningsregler i og uden for kontraktsforhold. København 1958.

Gordon — Gerald H. Gordon, The Criminal Law of Scotland. Edinburgh 1967.

Edward Green — Edward Green, The Reasonable Man. Legal Fiction or Psychosocial Reality? In 2 LAW & SOC. REV. 241.

Leon Green — Leon Green, The Negligence Issue. In 37 YALE L. J. 1029.

Green & Smith — Leon Green & Allen E. Smith, Negligence Law, No-Fault, and Jury Trial – I. In 50 TEXAS L. REV. 1093.

Griffiths — John Griffiths, Review. The Limits of Criminal Law Scolarship. In 79 YALE L. J. 1388.

Grünhut — Max Grünhut, Anselm v. Feuerbach und das Problem der strafrechtlichen Zurechnung. Hamburgische Schriften zur gesamten Strafrechtswissenschaft. Heft 3. Hamburg 1922.

Grünwald — Gerald Grünwald, Heilbehandlung und ärtztliche Aufklärungspflicht. In Artzt und Recht. Medizinisch-juristische Grenzprobleme unserer Zeit, p. 125. Herausgegeben von Hans Göppinger. München 1966.

Grönfors Subjektive Recht — Kurt Grönfors, Das subjektive Recht und der Persönlichkeitsschutz im skandinavischen Privatrecht. In Helmut Coing, Frederick H. Lawson und Kurt Grönfors, Das subjektive Recht und der Rechtsschutz der Persönlichkeit. Frankfurt/M. – Berlin 1959.

Grönfors Trafikskadeansvar — Kurt Grönfors, Om trafikskadeansvar utanför kontraktsförhållanden. Studier över skadeståndsproblem vid trafik till lands till sjöss och i luften. Uppsala 1952.

Gössel — Karl-Heinz Gössel, Wertungsprobleme des Begriffs der finalen Handlung unter besonderer Berücksichtigung der Struktur

des menschlichen Verhaltens. Schriften zum Strafrecht. Band 5. Berlin 1966.

Hafter — Ernst Hafter, Lehrbuch des schweizerischen Strafrechts. A. T. Zweite, neu bearbeitete Auflage. Bern 1946.

Hagerup — Francis Hagerup, Strafferettens Almindelige Del. Anden utgave. Oslo 1928.

Hagströmer — Johan Hagströmer, Svensk straffrätt. Föreläsningar. Första Bandet. Uppsala 1901–1905.

Jerome Hall Criminal Law — Jerome Hall, General Principles of Criminal Law. Second edition. Indianapolis 1960.

Jerome Hall Negligent behavior — Jerome Hall, Negligent Behavior Should Be Excluded From Penal Liability. In 63 COLUM. L. REV. 632.

Karl Alfred Hall — Karl Alfred Hall, Fahrlässigkeit im Vorsatz. Marburger Rechts- und Staatswissenschaftliche Abhandlungen. Reihe A. Rechtswissenschaftliche Abhandlungen. Band 1. Marburg 1959.

Livingston Hall — Livingston Hall, Assault and Battery by the Reckless Motorist. In 31 J. CRIM. L. C. & P. S. 133.

Hardwig — Werner Hardwig, Die Zurechnung. Ein Zentralproblem des Strafrechts. Hamburg 1957.

Harper & James — Fowler V. Harper and Fleming James Jr, The Law of Torts. Volume 2. Boston, Toronto 1956. Supplement to Volume 2. Boston, Toronto 1968.

Henry Hart — Henry M. Hart Jr, The Aims of the Criminal Law. In 23 Law and Contemporary Problems 401.

Hart Ascription — H. L. A. Hart, The Ascription of Responsibility and Rights. In Proceedings of the Aristotelian Society 1948–49 p. 171. Reprinted in "Logic and Language" (First

Series). Ed. with an Introduction by Antony Flew. Oxford 1951, p. 145.

Hart Intention — H. L. A. Hart, Intention and Punishment. In Punishment and Responsibility, 113–135.

Hart Excuses — H. L. A. Hart, Legal Responsibility and Excuses. In Punishment and Responsibility, 28–53. First Published in Determinism and Freedom, 95. Ed. by Sidney Hook. New York 1961.

Hart Morality — H. L. A. Hart, The Morality of the Criminal Law. Two lectures. Jerusalem-London 1965.

Hart Negligence — H. L. A. Hart, Negligence, *Mens Rea* and Criminal Responsibility. In Punishment and Responsibility, 136–157. First published in Oxford Essays in Jurisprudence. A Collaborative Work edited by A. G. Guest. Oxford 1961.

Hart Prolegomenon — H. L. A. Hart, Prolegomenon to the Principles of Punishment. In Punishment and Responsibility, 1–27.

Hart Elimination — H. L. A. Hart, Punishment and the Elimination of Responsibility. In Punishment and Responsibility, 158–185.

Hart Responsibility — H. L. A. Hart, Responsibility and Retribution. In Punishment and Responsibility, 210–237.

Hasselberg — Gösta Hasselberg, Studier rörande Visby stadslag och dess källor. Uppsala 1953.

Hellner Anteckningar — Jan Hellner, Några anteckningar om juridik och filosofi. In SvJT 1965 p. 1.

Hellner Culpabegreppet — Jan Hellner, Några synpunkter på culpabegreppet inom skadeståndsrätten. In SvJT 1953 p. 609.

Hellner Skadeståndsrätt — Jan Hellner, Skadeståndsrätt. Andra upplagan. Stockholm 1973.

Hemmer — Ragnar Hemmer, Om vådaverkan i den

Vådaverken	svenska landskapsrätten. In Rättshistoriska studier. Andra bandet. Skrifter utgivna av Institutet för rättshistorisk forskning. Serien II, p. 26. Stockholm 1957.
Hemmer Straffutmätningen	Ragnar Hemmer, Studier rörande straffutmätningen i medeltida svensk rätt. Helsingfors 1928.
Hemmer Dalalagen	Ragnar Hemmer, Yngre straff- och processrättsliga stadganden i Dalalagen. In JFFT 1969 p. 29.
Hepp	Ferdinand Carl Theodor Hepp, Kritische Darstellung der Strafrechts-Theorien nebst einem Versuch über die Möglichkeit einer Strafrechtlichen Theorie überhaupt. Heidelberg 1829.
Himmelreich	Klaus Himmelreich, Notwehr und unbewusste Fahrlässigkeit. Berlin, New York 1971.
v. Hippel	Robert von Hippel, Deutsches Strafrecht. Erster Band. Allgemeine Grundlagen. Berlin 1925.
His Strafrecht	Rudolf His, Das Strafrecht des deutschen Mittelalters. Erster Teil. Die Verbrechen und ihre Folgen im allgemeinen. Leipzig 1920.
His Geschichte	Rudolf His, Geschichte des deutschen Strafrechts bis Karolina. Handbuch der mittelalterlichen und neueren Geschichte. Abt. III: Verfassung, Recht, Wirtschaft. München und Berlin 1928.
Holdsworth	Sir William Holdsworth, A History of English Law. Volume II. Reprinted London 1966.
Holmbäck-Wessén I	Åke Holmbäck och Elias Wessén, Svenska landskapslagar tolkade och förklarade för nutidens svenskar. Första serien. Östgötalagen och Upplandslagen. Stockholm 1933.

Holmbäck-Wessén II Åke Holmbäck och Elias Wessén, Svenska landskapslagar tolkade och förklarade för nutidens svenskar. Andra serien. Dalalagen och Västmannalagen. Stockholm 1936.

Holmes Oliver Wendell Holmes, The Common Law. Edited by Mark DeWolfe Howe. Cambridge, Mass. 1963.

Hughes Omissions Graham Hughes, Criminal Omissions. In 67 YALE L. J. 590.

Hughes Footnote Graham Hughes, One Further Footnote on Attempting the Impossible. In 42 N. Y. U. L. REV. 1005.

Hurwitz-Waaben Stephan Hurwitz, Den danske kriminalret. Almindelig del. 4. reviderede udgave ved Knud Waaben. København 1971.

Hälschner Hugo Hälschner, Das Preussische Strafrecht. Zweiter Teil. Bonn 1858.

Jacobs Francis G. Jacobs, Criminal Responsibility. London 1971.

James Negligence Fleming James Jr, Nature of Negligence. In 3 UTAH L. REV. 275.

James Qualities Fleming James Jr, The Qualities of the Reasonable Man in Negligence Cases. In 16 MO. L. REV. 1.

James & Dickinson Fleming James Jr. and John J. Dickinson, Accident Proneness and Accident Law. In 63 HARV. L. REV. 769.

Jareborg Begrepp Nils Jareborg, Begrepp och brottsbeskrivning. Semantik och läran om normativa rekvisit. Stockholm 1974. (IFRF LXXVIII).

Jareborg Uppsåt Nils Jareborg, Handling och uppsåt. En undersökning rörande doluslärans underlag. Stockholm 1969.

Jeffery C. R. Jeffery, Criminal Responsibility and Mental Disease. Springfield, Ill. 1967.

Jensen Sverre Gram Jensen, Straffens grundproblemer. In Juristen 1967 p. 227.

Jescheck Aufbau — Hans-Heinrich Jescheck, Aufbau und Behandlung der Fahrlässigkeit im modernen Strafrecht. Freiburger Universitätsreden. Neue Folge. Heft 39. Freiburg i Br. 1965.

Jescheck Lehrbuch — Hans-Heinrich Jescheck, Lehrbuch des Strafrechts. A. T. 2. neubearbeitete und erweiterte Auflage. Berlin 1972.

Jones — J. Walter Jones, The Law and Legal Theory of the Greeks. An Introduction. Oxford 1956.

Jørgensen — Stig Jørgensen, Erstatningsret. 2. udg. København 1972.

Karlgren — Hjalmar Karlgren, Skadeståndsrätt. Femte upplagan. Stockholm 1972. (IFRF I).

Armin Kaufmann — Armin Kaufmann, Das fahrlässige Delikt. In ZfRV 1964 p. 41.

Arthur Kaufmann Handlung — Arthur Kaufmann, Die ontologische Struktur der Handlung. Skizze einer personalen Handlungslehre. Reprinted in Arthur Kaufmann, Schuld und Strafe. Studien zur Strafrechtsdogmatik. Köln, Berlin, Bonn, Munchen 1966, p. 25.

Arthur Kaufmann Schuldprinzip — Arthur Kaufmann, Das Schuldprinzip. Eine strafrechtlich – rechtsphilosophische Untersuchung. Heidelberg 1961.

Ekkehard Kaufmann — Ekkehard Kaufmann, Die Erfolgshaftung. Untersuchungen über die strafrechtliche Zurechnung im Rechtsdenken des frühen Mittelalters. Frankfurt/M 1958.

Kenny — Kenny's Outlines of Criminal Law. 19th edition by J. W. Cecil Turner. Cambridge 1966.

Klein — E. F. Klein, Grundsätze des gemeinen deutschen und preussischen peinlichen Rechts. Halle 1795.

Kneale — William Kneale, The Responsibility of Criminals. Oxford 1967.

Knoph — Ragnar Knoph, Rettslige standarder. Saer-

lig Grunnlovens § 97. Oslo 1939.

Kollman — Horst Kollman, Die Schuldauffassung der Carolina. In ZStW 1913 p. 605.

Kohlrausch — E. Kohlrausch, Irrtum und Schuldbegriff im Strafrecht. Teil 1. Berlin 1903.

Kraig — Jerry B. Kraig, Heart Attack as a Defense in Negligence Actions. In 12 CLEV.-MAR. L. REV. 59.

Kuttner — Stephan Kuttner, Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX. Systematisch auf Grund der handschriftlichen Quellen dargestellt. Città del Vaticano 1935.

Köstlin Römischen Recht — Christian Reinhold Köstlin, Die Lehre von Mord und Todtschlag, einer historisch-philosophischen Kritik unterworfen. Erster Theil. Die Ideen des römischen Rechts. Stuttgart 1838.

Köstlin Strafrecht — Christian Reinhold Köstlin, System des deutschen Strafrechts. 1. Abth. A. T. Tübingen 1855.

La Fave & Scott — Wayne R. La Fave and Austin W. Scott Jr., Handbook on Criminal Law. St. Paul, Minn. 1972.

v. Lassberg — F. L. A. von Lassberg, Der Schwabenspiegel oder schäbisches Land- und Lehen-Rechtbuch nach einer Handschrift vom Jahr 1287. Tübingen 1840. Neudruck Aalen 1961.

Lassen Definitioner — Julius Lassen, Nogle Bemærkninger om Definitioner i Retsliteraturen. In Festskrift för R. A. Wrede p. 23. Helsingfors 1921.

Lassen Haandbog — Julius Lassen, Haandbog i Obligationsretten. Almindelig del. Tredje tildels omarbejdede udgave. Kjøbenhavn 1917–1920.

Lee and Robertson — Orlan Lee and T. A. Robertson, "Moral

Order" and the Criminal Law. Reform Efforts in the United States and West Germany. The Hague 1973.

Leonhard — Franz Leonhard, Fahrlässigkeit und Unfähigkeit. In Festgaben für Ludwig Enneccerus. Marburg 1913.

Lersch — Philipp Lersch, Aufbau der Person. 9. Auflage. München 1964.

Liebermann 2:1 — F. Liebermann, Die Gesetze der Angelsachsen. Zweiter Band. Erste Hälfte: Wörterbuch. Halle 1906.

Liebermann 2:2 — F. Liebermann, Die Gesetze der Angelsachsen. Zweiter Band. Zweite Hälfte: Rechts- und Sachglossar. Halle 1912.

v. Liszt — Franz von Liszt, Lehrbuch des deutschen Strafrechts. 8. durchgearbeitete Auflage. Berlin 1897.

Luff — Karl Luff, Das automatische Reaktionsverhalten des Kraftfahrers und seine rechtliche Würdigung. In Der öffentliche Gesundheitsdienst 1957, p. 154.

Lundstedt Obligationsbegreppet — A. V. Lundstedt, Föreläsningar över valda delar av obligationsrätten. III. Obligationsbegreppet. Senare delen. Första häftet. Uppsala 1930.

Lundstedt Culparegeln — A. V. Lundstedt, Föreläsningar över valda delar av obligationsrätten. IV. Grundlinjer i skadeståndsrätten. Förra delen. Culparegeln. Uppsala 1935.

Löffler Körperverletzung — Alexander Löffler, Die Körperverletzung. In Vergleichende Darstellung des deutschen und ausländischen Strafrechts. Besonderer Teil. V. Band, p. 205. Berlin 1905.

Löffler Schuldformen — Alexander Löffler, Die Schuldformen des Strafrechts in vergleichend-historischer und dogmatischer Darstellung. Band 1. Die Entwicklung des geltenden Rechts.

Abt. 1. Deutschland und Österreich. Leipzig 1895.

MacDowell — Douglas M. MacDowell, Athenian Homicide Law in the Age of the Orators. Manchester 1963.

Maihofer — Werner Maihofer, Zur Systematik der Fahrlässigkeit. In ZStW 70, 159.

Makarewicz — J. Makarewicz, Einführung in die Philosophie des Strafrechts auf entwicklungsgeschichtlicher Grundlage. Amsterdam 1967.

Mannheim — Hermann Mannheim, Mens Rea in German and English Criminal Law. In 17 J. COMP. LEG. 3rd ser. 82.

Marc-Wogau — Konrad Marc-Wogau, Studier till Axel Hägerströms filosofi. Falköping 1968.

Maschke — Richard Maschke, Die Willenslehre im griechischen Recht. Zugleich ein Beitrag zur Frage der Interpolationen in den griechischen Rechtsquellen. Berlin 1926.

Maurach — Reinhart Maurach, Deutsches Strafrecht. A. T. Ein Lehrbuch. 4., völlig neu bearbeitete Auflage. Karlsruhe 1971.

McKeon — Richard McKeon, The Development and the Significance of the Concept of Responsibility. In 11 Revue Internationale de Philosophie 3.

Merker — Paul Merker, Das Strafrecht der altisländischen Grágás. Heidelberg 1907.

Mezger Unrechtselemente — Edmund Mezger, Die subjektiven Unrechtselemente. In Der Gerichtssaal. Band 89, p. 207.

Mezger Strafrecht — Edmund Mezger, Strafrecht. Ein Lehrbuch. München und Leipzig 1931.

Mezger-Blei — Edmund Mezger, Strafrecht I. A. T. Ein Studienbuch. Fortgeführt von Hermann Blei. 13., neubearbeitete Auflage. München 1968.

Middendorff — Wolf Middendorff, Beiträge zur Verkehrskriminologie. Bielefeld 1972.

Mikat — Paul Mikat, Erfolgshaftung und Schuldgedanke im Strafrecht der Angelsachsen. In Festschrift für Hellmuth von Weber. Bonn 1963, p. 9.

Mitteis-Lieberich — Heinrich Mitteis, Deutsche Rechtsgeschichte. Ein Studienbuch. Neubearbeitet von Heinz Lieberich. 8. ergänzte Auflage. München & Berlin 1963.

Mittermaier — Wolfgang Mittermaier, Zur Frage des Schuldcharakters der Fahrlässigkeit. In ZStW 32, 415.

Moberg — David O. Moberg, Old Age and Crime. 43 J. CRIM. L. C. & P. S. 764.

Model Penal Code — Model Penal Code, Proposed Official Draft. Philadelphia 1962. The American Law Institute.

Model Penal Code Tentative Draft 4 — Model Penal Code, Tentative Draft No. 4. Philadelphia 1955. The American Law Institute.

Mommsen — Theodor Mommsen, Römisches Strafrecht. Systematisches Handbuch der Deutschen Rechtswissenschaft. Erste Abteilung, vierter Teil. Leipzig 1899.

Moreland Negligence — Roy Moreland, A Rationale of Criminal Negligence. Lexington 1944.

Moreland Homicide — Roy Moreland, The Law of Homicide. Indianapolis 1952.

Morris — Clarence Morris, Custom and Negligence. In 42 COLUM. L. REV. 1147.

Mueller — Gerhard O. W. Mueller, On Common Law Mens Rea. In 42 MINN. L. REV. 1043.

Munktell Brott och straff — Henrik Munktell, Brott och straff i svensk rättsutveckling. Det levande förflutna. Svenska historiska föreningens folkskrifter 5. Stockholm 1943.

Munktell — Henrik Munktell, Mose lag och svensk

Mose lag — rättsutveckling. Några huvuddrag. In Lychnos 1936, p. 131.

Müller-Dietz Schuldgedanke — Heinz Müller-Dietz, Grenzen des Schuldgedankens im Strafrecht. Freiburger Rechts- und Staatswissenschaftliche Abhandlungen. Band 26. Karlsruhe 1967.

Müller-Dietz Strafbegriff — Heinz Müller-Dietz, Strafbegriff und Strafrechtspflege. Schriften zum Strafrecht. Band 8. Berlin 1968.

Negligence — Negligence and the General Problem of Criminal Responsibility. In 81 YALE L. J. 949.

Nehrman — David Nehrman, Inledning til then Swenska Jurisprudentiam Criminalem efter Sweriges Rikes Lag och Stadgar. Stockholm & Upsala 1756.

Nelson — Alvar Nelson, Rätt och ära. Studier i svensk straffrätt. Uppsala 1950.

Niese — Werner Niese, Finalität, Vorsatz und Fahrlässigkeit. Tübingen 1951.

Nordenson, Bengtsson, Strömbäck — Ulf Nordenson, Bertil Bengtsson och Erland Strömbäck, Skadestånd. Kommentar till den nya skadeståndslagen. Huvudgrunder av skadeståndsrätten. Skadeståndet i framtiden. Stockholm 1972.

Norwegian Penal Code — The Norwegian Penal Code. Translated by Harald Schjoldager and Finn Backer. With an introduction by Dr. jur. Johs. Andenæs. The American Series of Foreign Penal Codes No. 3. London 1961.

Note, 24 ARK. L. REV. 379.

Note, 19 AUSTR. L. J. 191.

Note, 1 BAYLOR L. REV. 499.

Note, 53 DICK. L. REV. 147.

Note, 1962 DUKE L. J. 138.

Note, 25 ILL. L. REV. 214.

Note, 30 KY. L. J. 220.

Note, 22 MICH. L. REV. 718.

Note, 46 NEBR. L. REV. 699.
Note, 13 N. Y. L. Q. REV. 126.
Note, 24 OHIO STATE L. J. 401.
Note, 15 TEXAS L. REV. 387.
Note, 79 U. PA. L. REV. 1153.
Note, 1950 WIS. L. REV. 334.

Nowakowski Fahrlässigkeit — Friedrich Nowakowski, Zur Theorie der Fahrlässigkeit. Kriminalbiologische Gegenwartsfragen. Mitteilungen der Kriminalbiologischen Gesellschaft. Vol. 7. Stuttgart 1953.

Nygaard — Nils Nygaard, Aktløysevurderinga i norsk rettspraxis. Bergen, Oslo, Tromsø 1974.

Oehler Zweckmoment — Dietrich Oehler, Das objektive Zweckmoment in der rechtswidrigen Handlung. Berliner Juristische Abhandlungen Band 1. Berlin 1959.

Oehler Rechts- und Pflichtnormen — Dietrich Oehler, Der materielle Gehalt der strafrechtlichen Rechts- und Pflichtnormen. In Festschrift für Wilhelm Sauer, p. 262. Berlin 1949.

Oehler Fahrlässigkeit — Dietrich Oehler, Die erlaubte Gefahrsetzung und die Fahrlässigkeit. In Eb. Schmidt-Festschrift, p. 232. Göttingen 1961.

Oehler Legalordnung — Dietrich Oehler, Wurzel, Wandel und Wert der strafrechtlichen Legalordnung. Münsterische Beiträge zur Rechts- und Staatswissenschaft. Heft 1. Berlin 1950.

Oppermann — Walther Oppermann, Die Schuldlehre der Carolina. Leipzig 1904.

Packer Mens Rea — Herbert L. Packer, Mens Rea and the Supreme Court. In 1962 The Supreme Court Review 107.

Packer Limits — Herbert L. Packer, The Limits of the Criminal Sanction. Stanford 1968.

Palandt — Otto Palandt, Bürgerliches Gesetzbuch. 32. neubearbeitete Auflage. München 1973.

Paton G. W. Paton, Negligence. In 23 AUSTR. L. J. 158.

Pedrick Willard H. Pedrick, The Lunatic Driver. In 31 AUSTR. L. J. 354.

Penal Code of Sweden The Penal Code of Sweden. As Amended Jan. 1st 1972. Originally translated by Thorsten Sellin. Amendments translated by Jerome L. Getz. Introduction by Lennart Geijer. London 1972.

Pennock J. Roland Pennock, The Problem of Responsibility. In Responsibility. Nomos III. New York 1960.

Perkins Assault Rollin M. Perkins, An Analysis of Assault and Attempts to Assault. In 47 MINN. L. REV. 71.

Perkins Criminal Law Rollin M. Perkins, Criminal Law. 2nd ed. Mineola, N. Y. 1969.

Pernice Alfred Pernice, Labeo. Römisches Privatrecht im ersten Jahrhundert der Kaiserzeit. Teil B. Band 2 in 1. Auflage. 1. Buch, allgemeine Lehren. Kapitel 4: Die Zurechnung. Neudruck der Ausgabe Halle 1878. Aalen 1963.

Pitcher George Pitcher, Hart on Action and Responsibility. In 69 The Philosophical Review 226.

Plucknett Theodore F. T. Plucknett, A Concise History of the Common Law. 5th ed. London 1956.

Pollock & Maitland Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I. Volume 2. 2nd ed. Reissued with a new introduction and select bibliography by S. F. C. Milsom. Cambridge 1968.

Pound Roscoe Pound, An Introduction to the Philosophy of Law. Revised edition. New Haven 1954.

Prosser — William L. Prosser, Handbook of the Law of Torts. 4th ed. St. Paul, Minn. 1972.

Radbruch — Gustav Radbruch, Über den Schuldbegriff. In ZStW 24, 333.

Rawls Justice — John Rawls, A Theory of Justice. Cambridge, Mass. 1971.

Rawls Concepts — John Rawls, Two Concepts of Rules. In 64 The Philosophical Review 3.

Reid — Lord Reid, The Law and the Reasonable Man. Maccabean Lecture in Jurisprudence of the British Academy 1968. London 1968.

Rein — Wilhelm Rein, Das Criminalrecht der Römer. Leipzig 1844. Neudruck Aalen 1962.

Restatement, Second, Torts — Restatement of the Law. Second. Torts, 2d. Vol. 2. §§ 281–503. As Adopted and Promulgated by the American Law Institute. St. Paul, Minn. 1965.

Reynolds — Osborne M. Reynolds Jr., The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature". In 23 OKLAHOMA L. REV. 410.

Riesenfeld — Stefan A. Riesenfeld, Negligent Homicide, a Study of Statutory Interpretation. In 25 CALIF. L. REV. 1.

Rodhe Lärobok — Knut Rodhe, Lärobok i obligationsrätt. Tredje upplagan. Stockholm 1972.

Rodhe Obligationsrätt — Knut Rodhe, Obligationsrätt. Stockholm 1956. (IFRF XI.)

Roeder — Hermann Roeder, Die Einhaltung des sozialadäquaten Risikos und ihr systematischer Standort im Verbrechensaufbau. Berlin 1969.

Ross Forbrydelse — Alf Ross, Forbrydelse og straf. Analytiske og reformatoriske bidrag til kriminalrettens almindelige del. København 1974.

Ross — Alf Ross, Hensigt er ikke forsæt. In TfR

Hensigt	1970 p. 337. Reprinted in Forbrydelse p. 9.
Ross Tilregnelighed	Alf Ross, Om tilregnelighed. In TfR 1973 p. 257. Reprinted in Forbrydelse p. 267.
Ross Skyld	Alf Ross, Skyld, ansvar og straf. København 1970. *Conc. Engl. transl., see p. 69.*
Ross *Tû-Tû*	Alf Ross, *Tû-Tû*. In 70 HARV. L. REV. 812.
Royal Commission on Capital Punishment	Royal Commission on Capital Punishment 1949–1953. Report. Presented to Parliament by Command of Her Majesty. September 1953. Reprinted. London 1965.
Russel	W. O. Russel. On Crime. 11th ed. by J. W. Cecil Turner. Vol. 1. London 1958.
Ryle	Gilbert Ryle, The Concept of Mind. Second Printing. New York 1960.
Salm	Karl Salm, Das Vollendete Verbrechen. Erster Teil. Über Fahrlässigkeit und Kausalität. Erster Halbband. Der Tatbestand des fahrlässigen Erfolgsdelikts. Berlin 1963.
Salmond Jurisprudence	Salmond on Jurisprudence. 12th ed. by P. J. Fitzgerald. London 1966.
Salmond Torts	Salmond on the Law of Torts. 14th ed. by R. F. V. Heuston. London 1965.
Sandels Barns skadeståndsskyldighet	Stina Sandels, Om barns skadeståndsskyldighet – några barnpsykologiska synpunkter. In SvJT 1969 p. 522.
Sandels Små barn	Stina Sandels, Små barn i trafiken. Undersökningar av små barns trafikförmåga. Stockholm 1968.
Sattler	Gerhard Sattler, Schrecksekunde und zivilrechtliche Fahrlässigkeit im Strassenverkehr. Köln 1966.
Sayre	Fancis Bowes Sayre, *Mens Rea.* In 45 HARV. L. REV. 974.
Schaffstein	Friedrich Schaffstein, Die allgemeinen Lehren vom Verbrechen in ihrer Entwick-

lung durch die Wissenschaft des gemeinen Strafrechts. Berlin 1930.

Schmidhäuser — Eberhard Schmidhäuser, Strafrecht. A. T. Lehrbuch. Tübingen 1970.

Schmidt Carolina — Eberhard Schmidt, Die Carolina. Ein Vortrag. In ZSR. Germanistische Abteilung. Band 53, p. 1.

Schmidt Einführung — Eberhard Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege. Dritte, völlig durchgearbeitete und veränderte Auflage. Göttingen 1965.

Schultz Rechtsprechung — Hans Schultz, Die strafrechtliche Rechtsprechung zum neuen Strassenverkehrsrecht. Bern 1968.

Schultz Strafrecht — Hans Schultz, Einführung in den Allgemeinen Teil des Strafrechts. I. Die allgemeinen Voraussetzungen der kriminalrechtlichen Sanktionen. Bern 1973.

v. Schwerin-Thieme — Freiherr Claudius von Schwerin und Hans Thieme, Grundzüge der deutschen Rechtsgeschichte. 4. Aufl. Berlin und München 1950.

Schönke-Schröder — Adolf Schönke und Horst Schröder, Strafgesetzbuch. Kommentar. Begründet von Adolf Schönke. Fortgeführt von Horst Schröder. 17., neubearbeitete Auflage. München 1974.

Seavey — Warren A. Seavey, Negligence – Subjective or Objective? In 41 HARV. L. REV. 1.

Sellin — Thorsten Sellin, The Protective Code. A Swedish Proposal. Stockholm 1957.

Silving Crime — Helen Silving, Constituent Elements of Crime. Springfield, Ill. 1967.

Silving Criminal Conduct — Helen Silving, Essays on Mental Incapacity and Criminal Conduct. Springfield, Ill. 1967.

Simson Straffrättsreform — Gerhard Simson, Om 1969 års västtyska straffrättsreformer. In Festskrift till Ivar

Agge p. 256. Stockholm 1970.

Simson Straffrättens utveckling — Gerhard Simson, Straffrättens utveckling i Tyskland och förslaget till ny strafflag. In SvJT 1963 p. 583.

Skattebrotten — Skattebrotten. Betänkande avgivet av skattestrafflagutredningen. Stockholm 1969. SOU 1969:42.

Skeie — Jon Skeie, Hvorvidt bør – udenfor Kontraktsforhold – Skadeserstatningspligt være betinget af Skyld? In TfR 1907 p. 161. Omtryckt i Afhandlinger om forskjellige restsspørsmaal. [1]. Kristiania 1913 p. 5.

Smith & Hogan — J. C. Smith & Brian Hogan, Criminal Law. Second edition. London 1969.

Stang Erstatningsansvar — Fredrik Stang, Erstatningsansvar. Kristiania 1919.

Stang Skade — Fredrik Stang, Skade voldt af flere. Fra spredte retsfelter II. Kristiania 1918.

Stephen History — Sir James Fitzjames Stephen, A History of the Criminal Law of England. Vol. 2. London 1883.

Stephen Commentaries — Sir James Fitzjames Stephen, Mr Serjeant Stephen's New Commentaries on the Laws of England. Partly founded on Blackstone. Volume 4 (of crimes) 9. ed. London 1883.

Stjernberg — Nils Stjernberg, Grundlinjer till föreläsningar över straffrättens allmänna del. 7. uppl. Band I. Stockholm 1938.

Lehrkommentar — Strafrecht der Deutschen Demokratischen Republik. Lehrkommentar zum Strafgesetzbuch. Band I. Berlin 1970.

Strahl Anmälan — Ivar Strahl, [Anmälan av] Henry Ussing, Erstatningsret. In JFFT 1939 p. 113.

Strahl Förberedande utredning — Ivar Strahl, Förberedande utredning angående lagstiftning på skadeståndsrättens område. Stockholm 1950. SOU 1950:16.

Strahl — Ivar Strahl, Idealism och realism i rätts-

Idealism	vetenskapen. In SvJT 1941 p. 302.
Strahl Introduction	Ivar Strahl, Introduction. In Thorsten Sellin, The Penal Code of Sweden. Effective January 1. 1965. Stockholm 1965.
Strahl Straffrättens allmänna del	Ivar Strahl, Kompendium i straffrättens allmänna del. Sjunde omarbetade upplagan. Uppsala 1969.
Strahl Skadeståndsskyldighet	Ivar Strahl, Om barns skadeståndsskyldighet. In SvJT 1971 p. 22.
Strahl Utvecklingen	Ivar Strahl, Utvecklingen av den svenska skadeståndsrätten på det utomobligatoriska området. In Minnesskrift ägnad 1734 års lag. II. Stockholm 1934, p. 874.
Stratenwerth	Günter Stratenwerth, Strafrecht. A. T. I. Die Straftat. Berlin, Bonn, München 1971.
Street	Harry Street, The Law of Torts. Fifth ed. London 1972.
Study Draft	Study Draft of a New Federal Criminal Code. Title 18, United States Code. By the National Commission on Reform of Federal Criminal Laws. Washington D. C. 1970.
Sturm	Friedrich Sturm, Die strafrechtliche Verschuldung. Strafrechtliche Abhandlungen, herausgegeben von Lilienthal/Schoetensack. Heft 41. Breslau 1902.
tenBroek	Jacobus tenBroek, The Right to Live in the World: The Disabled in the Law of Torts. In 54 CALIF. L. REV. 841.
Thornstedt NJM	Hans Thornstedt, [Forsett og rettsvillfarelse i strafferetten.] In NJM 1960 p. 125.
Thornstedt Företagaransvar	Hans Thornstedt, Om företagaransvar. Studier i specialstraffrätt. Stockholm 1948.
Thornstedt Rättsvillfarelse	Hans Thornstedt, Om rättsvillfarelse. En straffrättslig undersökning. Stockholm 1956. (IFRF X).

Thornstedt Legality — Hans Thornstedt, The Principle of Legality and Teleological Construction of Statutes in Criminal Law. In 1960 Scandinavian Studies in Law 211.

Thornstedt-Eklund — Hans Thornstedt and Erik Eklund, Skattebrott och skattetillägg. Andra, utökade upplagan. Katrineholm 1974.

Thyrén Förberedande utkast — Johan C. W. Thyrén, Förberedande utkast till strafflag. Kap. I–XIII. Allmänna delen. Lund 1916.

Thyrén Principerna II — Johan C. W. Thyrén, Principerna för en strafflagsreform. II. Brottets objektiva sida. Lund 1912.

Thyrén Principerna III — Johan C. W. Thyrén, Principerna för en strafflagsreform. III. Brottsbegreppets subjektiva sida. Försök. Subjektsflerhet. Sammanfattning af de legislativa resultaterna i delarne I–III. Lund 1914.

Turner — J. W. C. Turner, The Mental Element in Crimes at Common Law. In The Modern Approach to Criminal Law, p. 195. London 1948.

Undén — Östen Undén, Några synpunkter på begreppsbildningen inom juridiken. In Festskrift tillägnad Axel Hägerström, p. 166. Uppsala 1928.

Ussing Erstatningsret — Henry Ussing, Erstatningsret. 6. oplag. København 1962.

Ussing Skyld og skade — Henry Ussing, Skyld og skade. Bør erstatningspligt udenfor kontraktsforhold være betinget af culpa? København 1914.

Waaben Criminal Responsibility — Knud Waaben, Criminal Responsibility and the Quantum of Proof. In 1965 Scandinavian Studies in Law 243.

Waaben Forsæt — Knud Waaben, Det kriminelle forsæt. København 1957.

Waaben Utilregnelighed — Knud Waaben, Utilregnelighed og særbehandling. Problemer i den strafferetlige

lære om ansvar og sanktioner. København 1968.

Walker — Nigel Walker, Crime and Insanity in England. Volume one: The Historical Perspective. Edinburgh 1968.

Wasserstrom Mens Rea — Richard A. Wasserstrom, H. L. A. Hart and the Doctrines of *Mens Rea* and Criminal Responsibility. In 35 U. CHI. L. REV. 92.

Wasserstrom Strict Liability — Richard A. Wasserstrom, Strict Liability in the Criminal Law. In 12 STANFORD L. REV. 731.

Wechsler — Herbert Wechsler, The Challange of a Model Penal Code. In 65 HARV. L. REV. 1097.

Wechsler & Michael — Herbert Wechsler & Jerome Michael, A Rationale of the Law of Homicide. In 37 COLUM. L. REV. 701.

Wedberg — Anders Wedberg, Some problems in the logical analysis of legal science. In Theoria Vol. 17, p. 246.

Weisiger — G. B. Weisiger, Negligence of the Physically Infirm. In 24 NORTH CAROLINA L. REV. 187.

Welzel Strafrecht — Hans Welzel, Das Deutsche Strafrecht. Eine systematische Darstellung. 11. neubearbeitete und erweiterte Auflage. Berlin 1969.

Welzel Bild — Hans Welzel, Das neue Bild des Strafrechtssystems. Eine Einführung in die finale Handlungslehre. 4. erweiterte Auflage. Göttinger Rechtswissenschaftliche Studien. Band 1. Göttingen 1961.

Welzel Fahrlässigkeit — Hans Welzel, Fahrlässigkeit und Verkehrsdelikte. Zur Dogmatik der fahrlässigen Delikte. Karlsruhe 1961.

Wetter Grundlinjer — Folke P:son Wetter, Grundlinjer till föreläsningar över straffrättens allmänna del.

Första häftet. Lund 1923.

Wetter Straffrätt — Folke P:son Wetter, Allmän straffrätt. 2. uppl. Uppsala 1945.

White — Alan R. White, Attention. Oxford 1964.

Williams Criminal Law — Glanville Williams, Criminal Law. The General Part. Second edition. London 1961.

Williams Mental Element — Glanville Williams, The Mental Element in Crime. Jerusalem 1965.

Vinding Kruse — A. Vinding Kruse, Erstatningsretten. 2. rev. udg. København 1971.

Vinogradoff — Paul Vinogradoff, Outlines of Historical Jurisprudence. Volume two. The Jurisprudence of the Greek City. London 1922.

Winroth Rättshistoria — [Alfred O. Winroth,] Anteckningar efter professor Winroths rättshistoriska föreläsningar i straffrätt. Genomsedda och bearbetade. Till den studerande ungdomens tjenst. Lund 1889.

Winroth Skadestånd — [A. O.] Winroth, Strödda uppsatser. IV. Om skadestånd. Andra omarbetade och tillökta upplagan. Uppsala 1907.

Voigt XII Tafeln — Moritz Voigt, Die XII Tafeln. Geschichte und System des Civil- und Criminal-Rechts, wie – Processes der XII Tafeln nebst deren Fragmenten. Band 2: Das Civil- und Criminalrecht der XII Tafeln. Leipzig 1883.

Voigt Leges regiæ — Moritz Voigt, Über die leges regiæ; Teil I: Bestand und Inhalt der leges regiæ. In Abhandlungen der philologisch historischen Classe der königlich sächsischen Gesellschaft der Wissenschaften. Band 7, p. 555. Leipzig 1879.

Working Papers I — Working Papers of the National Commission on Reform of Federal Criminal Laws. Volume I. Washington D. C. 1970.

Ørsted Strafferetlige skrifter — Anders Sandøe Ørsted, Strafferetlige skrifter i udvalg. Første afdeling. København 1931.

Ørsted Grundregeln — Anders Sandøe Ørsted, Ueber die Grundregeln der Strafgesetzgebung. Abhandlungen aus dem Gebiete der Moral und Gesetzgebungs=Philosophie. Band 1. Kopenhagen 1818.

Øvergaard Erstatningsret — J. Øvergaard, Norsk erstatningsrett. 2. utgave. Oslo 1951.

Øvergaard Skyldbedømmelsen — J. Øvergaard, Om skyldbedømmelsen etter den almindelige erstatningsregel. In TfR 1940 p. 59.

TABLE OF CASES

Sweden

NJA

Ireland

People v. *Dunleavy,* [1948] Irish Reports 95: *231*

Canada

R. v. *Coyne,* (1958) 31 C. R. 335, 124 C. C. C. 176: *231*
R. v. *Jeffers,* [1964] 2 C. C. C. 358: *221*
R. v. *Rogers,* (1968) 65 W.W.R. 193, [1968] 4 C. C. C. 278: *229*
Slattery v. *Haley,* 52 Ont. L. 95 [1923] 3 D L R 156, 11 B R C 1036: *221*

United States

Ango v. *Goodstein,* (1970) 438 Pa. 468, 265 A. 2d 783: *233*
Armstrong v. *Day,* (1930) 103 Cal. App. 465, 284 P. 1083: *233*
Armstrong v. *Warner Bros Theatres Inc.,* (1947) 161 Pa. Super. 285, 54 A. 2d 831: *233*
Bailey v. *Williams,* (Tenn. 1960) 346 S. W. 2d 285: *224*
Balcolm v. *City of Independence,* (1916) 178 Iowa 685, 160 N. W. 305: *233*
Baxter v. *Fugett,* (Okl. 1967) 425 P. 3d 462: *235*
Bell v. *Commonwealth,* (1938) 170 Va. 597, 195 S. E. 675: *234*
Bennett v. *McDonald,* (Ohio App. 1962) 193 N. E. 2d 439: *220*
Bessemer Land Co. v. *Campbell,* (1898) 121 Ala. 50, 25 So. 793: *212*
Boise Payette Lumber Co. v. *Laren,* (9th Cir. 1954) 214 F. 2d 373: *235*
Booth v. *United States,* 140 Ct. Cl. 145, 155 F. Supp. 235: *195*
Breunig v. *American Family Ins. Co.* (Supr. Ct. Wis. 1970) 173 N. W. 2d 619: *211, 231*
Briese v. *Maechtle,* (1911) 146 Wis. 89, 130 N. W. 893: *201, 224*
Bull v. *Drew,* 286 App. Div. 1138, 146 N. Y. S. 2d 85: *233*
Cain v. *State,* (1937) 55 Ga. App. 376, 190 S. E. 371: *197*
Campbell v. *Walker,* (Del. 1910) 1 Boyce 580, 76 A. 475: *233*
Carman v. *Harrison,* (Neb.) 362 F. 2d 694: *233*
Carbone v. *Warburton,* 22 N. J. Super. 5, 91 A. 2d 518: *195*

INDEX

Fortsättning från omslagets sid 4

XLVI *Per Olof Ekelöf*
Rättegång V
202 s 4:e uppl 1975

XLVII *Knut Rodhe*
Lärobok i obligationsrätt
300 s 3:e uppl 1972

XLVIII *Bertil Bengtsson*
Hävningsrätt
675 s 1967

XLIX *Nils Börje Lihné*
Lagsökning
377 s 1968

L *Kurt Grönfors*
Successiva transporter
332 s 1968

LI *Hilding Eek*
Folkrätten
488 s 2:a tr 1972

LII *Nils Regner*
Rättspraxis i litteraturen
407 s 1968

LIII *Ole Westerberg*
Förfarandet i förvaltningen
151 s 1969

LIV *Nils Herlitz*
Elements of Nordic
Public Law
287 s 1969

LV *Jacob W. F. Sundberg*
Familjerätt i omvandling
244 s 1969

LVI *Fredrik Sterzel*
Riksdagens kontrollmakt
260 s 1970

LVII *Hjalmar Karlgren*
Produktansvaret
197 s 1971

LVIII *E. G. Westman*
Kommunal förvaltning
genom avtal
119 s 1971

LIX *Bertil Bengtsson*
Särskilda avtalstyper I
188 s 2:a tr 1974

LX *Anders Agell*
Växel, check och materiell
fordran
262 s 1971

LXI *Nils Regner*
Svensk juridisk litteratur II
398 s 1971

LXII *Ole Westerberg*
Allmän förvaltningsrätt
182 s 1971

LXIII *Åke Hassler*
Specialprocess
155 s 1972

LXIV *Folke Schmidt*
Arbetsrätt I
284 s 1972

LXV *Hilding Eek*
Lagkonflikter i tvistemål
307 s 1972

LXVI *Åke Lögdberg*
Personlighetsrätt
176 s 1972

LXVII *Holger Wiklund*
God advokatsed
641 s 1973

LXVIII *Halvar Lech*
Skadeersättning för
personskada
254 s 1973

LXIX *Henrik Hessler*
Allmän sakrätt
590 s 1973

LXX *Folke Schmidt*
Arbetsrätt II
270 s 2:a uppl 1975

LXXI *Hans Ragnemalm*
Extraordinära rättsmedel i
förvaltningsprocessen
293 s 1973

LXXII *Nils Börje Lihné*
Betalningsföreläggande
329 s 1973

LXXIII *Folke Schmidt*
Allmänna och privata
pensioner
239 s 1974

LXXIV *Bertil Bengtsson*
Nyttjanderätt till fast
egendom
221 s 1974

LXXV *Lars Welamson*
Rättegång VI
256 s 1974

LXXVI *Per Henrik Lindblom*
Processhinder
292 s 1974

LXXVII *Carl Martin Roos*
Grupplivskyddet
277 s 1974

LXXVIII *Nils Jareborg*
Begrepp och brottsbeskrivning
293 s 1974

LXXIX *Per Olof Ekelöf*
Supplement till
Rättegång I—V
51 s 1975

LXXX *Håkan Nial*
Svensk Associationsrätt
233 s 1975

LXXXI *Gösta Walin*
Separationsrätt
222 s 1975

LXXXII *Nils Jareborg*
Förmögenhetsbrotten
393 s 1975

LXXXIII *Bertil Bengtsson*
Skadestånd vid myn-
dighets utövning I
439 s 1976

LXXXIV *Hjalmar Karlgren*
Prestation och "fara"
i köprätten
196 s 1976

LXXXV *Gillis Erenius*
Criminal Negligence
and Individuality
282 s 1976

I *Hjalmar Karlgren*
Skadeståndsrätt
252 s 5:e uppl 1972

II *Håkan Nial*
Internationell förmögenhetsrätt
159 s 2:a uppl 1953

III *Lars Welamson*
Om anslutningsvad och reformatio in pejus
201 s 1953

IV *Karl Olivecrona*
Rättegången i brottmål enligt RB
379 s 3:e uppl 1968

V *Gunnar Lagergren*
Delivery of the goods and transfer of property and risk in the law on sale
151 s 1954

VI *Hjalmar Karlgren*
Avtalsrättsliga spörsmål
214 s 2:a uppl 1954

VII *Håkan Nial*
Handelsbolag och enkla bolag
460 s 1955

VIII *Per Olof Ekelöf*
Processuella grundbegrepp och allmänna processprinciper
292 s 1956

IX *Lars Welamson*
Domvillobesvär av tredje man
252 s 1956

X *Hans Thornstedt*
Om rättsvillfarelse
323 s 1956

XI *Knut Rodhe*
Obligationsrätt
838 s 1956

XII *Tore Strömberg*
Åtalspreskription
252 s 1956

XIII *Per Olof Bolding*
Skiljeförfarande och rättegång
251 s 1956

XIV *Åke Malmström*
Föräldrarätt
192 s 3:e tr 1969

XV *Per Olof Ekelöf*
Rättegång I
158 s 4:e uppl 1974

XVI *Nils Regner*
Svensk juridisk litteratur
642 s 1957

XVII *Nils Herlitz*
Nordisk offentlig rätt I
111 s 1958

XVIII *Nils Herlitz*
Nordisk offentlig rätt II
222 s 1958

XIX *Per Olof Ekelöf*
Rättegång II
184 s 4:e uppl 1974

XX *Hjalmar Karlgren*
Säkerhetsöverlåtelse
238 s 1959

XXI *Folke Schmidt*
Tjänsteavtalet
Nyskriven uppl 1968
229 s 2:a tr 1970

XXII *Ivar Agge*
Straffrättens allmänna del I
176 s 4:e uppl 1970

XXIII *Hjalmar Karlgren*
Kutym och rättsregel
112 s 1960

XXIV *Karl Olivecrona*
Rätt och dom
352 s 2:a uppl 1966

XXV *Lennart Vahlén*
Avtal och tolkning
329 s 2:a tr 1966

XXVI *Ole Westerberg*
Skatter, avgifter och pålagor
363 s 1961

XXVII *Per Olof Ekelöf*
Rättegång III
210 s 3:e uppl 1970

XXVIII *Seve Ljungman—Per Stjernquist*
Den rättsliga kontrollen över mark och vatten I
202 s 5:e uppl 1970

XXIX *Kurt Grönfors*
Ställningsfullmakt och bulvanskap
397 s 1961

XXX *Ivar Agge*
Straffrättens allmänna del II
I

XXXI *Sigurd Dennemark*
Om svensk domstols behörighet i internationellt förmögenhetsrättsliga mål
376 s 1961

XXXII *Lars Welamson*
Konkursrätt
846 s 1961

XXXIII *Hilding Eek*
Internationell privaträtt
279 s 2:a uppl 1967

XXXIV *Seve Ljungman—Per Stjernquist*
Den rättsliga kontrollen över mark och vatten II
152 s 3:e uppl 1968

XXXV *Per Olof Bolding*
Skiljedom
251 s 1962

XXXVI *Nils Herlitz*
Nordisk offentlig rätt III
831 s 1963

XXXVII *Folke Schmidt*
Äktenskapsrätt
208 s 5:e uppl 1974

XXXVIII *Per Olof Ekelöf*
Rättegång IV
182 s 3:e uppl 1973

XXXIX *Axel Adlercreutz*
Arbetstagarbegreppet
499 s 1964

XL *Ivar Agge*
Straffrättens allmänna del III
119 s 3:e tr 1970

XLI *Lars Welamson*
Konkurs
205 s 5:e uppl 1976

XLII *Hjalmar Karlgren*
Passivitet
247 s 1965

XLIII *Peter Westerlind*
Studier över tomträttsinstitutet I
529 s 1965

XLIV *Lennart Vahlén*
Fastighetsköp
250 s 2:a uppl 3:e tr 1971

XLV *Åke Hassler*
Skiljeförfarande
218 s 1966

INKLMOMS

ISBN 91-1-767071-3

7608 125,-

Fortsättning på omslagets sid 3