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## **TOWARDS A LEGAL HISTORY OF AMERICAN CRIMINAL THEORY: CULTURE AND DOCTRINE FROM BLACKSTONE TO THE MODEL PENAL CODE**

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# Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code

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Long before the birth of American law, English criminal jurisprudence had firmly established the general proposition that crime required not just a guilty act but a guilty mind. Coke's maxim to that effect, *actus non facit reum nisi mens sit rea*,<sup>1</sup> is still frequently deployed by courts and scholars alike. So is the phrase coined by Blackstone to describe that guilty mind: the "vicious will" that must be present for an act to become a crime. In another great maxim, however, Holmes said that "general propositions do not decide concrete cases."<sup>2</sup> It is not too shocking, then, that these general propositions of Coke and Blackstone have been pushed aside whenever judges have felt the need. While courts have often insisted on proof of a guilty mind, they have also freely applied strict liability and entrenched that doctrine in many areas of the criminal law.

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<sup>1</sup> See EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 107 (London, E & R Brooke 1797).

<sup>2</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, dissenting).

Still, in the face of established doctrine, modern defenders of a retributivist or subjectivist orthodoxy claim that knowing choice to do wrong must always be a central requirement of crime. And they have often drawn on Coke's and Blackstone's aphorisms to enhance that claim.<sup>3</sup> Take, for example, the eloquent Justice Jackson in the 1952 case of *Morissette v. United States*<sup>4</sup>: "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . . Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'"<sup>5</sup> In the half century since *Morissette*, moreover, retributivism has apparently gained a new ascendancy. For many theorists of criminal law, at least, it is the only theory of punishment that is consistent with justice to the defendant, that adequately resists the use of the accused "as a means to an end."<sup>6</sup> Some have even argued that "criminal liability without fault is a contradiction in terms" and therefore unconstitutional.<sup>7</sup>

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<sup>3</sup> For recent assertions of this position, see, e.g., Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 Calif. L. Rev. 931 (2000); Richard Singer and Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999); Richard G. Singer, *The Proposed Duty to Inquire as Affected by Recent Criminal Law Decisions in the United States Supreme Court*, 3 BUFF. CRIM. L. REV. 701, 705 (2000); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

<sup>4</sup> 342 U.S. 246 (1952).

<sup>5</sup> 342 U.S. at 250-251.

<sup>6</sup> I am not actually convinced that retributivism is now dominant, but that assumption has become quite common. See, for example, the discussion in Russel L. Christopher, *Detering Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843 (2002); Alan C. Michaels, "Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism, 100 COLUM. L. REV. 54, 57, n.22 (2000). For the parallel English case, see Jeremy Horder, *Two Histories and Four Hidden Principles of Mens Rea*, 113 Law Quarterly Review 95, 95 (1997) ("subjectivism became the orthodox academic theory of *mens rea* earlier in this century"). Note, though, that *Morissette*, 342 U.S. at 250-51, did not reject but embraced rehabilitation as a justification for criminal sanctions.

<sup>7</sup>James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a*

Yet strict liability has persisted. To take the most notorious example, the felony of statutory rape has retained a strict liability element at its core despite decades of scholarly condemnation. Traceable to late nineteenth-century cases and once the unquestioned rule in every state, the rule still condemns even those who have reasonably believed their sexual partners to be of age.<sup>8</sup> For adherents of the culpability principles of the Model Penal Code (MPC) and, more generally, for followers of the modern orthodoxy suggested above, the rule of strict liability is an anachronism and a blight on modern criminal justice.<sup>9</sup>

The rule nevertheless persists as a standing challenge to the modern orthodoxy and, to the historian, as a standing invitation to investigate the roots of modern criminal doctrine and theory: what processes of history could have produced both the modern retributivist ascendancy and the stubborn collection of rules that defy that orthodoxy? If my research was

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*Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1009, 1040 (1973).

<sup>8</sup> Even before any court had actually had to rule on the question, strict liability for statutory rape seems to have been taken for granted. See *Barnes v. State*, 19 Conn. 398 (1849); *Commonwealth v. Elwell*, 43 Mass. (2 Met.) 190 (1840). Holdings to that effect came later in the nineteenth century, and the rule still applies in most jurisdictions. See *State v. Pierson*, 514 A.2d 724, 727 (Conn. 1986) (holding that statutory rape is a strict liability crime); *State v. Stiffler*, 788 P.2d 220, 221 (Idaho 1990) (same); *Garnett v. State*, 632 A.2d 797, 803-4, 805 (Md. 1993) (holding that statutory rape is a strict liability crime, and that a majority of states retain statutes imposing strict liability); *Commonwealth v. Knap*, 592 N.E.2d 747, 748-49 (Mass. 1992) (holding that statutory rape is a strict liability crime); *Commonwealth v. Miller*, 432 N.E.2d 463, 464-5 (Mass. 1982) (finding that most other jurisdictions subscribe to strict liability); *State v. Yanez*, 716 A.2d 759, 763 (R.I. 1998) (finding that majority of courts maintain strict liability for statutory rape); *State v. Martinez*, 14 P.3d 114 (Utah App. 2000). See also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 11.02(c) (2d ed. 1995) (finding that "in many states" statutory rape is a strict liability crime); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 5.1(c) (2d ed. 1986) (discussing "nearly unanimous view that a reasonable mistake of age is not a defense to a charge of statutory rape."); Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499 (1997). But see, e.g., *People v. Hernandez*, 393 P.2d 673 (Cal. 1964) (holding that reasonable mistake of age is a defense to a charge of statutory rape).

<sup>9</sup> See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 723-30 (1978); Jerome Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 995 (1943) [hereinafter *Hall II*]; Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422 (1958); Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Liability*, 30 B.C. L. REV. 337 (1989); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 698-705.

prompted by a desire to uncover the origins of the rule in the statutory rape cases, the larger object that developed was to open a window on the under-investigated history of criminal theory more generally. Beginning with modern categories in mind, I wondered how criminal theorists and judges of the eighteenth and nineteenth centuries—the formative period of American law—thought about strict liability and its connection to the rhetoric of “vicious will” and “guilty mind.” If criminal theory now widely emphasizes moral justice to the accused, was this more or less retributivist orientation also dominant in other periods? Or did rules of strict liability reflect a broadly accepted, objectively oriented utilitarianism? Did these two broad alternatives even define the range of choices for criminal theorists before the modern age or do they constitute a peculiarly twentieth-century construct?<sup>10</sup> How did these or other theories of crime coexist (or not), and how did the answers to these questions change with developing cultural contexts? Does it even make sense to look for a dominant, organizing theory of crime at any particular historical moment?<sup>11</sup> Is criminal doctrine best explained by explication of a closed world of criminal theory or, alternatively, by reference to the larger cultural values peculiar to different periods? Or, even more narrowly, by the result-orientation of particular

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<sup>10</sup> See V. F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1296 (2001). Nourse says that, while the language of reasonableness has been around for a long time, the language of subjectivity and objectivity is relatively new in criminal law: “Open a casebook or a treatise before 1960 and there will be no emphasis on objectivity and subjectivity.” In my own investigations, I can recall no use of those terms before the twentieth century and no debate that maps unproblematically on to that one. See also Horder, *supra* n.—, at 96 (describing the history of mens rea principles as “never entirely subjective or wholly objective”).

<sup>11</sup> A succinct “no” is offered by Lindsay Farmer, *The Obsession with Definition: The Nature of Crime and Critical Legal Theory*, 5 SOCIAL AND LEGAL STUDIES 57 (1996). Candidates for a unified theory of criminal law include Larry Alexander’s *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 CAL. L. REV. 931 (2000), the argument of which is anticipated in some ways by R. A. Duff, *Recklessness and Rape*, 3 LIVERPOOL L. REV. 49 (1981); Holmes’s reduction of all criminal law to matters of objective risk-creation in *The Common Law* (1881); and the modern subjectivist claim that criminal sanctions should always be limited to cases of subjective choice to do wrong as in Singer’s *Resurgence of Mens Rea*, *supra* n. —.

judges in particular cases? These are some of the big questions that an infant historiography of American criminal theory would have to ask and that I mean to venture into in this article.

The plan of the article, then, is as follows. It begins with a brief discussion of the clash between the nineteenth-century cases that established the statutory rape rule and the ascendant, modern approach to criminal theory. Then it steps back to re-create the world of nineteenth-century criminal theory within the broader context of nineteenth-century Anglo-American culture. Traveling from Blackstone's gentle, Enlightenment reformism to the hegemony of "Victorian moralism" in nineteenth-century America, the narrative will suggest how varieties of consequentialism—defining a self-consciously "public" approach to criminal justice—dominated the language of criminal theory, while never entirely crowding out concerns for individual moral and legal justice, concerns that suggested a distinctly "private" approach to criminal law. Equipped with this overarching narrative, the article will then return to the statutory rape cases to suggest a more fully historical analysis than these cases or most American criminal doctrine has yet received. The goal is to set the judicial opinions firmly within two essential, historical contexts that have rarely been brought to bear in studies of criminal doctrine:<sup>12</sup> first, the context of the long term development of criminal theory; and, second, the broader social and intellectual context of the times, here the history of Victorian gender relations. The argument is that the rule of strict liability emerged, first, from a history of

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<sup>12</sup> I am hardly the first historian to bring context to the history of American criminal law. See, e.g., Friedman and Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (1981). But few have attended closely to the development of doctrine within a larger cultural context. Perhaps, the biggest exception to that generalization is the work done on the history of the insanity defense. See, e.g., JAMES C. MOHR, *DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA* 140-53, 164-79 (1993); CHARLES E. ROSENBERG, *THE TRIAL OF THE ASSASSIN GUTTEAU: PSYCHIATRY AND LAW IN THE GILDED AGE* (1968); Janet A. Tighe, *Francis Wharton and the Nineteenth-Century Insanity Defense: The Origins of a Reform Tradition*, 27 *AM. J. LEGAL HIST.* 223 (1983). Histories of culpability, as such, in contrast, while useful, have generally lacked careful attention to social context. See, e.g., Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 *Hastings L.J.* 815 (1980).

criminal theory that generally adopted what I call a “public” perspective on criminal law. Criminal theory in this period did not usually distinguish between utilitarian and retributivist camps as starkly as modern criminal theory does, but it usually did adopt an explicitly “public” perspective. The rule of strict liability also emerged from a history of gender relations that reveals not a simplistic, Victorian sexual prudery but a powerful, if historically situated, ideology of the family as the foundation of state and society. The article will end with an excursion into the twentieth century and the origins of the Model Penal Code, the most important, if ambiguous, product in the history of American criminal theory, a major focus for all American criminal theory since the 1950s, and yet a document that has attracted only passing efforts at historical explanation. The sum of the article, I hope, will be a first run at giving American criminal theory an appropriately complex, broadly contextualized, historical framework.

#### I. STRICT LIABILITY IN THE RAPE AND ABDUCTION CASES: ORTHODOXY OR HERESY?

It is both familiar and false that “mens rea” is an essential ingredient of crime.<sup>13</sup> The maxim articulating the indispensability of the guilty mind goes back at least to Coke. The United States Supreme Court does not go back that far, but it carries a good deal of weight today. And the Court says that criminal liability can attach in some circumstances in spite of the defendant’s reasonable mistakes.<sup>14</sup> So do many other courts, even when considering serious

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<sup>13</sup> See, e.g., John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996).

<sup>14</sup> See, e.g., *United States v. Park*, 421 U.S. 658, 672-73 (1975); *United States v. Freed*, 401 U.S. 601, 607-10 (1971); *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943); *United States v. Balint*, 258 U.S. 250, 251-54 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 67-70 (1910).

crimes.<sup>15</sup> Nevertheless, theorists of criminal law widely share the opinion that strict liability is an anomaly.<sup>16</sup> The great, although imperfect and ambiguous, monument to this position is the culpability structure of the Model Penal Code, which insists on precise attributions of fault for each discrete element of each offense.<sup>17</sup> Thus, to take a pertinent example, the MPC's version of statutory rape breaks from the usual rule (which was universal at the time the MPC was drafted) and allows the defendant to prove reasonable belief that the victim was at least sixteen years old,<sup>18</sup> although even the MPC denies such a defense when the victim is under ten years old.<sup>19</sup> The MPC thus evidences the centrality of mens rea to the history of criminality. In its

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<sup>15</sup> See, e.g., *United States v. Gonzalez-Chavez*, 122 F.3d 15, 17-18 (8<sup>th</sup> Cir. 1997) (reentry of deported alien); *United States v. Ayo-Gonzalez*, 536 F.2d 652, 656-62 (5<sup>th</sup> Cir. 1976) (strict liability as to location of boundary of American territorial waters in prosecution for illegal fishing); *People v. Garner*, 781 P.2d 87, 89-90 (Colo., 1989) (vehicular homicide); *State v. Angulo*, 471 N.W.2d 570, 572 (Minn. Ct. App. 1991) (strict liability regarding victim's status as a police officer in first-degree murder – although court resists label of “strict liability”); *Carter v. State*, 647 P.2d 374, 377 (Nev. 1982) (strict liability for age of victim under statute aggravating penalties for crimes committed against those over 65); *State v. Ervin*, 577 A.2d 1273, 1274-1276 (N.J. Super. App. Div. 1990) (strict liability for death that occurs because of an overdose from drugs provided by the defendant); *State v. Maxwell*, 767 N.E.2d 242, 246 (Ohio 2002) (strict liability as to source of child pornography being out of state); *State v. Hull*, 728 N.E.2d 414, 419 (Ohio. Ct. App. 1999) (felony illegal voting); *State v. Creamer*, 996 P.2d 339, 344 (Kan.App. 2000) (in jury to a pregnant woman and involuntary manslaughter while driving under the influence of alcohol and drugs).

<sup>16</sup>The modern literature criticizing the erosion of mens rea can be said to begin with Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932) [hereinafter *Mens Rea*] and *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) [hereinafter *Public Welfare Offenses*]. Further high points since then have included Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753 (1943) [hereinafter *Hall I*] and *Hall II*, *supra* n. --; Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 528 (1955); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHILOS. & POL'Y 29 (Spring, 1990); Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHILOS. & POL'Y 84 (Spring, 1990); Alan Brudner, *Agency and Welfare in the Penal Law*, in ACTION AND VALUE IN CRIMINAL LAW (Stephen Shute et al. eds., 1993); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999). See also the Model Penal Code § 2.02, which requires a showing of culpability for each material element of every offense and the brief discussion of the drafters' attitude towards strict liability in Hart, *supra* at 425 n.62.

<sup>17</sup> MODEL PENAL CODE § 2.02.

<sup>18</sup> *Id.* at §§ 213.4(6), 213.6(1).

<sup>19</sup> *Id.* at §§ 213.1(1)(d), 213.4(4), 213.6(1).

concessions to objective liability,<sup>20</sup> however, it also testifies to the persistent challenges that the doctrines of mens rea have faced.

A major illustration of such challenges--of the historical persistence of strict liability for serious crime--lies in the related offenses of "seduction," non-forcible "abduction," and "carnal knowledge" of a girl under some statutorily designated age. While there are important distinctions among these offenses, together they yielded in the nineteenth century a rule of strict liability with respect to the age of the victim in a group of related felonies. For purposes of this article, therefore, they will often be treated as interchangeable. A brief telling of the story of these cases will provide background for a larger investigation into their roots and causes.

Carnal knowledge of a girl under ten years old was made a felony by statute in England in the sixteenth century.<sup>21</sup> In nineteenth-century America, the precise contours of the offense were not entirely clear, but commentators seem generally to have assumed that carnal knowledge of a girl under ten years old was a felony while carnal knowledge of a girl under twelve was a misdemeanor.<sup>22</sup> Some states early in the century enacted their own statutes criminalizing carnal knowledge and non-forcible "abduction" of girls out of the possession of their parents (often for the purpose of prostitution),<sup>23</sup> but many states may not have done so for some time.

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<sup>20</sup> For example, the MPC endorses liability for some instances of negligent behavior, *see id.* at § 2.02, permits a finding of intoxication to substitute for a finding of actual awareness of criminal risk, *see id.* at § 2.08(2), and provides for strict liability as to the age of the victim in cases of sexual assault of a child under ten years old, *see id.* at § 213.6(1).

<sup>21</sup> For a quick account of this history, *see Myers, supra n. --*, at 109-10.

<sup>22</sup> *See, e.g.*, 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 583-84 (3d ed. 1865).

<sup>23</sup> *See, e.g.*, FRANCIS WHARTON, CRIMINAL LAW 436-37 (2d ed. 1852); for Kentucky, *see* 1 HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY, 135-36, 141 (Wm. W. Gaunt & Sons, 1983) (1804); for Virginia, *see* ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 209 n. 5, 214 n. 6 (1803) [hereinafter TUCKER'S BLACKSTONE].

In the long span of time before 1859, no case seems to have been reported that confronted the issue of the defendant's reasonably mistaking the age of the girl. This lacuna should seem odd if criminal intent in the modern sense was a prerequisite to liability. Some defendants must have made reasonable mistakes of age, but such cases were never reported. Moreover, the likelihood of a reasonable mistake and the morally exculpatory potential of such a mistake must have increased in the late nineteenth century as the statutory age of consent moved to sixteen or even higher in many states;<sup>24</sup> a fifteen-year-old might sometimes plausibly pass herself off as an adult, and her violation would presumably be viewed as at least somewhat less tragic than the violation of an eleven-year-old. But, in the event, no published case ruled on a mistake of age claim before 1859, and the cases that did confront this defense universally refused to allow it.

The most famous case on this issue was not an American case at all but a British case called *Prince*.<sup>25</sup> The charge in *Prince* was abduction, taking a minor out of the legal possession of her guardian. The case still appears in casebooks to illustrate some of the difficulties in applying the mens rea requirement.<sup>26</sup> Some have also suggested that it was the leading case in American courts for denial of the mistake-of-age defense: "*Prince* initiated a trend which was universally followed in American jurisdictions."<sup>27</sup> But it was not the first case to hold as it did. Nor was it routinely cited by American courts.

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<sup>24</sup> See MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920* 14-15 (1995).

<sup>25</sup> *Regina v. Prince*, 2 L.R.-C.C.R. 154 (1875).

<sup>26</sup> See, e.g., KADISH AND SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 226 (7th ed. 2001).

<sup>27</sup> Myers, *supra* n.--, at 111. See also Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 700.

The first case in the Anglo-American world to hold that mistake of age was no defense in this context and thus to apply strict liability<sup>28</sup> was Iowa's *State v. Ruhl*,<sup>29</sup> decided in 1859. In *Ruhl*, the defendant was charged with the statutory crime of enticing a girl under fifteen away from her legal guardian for purposes of prostitution. After conviction, he appealed the trial judge's refusal to let him prove his reasonable belief that the girl had been over fifteen, apparently arguing that his mistake was analogous to that of a man who has sex with someone not his wife by mistake. The court pointed out, however, that the analogy to a husband's mistake failed because that hypothetical husband simply had no criminal intent "either in law or morals."<sup>30</sup> This defendant, on the other hand, did have a "criminal or wrongful intent" regardless of the actual age of the victim, because his overtures to her were for the purpose of prostitution. In Iowa such enticement was not criminal in a case where the girl was over fifteen, but that did not stop the court from deeming an intent to so entice an adult female "criminal or wrongful." And from there the court found that even such a non-indictable "wrongful intent" could be "transposed" to supply the criminal intent necessary to convict the defendant for an indictable harm, such as enticement of a girl under fifteen. For this proposition the court cited only Joel Prentiss Bishop's recent treatise on criminal law,<sup>31</sup> which itself had cited no cases for its announcement of the same common-law principle of transferrable, "wrongful," although

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<sup>28</sup>Hall II, *supra* n. --, at 994-95, essentially reads strict liability for the age element of the crime as rendering the crime a strict liability crime. Moreover, while Sayre tries to excuse strict liability in the statutory-rape cases by asserting, among other things, that mens rea still applies to the crime even if not to the age element, he does not suggest what mistakes of fact could apply to this crime other than mistake of age. He seems in his acceptance of these decisions on grounds of public policy to have lost his analytical bearings as he tries to show that there have been only the slightest of departures in the cases from the universal doctrine of mens rea. See *Public Welfare Offenses*, *supra* n. --, at 74-75, where he skates over the surface of the statutory-rape cases and lands, it seems to me, directly in the sights of Hall, who later characterized the statutory-rape cases as a triumph of sexual mores over doctrinal integrity in criminal law. See Hall II, *supra* n. --, at 995.

<sup>29</sup>8 Iowa 447 (1859).

<sup>30</sup>8 Iowa at 450-51.

<sup>31</sup>8 Iowa at 451.

non-indictable intent.<sup>32</sup> Bishop's next edition, however, gladly cited *Ruhl* to support the position.<sup>33</sup>

*Ruhl* was the first case to hold a seducer strictly liable as to the victim's age. But it did so not by announcing strict liability as such even for the one element of the crime at issue. In fact, notwithstanding the codification of Iowa's criminal law, it did not treat mens rea as a concept to be tied to each "element" of an offense – as the MPC would make orthodox in the next century – but, true to the traditions of the common law, as a more diffuse aspect of the offense considered as a whole. It chose tacitly to presume that criminal intent remained integral to the crime, and it insisted that the defendant had had criminal intent in the traditional common-law sense of the term.<sup>34</sup> It did not say that, now that the statute had supplanted the common law, mens rea was required only where the statute explicitly said so but that the mens rea required under the code was the same kind as discussed by the common-law commentator Bishop; that is, a generally wrongful intent that could be rendered as "criminal" by the court once harm resulted from it.

Some years later, the Iowa court adopted even harsher reasoning than it had in *Ruhl*. In *State v. Newton*<sup>35</sup> the court rejected a defendant's claim in a statutory-rape (carnal knowledge) case that the judge should have instructed the jury that the defendant had to have known that the victim was under ten years old. The court held flatly that, "The crime does not depend

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<sup>32</sup>JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 295 (2d ed. 1858).

<sup>33</sup>1 BISHOP (3rd ed.), *supra* n. --, at 227.

<sup>34</sup> On the diffuseness of the traditional, common law mens rea inquiry, see, for example, George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 412-18 (1971); Gerhard O. W. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1060 (1958); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 654-67.

<sup>35</sup>44 Iowa 45 (1876).

upon the *knowledge* of defendant of the fact . . . but upon the fact itself.”<sup>36</sup> And the court cited for this unconditional holding a recent case of its own where the charge was selling liquor to a minor. There, it had held that “the person selling must at his peril know that the person to whom he sells is authorized to buy.”<sup>37</sup> In this latter case, the charge was arguably not a “criminal” charge but a minor offense subject to fine and prosecutable by any member of the public. Consequently, the court reinforced its holding by observing that even if the offense had been indictable, it still would not have been necessary “to allege that the defendant knew the person buying was a minor” since an indictment need only “clearly charge[ ] all the facts and circumstances which constitute the offense under the statute.” And if knowledge might be superfluous to an *indictable* offense, then the principle held all the more strongly where the offense was *not* indictable.<sup>38</sup> By 1876, then, Iowa appeared to have moved to frank acceptance that the legislature might dispense with the mens rea requirement as it saw fit and perhaps even to a presumption that the legislature does so whenever it fails to specify mens rea in the statute.

A California case of 1891 articulated further the rationale for strict liability. In *People v. Fowler*,<sup>39</sup> the defendant was charged with the non-forcible “abduction” of a girl under eighteen from the lawful charge of her mother for purposes of prostitution. He challenged the adequacy of the information because it did not charge him with knowledge of the girl’s age. But the California Supreme Court rejected the challenge for two separate, although relatable, reasons.

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<sup>36</sup>44 Iowa at 47.

<sup>37</sup>Jamison v. Burton, 43 Iowa 282, 284 (1876).

<sup>38</sup>43 Iowa at 286. *Jamison* had something of the flavor of *Ruhl*’s reliance on generally wrongful intent even though the morally questionable sale of liquor to adults was clearly legal in Iowa, at least under the circumstances in which the defendant acted. But even if *Jamison* was assimilable to *Ruhl*, *Newton* dispensed with all of the language of moral wrongness and simply held flatly, by quoting *Jamison*, that a statutory crime need not incorporate a mental element.

<sup>39</sup>88 Cal. 136 (1891).

First, it cited Bishop to the effect that the “gist” of the crime was the abduction – even though it would be no crime at all if the girl were eighteen or over – so that one who engages in such activity acts at his peril as to the “age of the child.”<sup>40</sup> Then the court turned to deterrence and declared that the purpose of the statute was to protect the family and that it ought to be interpreted so as to render it effective.<sup>41</sup> The court did not explain how denying a mistake-of-fact defense rendered a statute effective when the only activity that the statute targeted had been unintended.<sup>42</sup>

Five years later, *People v. Ratz* followed *Fowler*, this time in an actual statutory-rape case: “The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact” that the girl might be under age.<sup>43</sup> But it did not say what it meant by “such circumstances.” That language might suggest that the court was implicitly finding a kind of negligence with regard to age in the defendant’s behavior, but the “in peril of the fact” language suggests that the court was thinking in terms of strict liability.

Were courts obscuring findings of fault behind clumsy holdings that strict liability was the rule on the issue of the victim’s age? In *People v. Lewellyn*, the Illinois Supreme Court responded to the defendant’s claim of mistake by declaring that the defendant “knew that she was not that old; and, besides, it was immaterial whether he knew it or not.”<sup>44</sup> This court thus embraced strict liability, but would it have done so if it was not convinced of the defendant’s

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<sup>40</sup>88 Cal. at 138.

<sup>41</sup>88 Cal. at 138-39.

<sup>42</sup> It is easy enough to produce such an explanation. See, e.g., Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1512 (Sanford Kadish ed., 1983); Kenneth W. Simons, *When is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075 (1997); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 742-44 (1960); James B. Brady, *Strict Liability Offenses: A Justification*, 8 CRIMINAL LAW BULLETIN 217 (1972). But these courts did not feel the need to offer one.

<sup>43</sup>115 Cal. 132, 135 (1896).

<sup>44</sup>145 N.E. 289, 290 (Ill. 1924).

knowledge on the facts? Similarly in Ohio's *Zent v. State*<sup>45</sup> the court felt it necessary, after flatly denying the mistake-of-age defense,<sup>46</sup> to observe that the defendant's act also constituted adultery and generally to suggest enough moral guilt to deflate any claim that the result might be unjust.<sup>47</sup> On the other hand, in one of the earlier cases, Virginia announced its rule denying the mistake-of-age defense in a case where the court thought the defendant innocent and recommended him to the governor for clemency.<sup>48</sup> Despite the defendant's innocence and despite the apparent absence of Virginia precedent at that time, the court announced that, "The offence of having carnal knowledge of a female under twelve years of age is entirely independent of and unaffected by . . . any belief, or reasonable cause of belief, on his part that she was twelve years old. If he choose to have carnal connection with a female, he must do the act at his peril in regard to her being under the age of twelve years."<sup>49</sup>

The Virginia case notwithstanding, one could accuse many of these courts of sacrificing doctrinal regularity to the cause of convicting wrongdoers who had chosen to cross some moral rather than legal line.<sup>50</sup> But then why didn't the judges routinely say, as *Ruhl* and some others had, that the mens rea requirement remained but was satisfied once the defendant had knowingly done the immoral "gist" of the offense. What provoked ringing declarations that, in spite of the traditional mens rea requirement, the legislature may declare an act "punishable without proof that the defendant understands the facts that give character to his act"?<sup>51</sup> And why did such declarations rarely or never offend nineteenth-century commentators when they would so outrage twentieth-century theorists?

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<sup>45</sup>Ohio App. 473 (1914).

<sup>46</sup>Ohio App. at 474-76.

<sup>47</sup>Ohio App. at 477.

<sup>48</sup>*Lawrence v. Commonwealth*, 71 Va. 845 (1878).

<sup>49</sup>71 Va. at 855.

<sup>50</sup>*See, e.g., Hall II, supra n. --*, at 995.

<sup>51</sup>*Commonwealth v. Murphy*, 165 Mass. 66, 70 (1895).

## II. THE IDEA OF PUBLIC WRONG: MENS REA BEFORE THE SUBJECTIVE-OBJECTIVE DEBATE

The judges in the cases above did not write much about the individualized, moral justice that might be owed to a criminal defendant. Instead, they generally wrote from the perspective of the public interest. Contemporary treatise writers too discussed crime in terms of the distinction between public and private wrongs. While moral justice to the accused as an individual was hardly irrelevant, writers on criminal law widely focused on a sort of public rather than private justice as the goal of criminal proceedings, as an investigation of these writers will show.

### A. Blackstone

The early English treatments of criminal law were not called treatises on “criminal law” but were treatises on the “pleas of the crown.”<sup>52</sup> They discussed those legal actions that were procedurally the province of the crown and thus of the public as such. They did not define these “pleas” as essentially those that involved blaming or punishment or mens rea, but as those actions that could, in fact, be brought by the crown even if they could also sometimes be brought by private parties. When brought by private parties, they might be thought civil actions. When brought by the crown, they were generally criminal actions.<sup>53</sup>

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<sup>52</sup>E.g., MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* (Sollom Emlyn ed., 1778; published posthumously after being written in the seventeenth century); WILLIAM HAWKINS, *PLEAS OF THE CROWN* (1716, 1721).

<sup>53</sup>S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 404 (2d ed. 1981). The distinction in the text is undoubtedly an oversimplification of English law in this period. For a more complex introduction to the crime/tort distinction in English legal history, although focusing on a period earlier than the eighteenth century, see David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 *B.U.L. Rev.* 59 (1996).

This procedural distinction, however, was of little use for understanding the substantive distinctions between criminal and civil law or the meaning and role of criminal intent.<sup>54</sup> To the rescue came the monumental commentaries of Blackstone, which would attempt to rationalize English substantive law generally and, as part of that project, criminal law. The scope of Blackstone's rationalizing ambition was so unprecedented and its product destined to be so foundational to American jurisprudence that an extended consideration of his work is necessary here.

Although Blackstone is often thought, fairly enough, to have been a talented apologist for the common law, his agenda was also reformist, at least in the area of criminal law, and his reformism was of a decidedly public-oriented, proto-utilitarian stripe.<sup>55</sup> The essential historical background for his volume on crime was the chaotic and savage proliferation of capital statutes in eighteenth-century England and, by way of contrast, the publication of Beccaria's continental Enlightenment tract *An Essay on Crime and Punishments* in 1764. In offering an opening "apology"<sup>56</sup> for his writings on crime, Blackstone declared that this branch of law "should be founded on principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind . . . ." And yet, Blackstone observed, the criminal law across Europe and even in England had become "more rude and imperfect" than the civil law. Rather than receiving the maximal care and attention that so important a body of law deserved, the criminal law had succumbed to

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<sup>54</sup> David Lieberman, *Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence*, 8, unpublished manuscript forthcoming in *LAW, CRIME AND ENGLISH SOCIETY, 1660-1840* (Norma Landau ed., Cambridge University Press forthcoming).

<sup>55</sup> DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 66 (1989); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 265-66 (1986).

<sup>56</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 5 (1769).

carelessness, avarice, vengeful feeling, inertia, and impetuosity, bringing with them a frequent readiness to resort to the ultimate penalty to deter even minor offenses.<sup>57</sup>

The “inhumanity and mistaken policy” of this state of affairs in the nations of Europe had justly been pointed out by Beccaria, Blackstone observed. But, even in England, where criminal law and procedure were most advanced, Blackstone intimated that the same basic conclusion was warranted.<sup>58</sup> After all, it remained a capital felony in England “to break down . . . the mound of a fishpond, whereby any fish shall escape,” or to “cut down a cherry tree in an orchard,” or “to be seen for one month in the company of persons who call themselves, or are called, Egyptians.”<sup>59</sup> Each of these was more a “snare for the unwary” than an emanation of “principles that are permanent, uniform, and universal.” And the general proliferation of capital offenses had led not to effective prevention – the very purpose of criminal law – but to the vitiation of the law by compassionate juries and judges and thus to contempt for the law by offenders of all sorts.<sup>60</sup> Discussing the principles of preventive punishment, then, Blackstone adopted the conclusion of Beccaria, “an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment.”<sup>61</sup>

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<sup>57</sup> 4 BLACKSTONE. at 3. Blackstone does not seem to have considered the possibility that these savage criminal laws may never have been part of an effort to “deter” so much as simply an effort to vindicate and display the power of the ruling classes. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 47-65 (1975).

<sup>58</sup> 4 BLACKSTONE, *supra* n. --, at 3-4. Blackstone’s rebuke to Parliament here is decidedly understated as he congratulates England for not being as bad as Europe, but it seems clear that he means to say that Parliament too has much to learn from Beccaria and thus from Blackstone’s adaptation of Beccaria to the English setting.

<sup>59</sup> 4 BLACKSTONE. at 4. “Egyptians” was a reference to those who have more recently been called “gypsies.”

<sup>60</sup> 4 BLACKSTONE. at 18-19.

<sup>61</sup> 4 BLACKSTONE. at 17.

Seeking to educate the English ruling class in a rational, preventive approach to the substantive law, Blackstone deemphasized the jumble of writs and actions central to the lawyer's work and instead presented an apparently clean and logical structure of the substantive law.<sup>62</sup> For this audience, the proffered rationale of English law should include an explication of the law of crimes as such, since, even though "crime" was no part of the terminology of the law,<sup>63</sup> it was an important part of English language and culture.<sup>64</sup> And it meant more and less than conduct that was prosecuted by the crown, since it was clear both that "crimes" might sometimes be prosecuted by private parties and that crown actions were themselves sometimes civil rather than criminal.<sup>65</sup> Blackstone's fourth volume, then, was not to be another *Of the Pleas of the Crown*. But what title would appropriately indicate the meaning of crime in his preventive, utilitarian scheme?

Had he called it *Of Crimes* or *Of Punishable Offenses*, his readers would certainly have known what he was talking about,<sup>66</sup> but he called it, instead, *Of Public Wrongs*. He thereby maintained the symmetry of his volume titles around the ideas of public and private, right and wrong, but he also indicated the essential substantive rationale of the law as he saw it, a Beccarian rationale for criminal law as public policy. Blackstone opened with a definition of crimes as "public wrongs," which he found synonymous with the "pleas of the crown," and he contrasted them with violations of private rights. Private wrongs or civil injuries were wrongs to "individuals, considered merely as individuals," whereas public wrongs were violations of "the public rights and duties, due to the whole community, considered as a community, in its

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<sup>62</sup> Lieberman, *Mapping*, *supra* n. --, at 5-6; more generally, see LIEBERMAN, PROVINCE, *supra* n. --, at 63-64.

<sup>63</sup> Lieberman, *Mapping*, *supra* n. --, at 2; David J. Seipp, *Crime in the Year Books*, 33, in *Law Reporting in Britain* (Chantal Stebbings ed., 1995).

<sup>64</sup> Lieberman, *Mapping*, *supra* n. --, at 3.

<sup>65</sup> *Id.* at 17-19.

<sup>66</sup> *Cf. id.* at 17.

social aggregate capacity.”<sup>67</sup> As opposed to private law, where the point of the law was compensation, the distinctive function of criminal law was prevention, “to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole.”<sup>68</sup>

Blackstone was aware that his distinction between public and private wrongs was porous, that any wrong to an individual could be reconceived as a wrong to the public. But the impossibility of drawing a perfectly reliable line between public and private did not deter him from elaborating the meaning of that useful line – the line that kept harms to individuals from always falling “absolutely under the notion of private wrongs” – as best he could. Thus a privately redressable wrong became criminal, of public concern, and prosecutable (“always at the suit and in the name of the king”) insofar as it represented a violation of “the moral as well as the political rules of right,” insofar as it exhibited a tendency to breach the public peace, and insofar as its example would “threaten and endanger the subversion of all civil society.”<sup>69</sup>

In marking the boundaries of substantive criminal law, then, the sovereign defined what benefits were to be deemed the products of political society rather than the products of individual relations. And its authority to punish in the interests of the public came from two Lockean sources: First, “in a state of mere nature” every person had had a natural right to punish “*mala in se*,” which Blackstone perhaps idiosyncratically confined to those few crimes (like murder and sodomy) for which the Bible pre-politically prescribed the punishment – even theft and other property crimes being *mala prohibita* in his scheme. “In a state of society,” then,

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<sup>67</sup> 4 BLACKSTONE, *supra* n. --, at 5; Lieberman, *Mapping*, *supra* n. --, at 11.

<sup>68</sup> 4 BLACKSTONE, *supra* n. --, at 7; Lieberman, *Mapping*, *supra* n. --, at 11-12.

<sup>69</sup> 4 BLACKSTONE, *supra* n. --, at 176-77. Cf. Lieberman, *Mapping*, *supra* n. --, at 19-20.

“this right is transferred from individuals to the sovereign power.” Second, every person had consented as part of “the original contract into which they entered, when first they engaged in society,” that the sovereign should make positive laws for the citizenry’s security – “*mala prohibita*” – and enforce such law with “severities adequate to the evil.”<sup>70</sup> In compensation, one gained security against those who persisted (self-consciously or not) in indulgence of the private, pre-social self in violation of the social contract.

Blackstone thus rested on the Lockean conceit<sup>71</sup> that society was a matter of contract among a mass of individuals who had chosen to leave the “state of nature” in preference for collective living. In the state of nature, only natural law had limited the natural freedom to pursue self-interest, and natural law was rightly enforceable by each individual in the name of reason and general security.<sup>72</sup> In society, by contrast, every individual had contracted away much of this atomized liberty and embraced instead the legislative and executive authority of a public sovereignty for the purpose of establishing a greater security in the lives and property of all than could be achieved by self-enforcement of natural law. By exiting the state of nature, one granted to the legislative body a power to make positive law for the security and development of ever more complex “property,” broadly conceived. Moreover, one ceded to the public executive the right to enforce the laws, the executive thus resting on each citizen’s “natural political virtue,” in Peter Laslett’s phrase.<sup>73</sup> One sacrificed one’s natural freedom but gained in

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<sup>70</sup> 4 BLACKSTONE, *supra* n. --, at 7-9.

<sup>71</sup> See Thomas Green's observation, at xii, in his introduction to volume 4 of the University of Chicago Press edition of Blackstone (1979) that Blackstone, like all self-professed eighteenth-century Whigs, adhered to the principles of the Glorious Revolution, which generally informed English thought about public matters in the eighteenth century. Locke, of course, was one of the central figures in giving the Revolution meaning for its eighteenth-century adherents, and elements of his argument are easily visible at many points in Blackstone.

<sup>72</sup> Peter Laslett, *Introduction*, 94, 97, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (student ed. 1988).

<sup>73</sup> *Id.* at 102-08.

return the greater, positive freedom of society and property under positive law.<sup>74</sup> For Locke, the whole theory of political authority rested on an assumption that each individual brought to the social body a natural political virtue that was fundamentally publicly oriented in the first place.<sup>75</sup> The legislative power that it created, therefore, was a “living Body.” It transcended the individuals who had constituted it and imparted a positive, transcendent unity to the society as a whole, “the Commonwealth,” for which it spoke and to which it gave form.<sup>76</sup> The commonwealth was unintelligible except as a body into which each individual had merged politically, not as a self-interested individual simply looking to buy security in some market, but as a bearer of outward-looking natural political virtue, committed to a positive public sovereignty as a transcendent entity. Thus, according to Laslett, “Citizenship [became] a specific duty, a personal challenge in a world where every individual either recognized his responsibility for every other, or disobeyed his conscience”; that is, disobeyed the imperatives of an outward-looking natural political virtue now held in trust and given articulation by the public sovereignty.<sup>77</sup> As a good Lockean, then, Blackstone rested his analysis of “public wrongs” on the idea that each citizen had ceded the relatively expansive (though far from absolute) rights of self-interested indulgence, bounded only by natural law, and obligated her- or himself to the cultivation of a public character under positive law.

Consistently with this theme and with his explicit admiration for Beccaria’s importation of reason into the criminal law, Blackstone’s first chapter climaxed with the claim that the sole purpose of punishment was the public purpose of prevention, not private retaliation.<sup>78</sup> To this end, even the death penalty could be justified for *mala prohibita* where necessary to deter

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<sup>74</sup> *Id.* at 112.

<sup>75</sup> *Id.* at 111.

<sup>76</sup> *Id.* at 112-13, 118.

<sup>77</sup> *Id.* at 121-22.

<sup>78</sup> 4 BLACKSTONE, *supra* n. --, at 11-14.

conduct that the legislature had deemed dangerous, although the legislature must be careful not to adopt a cure disproportionate to the disease.<sup>79</sup> His worry about proportionality indicated a concern with individual culpability, as did other passages in his work.<sup>80</sup> But, while he worried that overly simplistic utilitarian reasoning had led Parliament to impose grossly unjust penalties for minor misconduct<sup>81</sup>--exercises of the public sovereignty that must be obeyed even as they might justly be reformed -- he seems to have treated the defendant's culpability merely as one important factor in a calculus of prevention. The measure of punishment for any particular offense, he said, could never be determined by an invariable rule that would bind the legislature, such as the *lex talionis* or other variations on just deserts. Rather, it must simply be left to that body to authorize such punishments "as appear to be the best calculated to answer the end of precaution against future offences."<sup>82</sup> The particulars of punishment, he wrote, "ought to be proportioned to the particular purpose [that the punishment] is meant to serve" -- here, he indicated a choice of purposes among rehabilitation, incapacitation, and general deterrence -- "and by no means to exceed" what was necessary. Thus, far from considering desert fundamental to the measure of punishment, he freely took into account as well such matters as how difficult particular offenses were to detect. Even though two crimes might be of "equal malignity," one might justly be made capital if it was difficult to prevent -- e.g., a servant's theft from her or his master -- whereas another should not be if it was relatively easy to prevent, such as theft by a stranger.<sup>83</sup> Blackstone's focus on public wrong and prevention, then, revealed the object of criminal law and state punishment not as the delivery of private moral

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<sup>79</sup> 4 BLACKSTONE, at 9-10. In Blackstone's language, the death penalty should be avoided where "the evil to be prevented is not adequate to the violence of the preventive."

<sup>80</sup> For example, he describes the quality of one's "will" as "the only thing that renders human actions either praiseworthy or culpable." 4 BLACKSTONE, at 20-21.

<sup>81</sup> 4 BLACKSTONE, at 3-4, 10, 18-19.

<sup>82</sup> 4 BLACKSTONE, at 11-12.

<sup>83</sup> 4 BLACKSTONE, at 16.

justice to the individual but as a matter of rational public policy. Common morality was obviously part of the calculation, but the chief object was not private justice to the accused; it was cultivation of society as a whole – “in its social aggregate capacity” – and the consequent security and development of persons, property, and civilization.

Having defined crime from this public perspective and without regard yet to the intent of the actor, Blackstone moved in his second chapter to discuss what would render the “committer of a forbidden act” nevertheless unpunishable. Here the mental element became salient. Only “the want or defect of *will*” could remove “culpability” from the actor since a “vicious will” and “an unlawful act consequent upon such vicious will” were absolutely necessary to such a finding.<sup>84</sup> But what relationship was there between the public-ness of the wrong and the vicious-ness of the will? Were public wrongs only those for which a more or less modern sort of criminal intent could be shown? Even though society might have a strong interest in overriding such a limitation where the public good seemed to require it?

I think that what Blackstone meant by a “vicious” will was perhaps a “vitiating” or “unlawful” will.<sup>85</sup> “Vicious” certainly did not have the modern connotation that “vicious” now bears, reflecting the savage malignity or cruelty of an act. Blackstone’s readiness to convict even when the offender “did not foresee or intend” harm<sup>86</sup> suggests that clearly enough. Rather, “vicious” described a more generalized corruption of or imperfection of character or conduct.<sup>87</sup> Thus Johnson’s Dictionary noted that “vicious” was “rather applied to habitual faults, than criminal actions. It is used of persons and practices,” describing generalized

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<sup>84</sup> 4 BLACKSTONE, at 20-21.

<sup>85</sup> Cf. GRAHAM WALLACE, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT (1990), which discusses Augustine’s notion of levels of vitiating being that are suggestive of the difference between what I am calling here the public and private selves.

<sup>86</sup> 4 BLACKSTONE, *supra* n. --, at 26-27.

<sup>87</sup> See the historical examples in 19 THE OXFORD ENGLISH DICTIONARY 604-05 (2d ed. 1989), including the definition drawn from law: “[N]ot satisfying legal requirements or conditions; unlawful, illegal.”

imperfection more than situational savagery.<sup>88</sup> Closely related in both etymology and traditional meaning to the verb “vitate,” “vitious” described an exercise of will that proceeded from a character or practice less pure or perfect than it should be. Just as a contract or a will might be vitiated, might lose its status as a lawful document, through some imperfection unrelated to morality, so I take a criminal “will” to be “vitious” not just when it was clearly immoral but whenever it fell short of the requisite degree of “lawfulness.” It was not necessary, for Blackstone, that the will exhibit some deep malignity nor that it pursue any *particular* crime or risk any *particular* harm, only that it indulge the self in private pursuits in derogation of the exacting discipline of public virtue.<sup>89</sup> And it was not always necessary that the act be morally wrong, as long as it was at least in tension with some law or some apparent public policy and was in that sense “unlawful.”<sup>90</sup> Such an act, vitiating one’s public virtue by indulging private impulses inconsistent with the will of the “living Body” of the commonwealth as a whole, was exactly what society existed to secure its members against.

The point flows as well from Blackstone’s statement that any harm that accidentally followed “a *lawful* act” was completely excused for the actor, whereas “if a man be doing anything *unlawful*” he had no excuse for “whatever consequence” followed, no matter that “he

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<sup>88</sup> SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785).

<sup>89</sup> It is worth noting here the huge scholarship on republican political thought in the eighteenth century, the central concept of which was “virtue,” not in the sense of moral rectitude but in the sense of attention to the public good rather than private interest. For a general look at the historiography, see Daniel Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992). The best of this scholarship has observed a good deal of overlap between republican political thought and other brands of thought, suggesting something of a fusion of the republican notion of political virtue and religious notions of moral virtue. Each sort of thinking perhaps suggested that public and personal virtue consisted in the elevation of the self to a higher state of being, attuned to the public interest and legitimate public authority and thus freed from the mere pursuit of private interest. See James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987).

<sup>90</sup> Even one much less positivistically inclined than Blackstone, Joel Prentiss Bishop, agreed that, “If any law, statutory or common, prohibits a thing, one can hardly be said to intend innocently the doing of it . . .” Consequently, adequate intent could be shown for conviction even though the result was different from that intended. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 210 (7<sup>th</sup> ed. 1882).

did not foresee or intend” it.<sup>91</sup> Here, I think he used “lawful” and “unlawful” to restate the distinctions between public and private harms and between “vicious” and virtuous wills. As will be discussed further below, “unlawful” did not necessarily mean criminal but might describe any conduct not positively authorized by law.<sup>92</sup> A merely civil trespass, for example, was enough to count as “unlawful” for Blackstone and sustain a felony conviction for manslaughter.<sup>93</sup> Similarly, “casting stones in a town” and “the barbarous diversion of cock-throwing” were “unlawful acts.” Blackstone does not indicate that these would ever have been punishable or actionable in themselves but only that they would have supported a felony conviction once they caused injury or death.<sup>94</sup> And drinking oneself into “madness” or “phrenzy” – undoubtedly “unlawful” but not clearly designated as criminal conduct in Blackstone – would not mitigate but aggravate any consequent offense, no matter that the offense was truly involuntary and caused by the alcohol rather than by any will to engage in the criminal conduct.<sup>95</sup> “Lawful” and “unlawful,” therefore, were not given any independent definition by Blackstone but simply reflected Blackstone’s general approach to criminal law as prevention, achievable by punishing those who cause sufficiently public harms when acting from a “vicious” or insufficiently public-regarding will or character. It is very clear that Blackstone did not mean the requirement of “vicious will” to require specific criminal intents regarding each “element” of a crime nor to require intention or foresight of harm. Rather, his requirement of a vicious will simply expressed the idea that punishable criminality inhered in

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<sup>91</sup> 4 BLACKSTONE, *supra* n. --, at 26-27.

<sup>92</sup> See below at \_\_\_\_

<sup>93</sup> 4 BLACKSTONE, *supra* n. --, at 193.

<sup>94</sup> 4 BLACKSTONE, at 183.

<sup>95</sup> 4 BLACKSTONE, at 25-26.

any voluntary act that excessively indulged private interest as judged by the needs of the public.<sup>96</sup>

Turning to the law of excuses, Blackstone offered a rather cursory recital of the common wisdom that mistake of fact could be a legitimate excuse but that mistake of law could not.<sup>97</sup> The lack of serious discussion here is noteworthy, especially when he had previously observed that the proliferation of new criminal statutes created prohibitions that were unknown to many and therefore stood as “snare[s] for the unwary”?<sup>98</sup> Again, the cause seems to lie in Blackstone’s endorsement of liability even for unintended harms as long as the harm counted as a “public wrong,” one for which the public required a response. Mistake defenses proliferate where criminal liability rests on specific knowledge and intent requirements, but Blackstone’s notion of a “vicious will” seems to have implied a much smaller scope for mistake. If one mistook the law, for example, the very tool by which the public sovereign constituted a commonwealth out of pre-social individuals, then one was by definition a proper object of the law’s example. And if a particular *malum prohibitum* was a “snare for the unwary” then it might be an unwise law; but it was nevertheless a valid law, and ignorance of that law could not excuse a voluntary act

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<sup>96</sup> Blackstone’s discussion of excuses as reflecting “defect of *will*” is also consistent with this picture. When the doer of a “forbidden act” had an excusing “defect of will,” Blackstone seemed to mean that she or he had acted without consciousness of the action’s having public implications or risks at all. This excusing defect might come from insanity, which disconnected the actor from any such consciousness altogether. Or it might be that the actor never exercised her or his own will in a relevant way at all, as in cases of uncontrollable chance or duress or utter ignorance of the facts necessary to indicate the public’s interest in the defendant’s conduct. 4 BLACKSTONE, at 20-33. A “defect of will” was not a “defect of intent.” Blackstone was not concerned with whether the precise conduct or harm was intended but whether the defendant could be conceived of as responsible in a basic sense, whether the defendant had in fact exercised a will that was meaningfully connectible to the harm. The nature of the required connection, then, might have been anything from mere awareness of one’s physical movements to a fully subjective intention with respect to every aspect of the offense, but Blackstone’s generally public orientation—his preoccupation with rationalizing the pursuit of public ends more than with any risk that individuals might be used for public ends—and his marginalization of excuses and intent would suggest a very strict standard of responsibility for a putatively virtuous citizenry.

<sup>97</sup> 4 BLACKSTONE, at 27.

<sup>98</sup> 4 BLACKSTONE, at 4.

that objectively defied the public and thus contradicted one's own consent to the laws. Similarly, not every genuine mistake of fact could excuse, since it was each citizen's duty to be attentive to circumstances that might affect the public. However, if one mistook facts in an acceptable way – that is, if one “intending to do a lawful act, does that which is unlawful” – one might be acting with full virtue, “lawfully,” and yet cause a harm targeted by the criminal law. Then, to apply criminal law to the individual would be to indict the public itself, or, in Holmes's words of a century later, to make a rule “too hard for the average member of the community to bear,”<sup>99</sup> with the unfortunate result being not so much injustice to the individual as undermining of the criminal law's very purpose to cultivate such public virtue as the citizenry was capable of.<sup>100</sup>

Blackstone extended his discussion of mistake of fact somewhat when he reached homicide but largely reiterated principles already stated. He found that homicide became mere misadventure where the defendant had been doing “a lawful act” but at least manslaughter where the act was “unlawful,” even if the unlawfulness was a mere failure of moderation in an otherwise lawful act: “And in general, if death ensues in consequence of any idle, dangerous, and unlawful sport, . . . the slayer is guilty of manslaughter . . . .”<sup>101</sup> I read “idle” and “dangerous” again to define the all-purpose term “unlawful,” with a merely “idle” lapse of one's alertness to one's public duties enough to create liability where the activity turns out to be

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<sup>99</sup> O. W. HOLMES, *THE COMMON LAW* 57 (1881).

<sup>100</sup> Thus even Bishop, who emphasized private justice and morality more strongly than anyone else in the American nineteenth century, demanded a defense only for those mistakes of fact that reflected genuine virtue and did so for consequentialist reasons as much as for reasons of pure justice: “To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because, misled while he was cautious, he honestly supposed the facts to be the reverse of what they were, would restrain neither him nor any other man from doing wrong in the future; it would inflict on him a grievous injustice, would shock the moral sense of the community, would harden men's hearts, and promote vice instead of virtue.” 1 BISHOP (7<sup>th</sup> ed.), *supra* n. --, at 179.

<sup>101</sup> 4 BLACKSTONE, *supra* n. --, at 182-83.

dangerous. Similarly, Blackstone said that the “malice” required for murder was not any specific intent to cause death or injury but “any evil design in general; the dictate of a wicked, depraved, and malignant heart . . . .”<sup>102</sup> As mere idle inattention to one’s public duties could create felony liability for a death accidentally caused, so this formulation legitimated liability for murder itself where the death was just as accidental but where the offender had shown her- or himself not just inattentive to the public but positively antipathetic to it;<sup>103</sup> for example, where “one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death.”<sup>104</sup> In this state of things, society was justified in judging her or him fundamentally malicious and unassimilable to the public body.

Finally, regarding the age-dependent statutory crimes of carnal knowledge and its like, which will be the focus of part IV, Blackstone did little but acknowledge their existence.<sup>105</sup> The spate of cases rejecting the mistake-of-age defense a century later makes it seem odd that Blackstone would not have even mentioned the issue. But Blackstone’s omission suggests that the issue would have been all but unintelligible before the mid-nineteenth century. A defendant’s mistake of the age of the girl hardly partook of the centrality to the public interest that allowing a defense would have given it. If a defendant were trying to prove that he had actually acted in a public mode – “lawfully,” virtuously – he was not going to do it by showing that he thought the girl was eleven rather than ten, “reasonably” or not.

This subsection has argued that Blackstone’s writing on criminal law reflected a preoccupation with prevention and with an imperative that one always attend to the public.

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<sup>102</sup> 4 BLACKSTONE, at 199.

<sup>103</sup> Cf. Cynthia B. Herrup, *Law and Morality in Seventeenth-Century England*, PAST AND PRESENT, 102 (Feb. 1985). Herrup seems to overstep her evidence in deeming “criminal” only those who were thought positively antisocial, but she seems right to suggest that the distinction between those who had made a misstep and those who were inveterately antisocial was important.

<sup>104</sup> 4 BLACKSTONE, *supra* n. --, at 199.

<sup>105</sup> 4 BLACKSTONE, at 209, 212.

These points should not be taken to mean, though, that Blackstone disregarded justice to the individual accused or the legitimate scope of private interest. While the criminal law could be taken to demand that all members attend perfectly and perpetually to the public good – a demand for perfect virtue – the reality was that Blackstone recognized a division between the public and the legitimately private in society. If criminal law existed to prevent harms to the public by insisting on such attention to the public interest as would generally prevent harms from occurring, then private law existed to resolve disputes when the parties had legitimately looked to their private interests but ended up in collision. Society rested both on the virtue that separated civilization from the state of nature and on the self-interest that was inseparable from human nature.

Similarly, Blackstone's treatment of criminal law as simply a branch of public policy hardly eliminated all concern with moral justice to the individual. Clearly, the great majority of cases of "public wrong" would involve a finding of immorality or "culpability" on the part of the accused. But Blackstone's distinct emphasis on the public perspective meant that, in the name of prevention and the public interest, he could comfortably endorse criminal liability where, for example, the defendant's intentions were only morally questionable rather than criminal in themselves, where harm was unintended and unforeseen, where liability was "strict" in our modern sense, as in felony murder or many cases of mistake of law or fact, even where a law constituted in his own judgment a "snare for the unwary." The perspective of justice to the individual, while hardly absent, was not his main concern. Nor had he even conceived of a modern version of mens rea, as epitomized by the MPC's insistence on element-specific and usually subjective mental states.

Blackstone's isolation of the public-ness of the wrong was quite original yet well grounded in the law and culture of the time. David Lieberman argues that neither the idea that

crime would normally call up public prosecution nor the idea that crime touched collective, not just private, interests was new with Blackstone. Moreover, the opposition between public and private was common in many areas of law. But, he says, the unification of these ideas in a definition of crime as “public wrong” was indeed new.<sup>106</sup> And yet, thanks to its grounding in common usages and assumptions, it proved no mere novelty. Rather, it was widely adopted by eminent legal thinkers in England<sup>107</sup> as well as in the new United States, as the next subpart will illustrate.

## B. The Public Perspective in American Criminal Theory

A survey of American commentary on criminal law across the nineteenth century will show that the language of “public wrong” and the adoption of a public perspective on crime represented a major, perhaps the dominant, theme in criminal theory. Criminal intent and culpability were also of major importance for every theorist of criminal law, although no one conceptualized them as the MPC and twentieth-century subjectivists would. But a public, utilitarian perspective akin to Blackstone’s lay at the center of most writing on criminal law.

Perhaps America’s first homegrown treatise on criminal law, although it relied very heavily on English writers, was Toulmin and Blair’s *A Review of the Criminal Law of the Commonwealth of Kentucky*,<sup>108</sup> published in 1804. Having been commissioned by the state legislature, it sought mainly to render the state’s criminal law accessible for practice, not to

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<sup>106</sup> Lieberman, *Mapping*, *supra* n. --, at 20-22.

<sup>107</sup> *Id.* at 22, 25.

<sup>108</sup> 1 TOULMIN & BLAIR, *supra* n. --.

provide a theory or philosophy of criminal law.<sup>109</sup> With few exceptions, this orientation to practice would characterize writing on criminal law across the nineteenth century.<sup>110</sup>

Toulmin and Blair did not attempt a definition of crime, but their discussion of the law of homicide manifested a mostly public-oriented theory of crime. They frequently relied on Blackstone, although they did not use his language of “public wrong.” And, while the authors did at one point refer to “felonious intention” as a “necessary ingredient in every felony,”<sup>111</sup> the doctrinal particulars sustained convictions for harms quite remote from whatever “felonious intention” the accused had manifested. Nowhere in this treatise did the authors explicitly identify or justify criminal liability where the defendant bore no fault of any sort, but neither did they think it necessary that the “felonious intention” actually be an intention to do a felony. Nor did criminal liability turn more on the nature of one’s intention than on the nature and actual (objective) circumstances of the harm caused.

In discussing the “malice aforethought” necessary to murder, for example, the authors affirmed that the malice might be either express or implied.<sup>112</sup> And “implied” malice certainly did not imply any necessary intention to do harm, although it suggested an intention to do something that the law frowned on and, for murder, perhaps an awareness of some significant risk to someone else’s safety. Thus malice might be implied by a jailer’s breach of his legal duty to care for a prisoner, by his doing of a “deliberate” act that “must apparently cause harm,” or by any “cruel” act.<sup>113</sup> And an absence of intent to kill would not prevent a murder conviction for one who intended an unlawful abortion from which the pregnant woman died.<sup>114</sup>

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<sup>109</sup> 1 TOULMIN & BLAIR, at ix.

<sup>110</sup> For a quick survey, see GERHARD O. W. MUELLER, CRIME, LAW AND THE SCHOLARS 31-63 (1969).

<sup>111</sup> 1 TOULMIN & BLAIR, *supra* n. --, at 94.

<sup>112</sup> 1 TOULMIN & BLAIR, at 4.

<sup>113</sup> 1 TOULMIN & BLAIR, at 11 (apparently quoting R. v. Huggins of 1730).

<sup>114</sup> 1 TOULMIN & BLAIR, at 20.

As in Blackstone, there was no explicit attention to the question of subjective awareness of danger as against negligence or strict liability. So it is simply unclear what significance the subjective-objective distinction, as modern theorists use the terms, had at this stage of things and perhaps anachronistic even to ask the question.<sup>115</sup> Toulmin and Blair said that malice meant “such circumstances, as are the ordinary symptoms of a wicked, depraved and malignant spirit.”<sup>116</sup> Subjective or objective? Their quotations from an English case called *Oneby* could suggest that this language referred to deliberate, violent attack,<sup>117</sup> as opposed to a less serious heat of passion arising from a “sudden affray.” But then the *Oneby* court, in their account, declared that the distinction between malice aforethought (murder) and heat of passion arising from “sudden affray” (manslaughter) might turn on whether such time had passed “that the passion by that time must be looked on to be cooled” – a question of law for the judge to answer.<sup>118</sup> Beginning with examples that suggested that malice meant subjective intention to do serious injury, the court ended with a rule that again implied malice on the basis of objective facts – legally adequate cooling time – regardless of whether the defendant had in fact harbored that cool malignity that earlier parts of the opinion suggested were the key to malice.

The significance of this ambiguity, however, is not that the common law was muddle-headed, but that the modern distinction between subjectivity and objectivity was unimportant. And if that distinction was unimportant, it was not because Blackstone and his like could not have thought of it but because criminal liability turned on whether the defendant’s conduct was a serious challenge to the social order – routinely true in cases of intentional attack but also true

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<sup>115</sup> See Nourse, *supra* n. -- at 1296.

<sup>116</sup> 1 TOULMIN & BLAIR, *supra* n. --, at 21-22.

<sup>117</sup> 1 TOULMIN & BLAIR, at 27-28.

<sup>118</sup> 1 TOULMIN & BLAIR, at 35.

in other cases – not on whether the defendant had deliberately chosen an evil commensurate with the liability subsequently imposed.

The ambiguity above runs right through Toulmin and Blair’s extended discussion of implied malice. On the one hand, apparently objective rules get illustrated by cases of subjective wrongdoing. Felony murder is illustrated mainly by transferred intent cases, suggesting a surprisingly subjective dimension to that offense.<sup>119</sup> Similarly, the announcement of the apparently anti-subjective principle that even non-felonious breach of the peace can sustain a murder charge is illustrated by a case of substantial, deliberate violence.<sup>120</sup> Still, on the other hand, the authors pretty clearly embraced strict liability with respect to, for example, an officer’s status. One who breached the peace and killed by coming to the aid of another was guilty of murder, not manslaughter, by virtue of the victim’s turning out to be an officer, simply because public officers were under the special care of the law.<sup>121</sup> And, in any case, even where “no mischief was really intended” the defendant was guilty of murder where she or he “happen to occasion the death of another, by the commission of any idle wanton action, which is evidently attendant with danger to some one,” such as riding a kicking horse among a crowd for one’s own amusement.<sup>122</sup> The discussion of these cases did not indicate any requirement that the defendant have intended to commit a felony. Rather, if a “felonious intention” was required, it was simply an intention to do something so “apparently” or “evidently” dangerous or just something sufficiently ill-advised to get boot-strapped into “felonious intention” by the occurrence of a death.

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<sup>119</sup> 1 TOULMIN & BLAIR, *supra* n. --, at 47-51.

<sup>120</sup> 1 TOULMIN & BLAIR, at 51-52.

<sup>121</sup> 11 TOULMIN & BLAIR, at 52-54

<sup>122</sup> 1 TOULMIN & BLAIR, at 60-61.

This boot-strapping of relatively petty idleness, wantonness, or excessive punctiliousness in points of “honor”<sup>123</sup> into “felonious intention” was all the more clear in the discussion of involuntary manslaughter. There, a felony homicide conviction might be had for a death “in the commission of an unlawful act, without any deliberate design of doing any mischief at all to the person killed.”<sup>124</sup> And all indications are that the language of “unlawful act” did not refer to a felonious act or even a sub-felonious criminal act, at least not in any carefully worked out sense. It simply meant an act that would render one liable, whether civilly or criminally, in a common law court if harm were to proceed from the act. Writers did not even equate “unlawful” with “immoral.” Thus Toulmin and Blair cited Foster’s inclusion within manslaughter of deaths resulting from the “unmanly barbarous custom” of “cockthrowing.”<sup>125</sup> Although Foster might have liked to see the full legal suppression of this activity, there was no indication that the activity was in fact illegal, only that it was adequate to sustain a manslaughter charge – adequate to supply “felonious intention” – once a death in fact resulted from it. Similarly, the authors cited Chichester’s case, in which Chichester was playing at swordfighting with his servant when the scabbard came off his sword unexpectedly as he thrust. Chichester was convicted of manslaughter because the playful thrust, which hardly

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<sup>123</sup> The distinction between murder and voluntary manslaughter found its paradigm case in the “sudden affray,” the facts of which typically comprised a killing of one man by another when his overly sensitive honor was offended. If “he shewed his intention was not so much to kill, as in compliance with those common notions of honour, to combat with the other, . . . during the time [he] is under the dominion of a sudden passion,” then his otherwise murderous conduct and intention was reduced to manslaughter. 1 TOULMIN & BLAIR, at 64. The key to the mitigation appeared to be a showing that one acted in hot blood after receiving some “piece of insolence, . . . to which few spirits can yield.” 1 TOULMIN & BLAIR, at 63. And a man’s catching his wife in an adulterous act, too, was described as nearly a justification for killing, since it would inspire jealousy and because “adultery is the highest invasion of property.” 1 TOULMIN & BLAIR, at 64. The list of provocations that would reduce a killing to manslaughter was somewhat varied, but centered on masculine honor. Although hot blood and an affront to honor could not justify or excuse the resort to private violence – in law, at least – the killing would be deemed a product of “human frailty” in a culture of honor, rather than a product of “malignity.” 1 TOULMIN & BLAIR, at 62-71.

<sup>124</sup> 1 TOULMIN & BLAIR, at 62.

<sup>125</sup> 1 TOULMIN & BLAIR, at 72.

seems a potential target of the law or morality in prospect, was “unlawful” in retrospect.<sup>126</sup> The authors did limit the principle by noting that conduct that was made unlawful only by statute would not be used to sustain a homicide conviction beyond the conduct’s “intrinsic” ability to do so.<sup>127</sup> Thus they suggested again that “unlawful” was a term peculiar to common law thinking—defined neither by morality, as such, nor by statutory law, as such, but only by the process of post hoc judgment as to whether vindication of public peace and public rights required the criminal law to respond.

These authors offered little analysis of the state’s laws regarding rape and abduction. Kentucky apparently did have a statute criminalizing sexual intercourse, regardless of consent, where the girl was under 12, with aggravated penalties where she was under 10.<sup>128</sup> It also had a statute criminalizing the taking of a girl under 14 out of the possession of her parents. For neither of these offenses did the authors provide any meaningful discussion of intent requirements. They did briefly note, however, that the Kentucky statute against abducting a woman of substance provided a defense for any “reasonable claim to her as his ward or bondwoman,”<sup>129</sup> thus mandating what would later be called objective liability.

If Toulmin and Blair relied heavily on English treatises and the cases they cited, other early American treatises on criminal law were mere adaptations of English treatises. William Oldnall Russell’s *Treatise on Crimes and Misdemeanors*, first published in England, was reprinted

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<sup>126</sup> 1 TOULMIN & BLAIR, at 90.

<sup>127</sup> 1 TOULMIN & BLAIR, at 91. See also TUCKER’S BLACKSTONE, *supra* n. --, at 26 n. 5, where Tucker comments on Blackstone’s holding offenders guilty of whatever follows from an “unlawful” act. Tucker says that that imputation of “vicious will” without regard to the offender’s actual state of mind only held where the underlying unlawful act was *malum in se* rather than *malum prohibitum*.

<sup>128</sup> 1 TOULMIN & BLAIR, *supra* n. --, at 135-136. These statutes were apparently English laws formally incorporated into Kentucky law in 1801.

<sup>129</sup> 1 TOULMIN & BLAIR, at 138.

in Boston in 1824 with an American editor's addition of domestic cases.<sup>130</sup> Russell set the tone for at least some later treatises by lifting great hunks of Blackstone almost directly into his work. And he reinforced Blackstone's recognition of the essentially externally imposed nature of criminal law (as opposed to the notion that crime was defined by the internal, subjective choice to do evil) with an often quoted section from Hale's earlier treatise on the pleas of the crown: "Doubtless most persons that are felons of themselves and others are under a degree of partial insanity when they commit these offences . . . ." <sup>131</sup> But, Hale continued, partially insane or not, intentionally criminal in any rational sense or not, these "felons" must be deemed felons by criminal law lest "too great an indulgence be given to great crimes."<sup>132</sup> Russell thus indicated, with Hale, that criminal law was society's utilitarian device for drawing a line between it and those actors who threatened harm to society, even though culpability might, in an important sense, be absent.

Russell further reinforced the public perspective of the criminal law in his discussion of the relationship between statutory and common-law crime in the area of seduction. Observing first that "*seduction* may be attended with such circumstances as to make it an indictable offence" at common law,<sup>133</sup> he noted that statute law as well had made criminal the "taking" (or seduction) of a girl under the age of sixteen out of the "possession" of her guardian. So why the statute? According to Hawkins, the statute had not created any new offense but had only aggravated the punishment for common-law seduction.<sup>134</sup> But Russell insisted that the statute created another difference as well, a difference in the mens rea requirements for the two

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<sup>130</sup> RUSSELL, *supra* n. --.

<sup>131</sup> *Id.* at \*12 (quoting HALE, *supra* n. --, at 30).

<sup>132</sup> *Id.* at \*13.

<sup>133</sup> *Id.* at \*817. As an example, he offered the case of Lord Grey's enticing his sister-in-law, who was under eighteen, "to unlawful lust." *Id.* at \*818.

<sup>134</sup> *Id.* at \*832.

versions of the offense. Thus, according to Russell, “wherever a statute *forbids* the doing of a thing, the doing it willfully, although without any corrupt motive, is indictable,”<sup>135</sup> whereas at common law a “corrupt motive” was essential. Under a statute, “the prohibition being general, the want of a corrupt motive is no answer to the criminal charge.”<sup>136</sup> Thus while the common law’s requirement of “corrupt motive” or “vitious will” – I take them to be equivalents – opened a narrow window for excuses, Russell took the law of statutory crimes to make that opening ever narrower. It might be true that conduct newly made illegal by statute would not be treated as the equivalent of “unlawful” for purposes of common law reasoning, as Toulmin and Blair had indicated, but the conduct itself was nevertheless criminal and so a punishable derogation of public right, even in the absence of a corrupt motive and even if jealous common-law courts would confine it rigorously to its terms.

An interesting New York case report of the early nineteenth century annotated by John Anthon, a leading New York lawyer and editor of case reports, supports Russell’s approach to statutory crimes, further elaborates the public perspective of the criminal law, and reveals the distance between the meanings of criminal intent then and now. In a New York statutory prosecution for loading flour on to a ship without first having it inspected, the defendant argued that if, as he claimed, his agent had made the mistake, then he should escape liability. James Kent, then Chief Justice of the New York Court of Appeals, agreed and held that “all infringements of the police law must be tested by the intention of the party. Without a criminal

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<sup>135</sup> *Id.* at \*65-66.

<sup>136</sup> *Id.* at \*832.

intent, there is no breach of law,"<sup>137</sup> although a "neglect may be so gross as to amount to a criminal intent."<sup>138</sup>

A modern reader might see in this holding an unremarkable endorsement of the defense of unavoidable mistake of fact. Reporter Anthon, however, read Kent otherwise. He took issue with Kent, arguing that statutory crimes, *mala prohibita*, could not require "criminal intent." After all, "criminal intent" meant corrupt motive, not just awareness of the material facts. And a defendant could hardly be shown to have acted "corruptly" in a case of *malum prohibitum*—since there is nothing corrupt about the prohibited act—except where the defendant knows the legal requirements ahead of time and deliberately evades them. Thus Anthon argued that "proof of criminal intent can scarcely be a prerequisite to the infliction of the penalty" since that would make ignorance of the law, not just mistake of fact, a good defense to every *malum prohibitum*, no corrupt motive being inferable from the conduct in such a case but only from an intention to evade known "social duties of positive creation."<sup>139</sup>

Anthon's argument is interesting in two related respects: First, regarding mistake of fact, it shows that it never occurred to Anthon that Kent's "criminal intent" might have meant what a modern lawyer would likely take it to mean, simple awareness of the facts that constituted the elements of the offense. Second, regarding mistake of law, it also never occurred to Anthon to say, as other modern lawyers might, that *mala prohibita* ("snares for the unwary") are just those offenses where a generous criminal intent requirement is most important, including allowing a defense of mistake of law. In Anthon's time, the common law notion of "criminal intent" was a matter of "corrupt motive," not a matter of knowing the facts or the law

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<sup>137</sup> *Sturges v. Maitland*, 1 Ant. N.P. Cas. 153, 154 (N.Y. 1820)

<sup>138</sup> 1 Ant. N.P. Cas. at 155-156.

<sup>139</sup> 1 Ant. N.P. Cas. at 154 n.a.

that constitute the offense. Neither mistake of fact nor mistake of law was made relevant by an offense's element structure. Each was relevant only insofar as it could show a complete absence of formal responsibility for the harm. In the case of a statutory *malum prohibitum*, moreover, the idea of "corrupt motive" was largely irrelevant to the question of formal responsibility, since the conduct was morally indifferent in itself and since it would be only the rarest case in which the defendant could be shown to have known and evaded the statutory rules. Rather, if cases of *mala prohibita* could justifiably be brought at all – a serious worry of modern criminal theorists but hardly doubted by Anthon and his generation – then they necessarily went off without regard to "corrupt motive" or "criminal intent." Instead, they focused only on the formal lines of responsibility implied by the statute. Or so Anthon seemed to indicate.

Anthon did not fully discuss what knowledge a defendant would need to be deemed responsible in such a case. His comments would seem to imply, though, that knowingly being in the statutorily regulated role – for example, knowing that you were a shipper of flour in New York City – might be enough to justify an imposition of responsibility for a *malum prohibitum*. And Anthon reinforced his hard view of statutory justice by noting the rule that statutes applied even before their contents could possibly be known in the place where a violation occurred.<sup>140</sup> The common law might explain away its own *ex post facto* quality by claiming to apply a kind of reason that is available to all, but this hard statutory justice could only come from a claim that the necessity of *mala prohibita* for regulatory purposes implied the necessity of a criminal law for urgent public ends. And the public interest would justify liability even in the absence of corrupt motive and perhaps even for responsible offenders who were ignorant of material facts.

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<sup>140</sup> 1 Ant. N.P. Cas. at 154 n.a.

Across the nineteenth century, American treatise writers continued to adopt the public perspective and often to follow Blackstone's definition of crime. Oliver Barbour, for example, writing on the criminal law of New York, lifted Blackstone's language almost verbatim in defining crime as a violation of "public rights and duties due to the whole community, considered as such, in its social aggregate capacity."<sup>141</sup> J. A. G. Davis, a law professor at the University of Virginia, agreed that a crime is a public wrong, subjecting the defendant to "public prosecution and punishment," whereas "other illegal acts constitute private wrongs . . . redressed by the private action of the party injured . . ."<sup>142</sup> And the point of punishment was "not to avenge but to prevent crimes . . ."<sup>143</sup> Thus the public wrongs committed by slaves, which were attacks on the security of white society considered as such, had to be met with even greater punishment than the same wrongs committed by the free. Since slaves were not "member[s] of society" and not constituents of its laws, they were less morally restrained by those laws. To achieve deterrence, therefore, criminal law had to punish them more severely. And this was so even though their exclusion from society also made them morally less culpable for the public wrongs they caused.<sup>144</sup> In short, punishment was justified insofar as it rationally sustained the integrity and the security of the public, regardless of how well or badly graduated it was to the culpability of the offender.

Through the end of the century, treatises continued to define crime in the same way. Francis Wharton, author of numerous treatises and one of the two most prominent American writers on criminal law in the nineteenth century, followed Blackstone in defining crime as "public wrong" and, as will be discussed below, treated crime consistently from a public

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<sup>141</sup>OLIVER LORENZO BARBOUR, A TREATISE ON THE CRIMINAL LAW OF NEW-YORK 17 (2d ed. 1852). Compare with 4 BLACKSTONE, *supra* n. --, at 5.

<sup>142</sup>J.A.G. DAVIS, A TREATISE ON CRIMINAL LAW 14 (1838).

<sup>143</sup>*Id.* at 21.

<sup>144</sup>*Id.* at 21.

perspective.<sup>145</sup> In 1894, William L. Clark cited a number of commentators for the proposition that crime required a “public” injury punishable “by the state in a proceeding in its own name.”<sup>146</sup> He distinguished crimes from torts in this way: “A wrong which injures another as an individual only, and affects the other members of the community so slightly that the public good does not require the state to notice it, is only a private wrong or a tort. Those acts which injure the community as a community are public wrongs, and, where they are made punishable by the state in a proceeding in its own name, they are crimes.”<sup>147</sup>

Clark was, however, influenced by the nineteenth-century development of the idea that criminal intent was what distinguished crime from tort, and so he declared that distinction as well.<sup>148</sup> But he embraced rather than criticized doctrines that suggested otherwise, that criminal intent could be dispensed with where “it is apparent that the legislature intended” it<sup>149</sup> and that the mistake-of-fact defense could be eliminated whenever a statute made certain facts (like the age of the victim in a carnal-knowledge or seduction case) exempt from any intent requirement.<sup>150</sup>

Only in the twentieth century would criminal theorists square off against each other, creating camps of objectivists and subjectivists. It is certainly true, though, that the forebears of the twentieth century’s relatively extreme subjectivists, who emphasize the perspective of individual moral justice, can be found in the nineteenth century, just as the forebears of the twentieth century’s extreme advocates of the public perspective can be found there. The next part, therefore, will broaden the historical context for the criminal law of the nineteenth century.

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<sup>145</sup> See below at \_\_\_\_

<sup>146</sup> WILLIAM L. CLARK, JR., *HAND-BOOK OF CRIMINAL LAW* 1-2 (1894).

<sup>147</sup> *Id.* at 5.

<sup>148</sup> *Id.* at 12.

<sup>149</sup> *Id.* at 44.

<sup>150</sup> *Id.* at 69-70.

It will suggest wider connections between criminal theory and the larger culture; show how a developing focus on individual moral justice came to challenge the reigning, utilitarian, public perspective on criminal justice; and explain how a persistently public logic of criminal law nevertheless blunted that challenge in the courts, and, through the nineteenth century, even among the theorists.

### III. CULTURAL HISTORY, THE CONTINGENCY OF “CRIME,” AND THE EMERGENCE OF “SUBJECTIVE” THEORIES OF CRIMINALITY IN VICTORIAN AMERICA

Before examining the emergence of subjectivist theories of crime, it is important that the post-Enlightenment tradition of understanding crime as “public wrong” be put in a larger context. I have introduced an eighteenth- and nineteenth-century doctrinal tradition of public wrong – what I’ve been calling the public perspective on criminal justice – as a way of undercutting the notion that subjectivist doctrine or individual moral desert has held the preeminent place in the history of criminal law. But I have not tried to claim that that history can be organized *solely* around the idea of public wrong. Rather, a broader, socially contextualized picture of the development of criminal doctrine reveals that the ideas of public wrong and individual, subjective choice to do wrong have both played important roles, sometimes complementing each other and sometimes in tension with each other. Similarly and relatedly, I think, larger social assumptions about the relationship between individual and collective responsibility have shifted back and forth. The emergence of a kind of proto-MPC ideology of criminal law during the nineteenth century – one that brings a new emphasis on private moral justice to the accused as the legitimating consideration in punishment – will appear in the course of this broader history and begin to connect with the history of the idea of public wrong introduced above. With this more fully contextualized history of the double

impulses of criminal theory in hand, part IV will turn to a somewhat narrower focus on the social and cultural history of gender relations in the late nineteenth century, the necessary context for imparting meaning to the strict liability holdings in the statutory rape cases.

Here, subpart A will offer a capsule history of the struggle to distinguish individual responsibility from larger determining forces in changing historical contexts, ending with the emergence of a peculiarly Victorian, individualist moralism. Subpart B will examine the appearance of this Victorian moralism specifically in criminal theory. The central figure here is the treatise writer Joel Prentiss Bishop. If Bishop represents one route to a criminal law of individualism and private justice, then the codifiers, discussed in subpart C, represent a very different route to a similar end, substituting for Bishop's Christian justice a philosophy of positivism and prospectivity as concomitants of individual freedom. Here the great example is Edward Livingston's unenacted criminal code for Louisiana, too advanced for its own time, but working out an approach that decisively foreshadowed the defense later claimed in the statutory rape cases as well as the approach of the MPC itself. Subpart D, finally, will discuss the persistence of a more or less traditionally public perspective on criminal law in the same period, as exemplified in the writings of Francis Wharton and Oliver Wendell Holmes.

#### A. The Ambiguities of Criminal Responsibility and the Emergence of Victorian Moralism

Where does responsibility truly lie when harm is done by human hands? When the harm is sufficiently serious that a community considers a public response necessary, how does it determine who, if anyone, is legally responsible? Whereas in other areas of law, it might often be adequate to talk of liability as a device for distributing losses, in criminal law liability is virtually always discussed as a matter of attributing responsibility. Yet the history of criminal

law makes clear that the very notion of individual responsibility has been and remains fluid and mysterious.<sup>151</sup> Are human doings actually produced in whole or in part by individual choice? Or are they produced by an omnipotent God, by original sin, by genetics, by mental or physical disease, by society as a whole, by social or physical environment? Metaphysical questions of the precise scope of personal responsibility always troubled those who thought seriously about criminal law. But in the nineteenth century these questions would give way to a new Victorian cutting of the Gordian knot, a simple, stout insistence on character, on an individual moral responsibility that posited without question the rightness and utility of individual consequences for individual choice. This brand of individualism found its way into criminal law as readily as it colored the rest of Victorian culture. Especially in connection with emergent positivist notions of law and the growing role of statutes across the century, this Victorian individualism planted the seeds of twentieth-century subjectivism. But the story is complex; the ascent of Victorian individualism was never without challenge or, for that matter, ambiguity.

This subpart will offer a more or less chronological narrative of shifting Anglo-American notions of criminal responsibility. In the course of the narrative, criminal law is sometimes an arena for vindicating the authority of the state with a consequent severity in criminal doctrine; sometimes an arena of moral blaming with consequent doctrinal attention to condemning only those who have set themselves against some enduring moral law; sometimes an arena in which society vindicates its values and cohesiveness, perhaps with only passing regard for the moral standing of the offender; sometimes as an arena of character education, akin to church or school,

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<sup>151</sup> See, e.g., KAREN HALTTUNEN, *MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION* (1998); Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound*, 93 MICH. L. REV. 1915 (1993); Thomas Andrew Green, *Conventional Morality and the Rule of Law: Perspectives on Freedom and Criminal Responsibility in Twentieth-Century American Legal Thought* (unpublished manuscript).

directed both at the offender and at society at large; sometimes as an arena of healing, for offender as well as for society and victim. Each of these versions of criminal law has overlapped with the others both conceptually and historically. All these and others are probably in play, in different balances and with different emphases, in virtually every period. Each has had to come to grips with certain persistent, though sometimes inconsistent, ideas: first, that individuals are personally morally responsible for the choices they make and only the choices they make; but, second, that individual choice is actually the product of social and natural forces in indeterminable degree; and, third, that every society has occasionally deemed the criminal law necessary to vindicate its interests at the expense of particular individuals, however innocent or undeserving they may in some sense be. In every period, that is, the criminal law has been multivalent, not defined or limited by any master principle but buffeted and manipulated by chance, by interest, by social needs, as well as by theory.

Although criminal law before Blackstone can hardly be said to have ignored the notion of justice to the individual,<sup>152</sup> the argument has been effectively made that the major object of criminal justice was to vindicate the monopoly of violence and terror held by the governing classes.<sup>153</sup> Foucault revealed the importance of sovereign majesty and the awesomeness of royal authority exhibited in public executions and the like. Douglas Hay and E. P. Thompson, among others, described the combination of a bloody code with the apparently merciful discretion and formal impartiality of the propertied operators of the criminal justice system. From both directions, scholars have argued that pre-Beccarian criminal law was not really meant to

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<sup>152</sup> See, e.g., ADEKEMI ODUJIRIN, *THE NORMATIVE BASIS OF FAULT IN THE CRIMINAL LAW: HISTORY AND THEORY* 71-73, 78 (1998); Herrup, *supra* n. --.

<sup>153</sup> FOUCAULT, *supra* n. --, at 47-65; Douglas Hay, *Property, Authority and the Criminal Law, in ALBION'S FATAL TREE* (Douglas Hay et al. eds., 1975); E. P. THOMPSON, *WHIGS AND HUNTERS* (1975).

prevent crime or anti-social behavior comprehensively or rationally, nor to visit morally deserved retribution on all wrongdoers, but simply to vindicate and reinforce a hierarchical structure of authority. In this structure, the lower orders deferred to the propertied, expected no “justice” but the protection that was earned by that deference, and conceded the monarch’s monopoly on the use of violence.<sup>154</sup> Crime described a category of wrongs that were wrong more because they were peculiarly disruptive to this political order than because they were peculiarly inconsistent with any durable morality.<sup>155</sup> Thus the proliferation of capital offenses lamented by Blackstone in the eighteenth century was not produced by a theory of personal responsibility but by the impetuous indignation of the elite when confronted with instances of vandalism or insubordination among the lower classes. This interpretation, of course, slights the importance of local moral judgment to the history of the criminal law,<sup>156</sup> but no more than a desert-oriented account of that history slights the historical centrality of criminal law to the vindication of existing power structures.<sup>157</sup>

While Foucault has offered the vindication of public authority through the “theater of punishment” as one way of viewing pre-Enlightenment criminal justice in Europe, Karen Halttunen has identified a “theater of mercy” in simultaneous operation in America.<sup>158</sup> Foucault’s picture suggests the near irrelevance of individual responsibility before the sovereign’s need to awe its subjects. Halttunen’s picture of Puritan Massachusetts, on the other

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<sup>154</sup> Hay, *supra* n. --.

<sup>155</sup> FARMER, CRIMINAL LAW, TRADITION AND LEGAL ORDER: CRIME AND THE GENIUS OF SCOTS LAW, 1747 TO THE PRESENT 100-09 (1997).

<sup>156</sup> See, e.g., ODUJIRIN, *supra* n. --; Herrup, *supra* n. --.

<sup>157</sup> For an account that recognizes the way both versions can coexist, see THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 97-102 (1985).

<sup>158</sup> HALTTUNEN, *supra* n. --, at 23.

hand, exemplifies the struggle to determine the line between individual criminal responsibility and the determining power of greater forces like divine will and original sin.

In Puritan New England, the assumed bonds of community lay not just in the structure of hierarchical authority but in an all-encompassing Christianity as well. The ministerial leadership of the community thus explained crime as a product of the fallen nature that all humans shared. Puritan execution sermons did portray the condemned's actions as reflecting her or his own grave moral failing, but that failing was shared in its most fundamental character by every member of the community as equal inheritors of original sin. Crime only happened through the loss of God's grace, and God might withdraw that grace at any time. The condemned, consequently, did not become an outsider, an unintelligible enemy of the community, but a kind of tragic figure with whom all could identify. "There but for the grace of God go I," they said, meaning it literally.

In emphasizing the centrality of God's freely given and freely withdrawn grace, however, the ministers perpetuated a never-resolved conundrum. The logic suggested that the cause of crime lay with God, yet responsibility remained with the unlucky human offender.<sup>159</sup> In different forms, this puzzle of individual responsibility has been a persistent presence over time. The Puritans finessed the conundrum through religious faith, leaving only the ritual of the offender's repentance before execution, by which the community was instructed in its own dependence on God. In contrast to the "theater of punishment," the Puritan execution was a "theater of mercy," witnessed by a population that understood itself--through contemplation of its condemned--as always on or over the edge of sin, criminality, damnation.<sup>160</sup>

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<sup>159</sup> John Locke himself admitted that he could not resolve the apparent conflict between divine omnipotence and human freedom. See Laslett, *supra* n. --, at 94 n.+.

<sup>160</sup> HALTTUNEN, *supra* n. --, at 7-32.

Subsequent cultural takes on criminality too oscillated between seeing crime as a simple reflection of individual evil and a reflection of larger forces, increasingly secular now, to which the individual offender must be sacrificed for vindication of larger social needs. Thus, there emerged in eighteenth-century popular literature an Enlightenment approach to criminality. This literature suggested that every crime was rationally explicable as a secular matter of motive or passion or environment, not original sin and absence of grace. Yet the post-Puritan printed accounts of murders regularly allowed their rational explanations for crimes to sink into mere horror at the crimes and their ultimate inexplicability. Moreover, even as readers were revolted by the horrid details of bloody murders that defied explanation, complete with diagrams of the murder scene, etchings of the fatal moment, and minute accounts of the gory and sometimes sexual details of fate's course, such details were also perversely attractive, stimulating in the reader a type of "pornographic" identification with the killer.<sup>161</sup>

The trial reports that proliferated in the nineteenth century similarly combined a vehicle by which the reader might fully condemn the doer of the bloody deed with an invitation to unravel the mystery and identify reasons for the killing that might have driven anyone to the same act. Again, the citizen was led both to condemn the offender as personally responsible for her or his criminal choice and at the same time to identify with the offender as not unlike the reader but for forces of various kinds—mental disease, childhood abuse, environmental stress—that impelled the crime. But for the secularization of culture in the nineteenth century, these readers too might have declared, "There but for the grace of God go I," even as they pressed forward in the business of conviction and punishment.<sup>162</sup>

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<sup>161</sup> *Id.* at 33-90.

<sup>162</sup> *Id.* at 91-134.

Worries about the nature and justifiability of “us” condemning “them” found further sustenance in themes of environmental and biological causation of crime. Beginning in the 1830s, doctors claimed increasing capacity to explain much criminal activity as the product of insanity. The notion of “monomania” or “moral insanity,” which pressed the boundaries of disease beyond the physical and the idea of insanity beyond the paradigmatic “wild beast,” threatened to swallow all other explanation of criminal conduct. Hale himself had thought felony virtual proof of a kind of insanity. Now doctors added the imprimatur of scientific progress to such a view of crime and threatened to medicalize criminal law completely. The imperialism of these doctors brought a backlash from some of their colleagues, from lawyers and judges, and from the public at large. Still, as ridiculed as some of this “science” and some of these experts were, the law never gave up on the common and professional understanding that some criminals were not so much evil as insane and irresponsible, products not of their own choices but of some combination of heredity and environment. Half a century after Dr. Isaac Ray began his crusade for an expansive understanding of insanity, the trial of President Garfield’s assassin in 1881 proved the continuing vitality of the debate between those inclined to moralize and those inclined to medicalize the notion of crime.<sup>163</sup> There was no simple answer to the ever-developing conundrum of responsibility, nor to the question whether criminal justice must focus on the offender’s individual responsibility, so-called, or on the larger public purposes that conviction might serve.

Meanwhile, if the nineteenth century brought new degrees of secularism and science in the explanation of criminality, it also brought, as suggested above, a crucial replacement of an

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<sup>163</sup> *Id.* at 208-240; JAMES C. MOHR, DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA 140-53, 164-79 (1993); CHARLES E. ROSENBERG, THE TRIAL OF THE ASSASSIN GUILTEAU: PSYCHIATRY AND LAW IN THE GILDED AGE (1968); Janet A. Tighe, *Francis Wharton and the Nineteenth-Century Insanity Defense: The Origins of a Reform Tradition*, 27 AM. J. LEGAL HIST. 223 (1983).

ideal of hierarchical authority and local stability with a new egalitarianism and mobile individualism. It thus brought new public purposes to criminal justice and new efforts to establish the scope of personal responsibility in a more or less novel social order. A brief detour to England, where the intellectual history of criminal responsibility has attracted much more thorough research than has the American case, will help explicate the evolution of criminal theory that emerged from broader social changes in the nineteenth century.

In the late eighteenth and especially in the nineteenth century, England saw the emergence of a group of criminal reformers dedicated to reshaping the criminal law for purposes of rational deterrence and character education in a society newly freed, for better or worse, from the full measure of localist hierarchy.<sup>164</sup> These reformers assumed that the only justification and purpose of criminal law must be deterrence of public wrongs. And they saw in the old theater of punishment an inexplicable, irrational tool, which they hoped to replace with a system based on principle.<sup>165</sup> Aware of the controversial nature of individual responsibility, they nevertheless pursued a remade system of prevention, premised on their faith in a rational system of incentives and disincentives. Pursuing prevention in a society of vitiated community controls, they had little choice but to assume maximum individual responsibility and deterrability. The older, chaotic system might possibly have served some purpose in a well

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<sup>164</sup> Often inspired by Beccaria but representing somewhat diverse approaches, these reformers included Blackstone, Eden, Romilly, Bentham, Austin, and the Criminal Law Commissioners of 1833-1845, among others. For a general survey of the doctrinal thinking of most of these thinkers, see K. J. M. SMITH, *LAWYERS, LEGISLATORS AND THEORISTS: DEVELOPMENTS IN ENGLISH CRIMINAL JURISPRUDENCE, 1800-1957* (1998). For better contextualization and analysis of different aspects of the reform phenomenon, see ALAN NORRIE, *CRIME REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 15-26* (2d ed. 2001); MARTIN J. WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830-1914* 52-67 (1990); Lindsay Farmer, *Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45*, 18 *LAW & HIST. REV.* 397 (2000).

<sup>165</sup> See, e.g., SMITH, *supra* n. --, at 30.

monitored society of securely local and hierarchical authority. As social and geographic mobility began to replace such a stable, hierarchical localism, however, liberal theory sought both to endorse the new freedom and to control the new social instability and the new criminality that emerged in the transition. In the Victorian context, then, the utilitarian devotion to prevention settled in the concept of individual character. If the new liberal citizen might claim an awful freedom from earlier social and governmental constraints, then social peace and the security of property would depend on the individual's earnest cultivation of her or his own moral character as well as an unyielding expectation of such character in others.

In Martin Wiener's cultural history of criminality in nineteenth-century England, the story begins with the perception and reality in the early part of the century of a growing population of mobile, urban youth. Given the temptations to impulse and license that afflict every person, this population's freedom from a traditional social order seemed to pose a special and novel danger. The new threat could not be addressed by returning to the heyday of the rural gentry but only by positively building the moral character and self-control of every member of a newly individualistic society. Utilitarians and evangelicals alike preached the gospel of rational self-interest as self-control, whether the reward was in this world or the next.<sup>166</sup> Medical scientists traced individuals' ailments back to earlier mis-exercises of individual will.<sup>167</sup> And the criminal justice system responded by extending its reach to teach such self-control. Police forces were enlarged and extended their presence throughout each community.<sup>168</sup> The summary jurisdiction of justices of the peace was expanded.<sup>169</sup> Younger and

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<sup>166</sup> WIENER, *supra* n. --, at 38-41.

<sup>167</sup> *Id.* at 42-45.

<sup>168</sup> *Id.* at 49-51.

<sup>169</sup> *Id.* at 50-51, 66-67.

younger children became subject to prosecution in the interests of forming character early.<sup>170</sup> Claims of drunkenness and provocation as excuses for crime received less and less indulgence in the criminal courts.<sup>171</sup> Claims of insanity in the form of “irresistible impulse,” endorsed by an important segment of the medical profession, were steadfastly resisted by the courts, who insisted that the failure to resist a criminal impulse revealed a character defect and constituted the very heart of crime, not an excuse for criminality.<sup>172</sup> Perhaps the clearest evidence of a change in attitudes about criminality from the old theater of punishment to the Victorian project of character-building lay in the techniques of punishment themselves. In reaction to the old system’s use of public methods of intimidation like the pillory and the gallows, the reformers substituted penitentiaries, designed to facilitate both the offender’s rediscovery of moral character and a general deterrence.<sup>173</sup> Victorian defenders of stark notions of individual responsibility viewed the criminal law as a genuinely effective means of public education and character-building on an equal level with school, family, and church.<sup>174</sup> The new Victorian moralism thus was widely articulated as part of a consequentialist pursuit of prevention and public character-building, even as it could be seen as generally consistent with the principle of desert.

By the 1880s and continuing on into the twentieth century, however, the growing prestige of science and its increasing tendencies to determinism, whether in the natural sciences and medicine or in psychology and Spencerian sociology, began to undercut the rhetoric of individual responsibility. So did increasing recognition of the impersonal causation of so many harms in mass, industrial society, where risk could perhaps be managed but not eliminated nor

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<sup>170</sup> *Id.* at 51-52.

<sup>171</sup> *Id.* at 78-80, 82-83.

<sup>172</sup> *Id.* at 83-90.

<sup>173</sup> *Id.* at 101-141.

<sup>174</sup> *Id.* at 46-49.

easily blamed on anyone in particular.<sup>175</sup> Accelerating the erosion of character and responsibility, the interventions of a proto-welfare state – such as the expansion of poor relief and its removal from the rigors of the workhouse, analogous developments in public funding of education, and the redirection of “habitual drunkards” to medical asylums rather than jails – came to be conceptualized as assistance to those who could not be expected to help themselves.<sup>176</sup> Those with none of the resources of the middle class were more often exempted from the middle-class model of character, offered assistance, and left unpunished for their failure to measure up. Simultaneously, the scientization of criminality moved quickly away from the idea that criminality was simply a matter of individual moral choice, past the continental notion that criminality could be largely explained by inherited physical traits, and on to the conviction that there was an ineradicable measure of abnormality or criminality in everyone of every social class – Dr. Jekyll and Mr. Hyde, meet Cotton Mather.<sup>177</sup>

The consequent conviction that criminal law must simply be a device for management of abnormality in the public interest never vanquished the Victorian conceptions of criminal law as builder of character and condemner of immoral choice. Rather, these arguably inconsistent approaches came to coexist, often uneasily but durably. Notwithstanding the determination of some to write about criminal law as if it had an essential nature as the embodiment of community morality,<sup>178</sup> then, the use of criminal law to manage risk, abnormality, or an

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<sup>175</sup> Wiener, 159-71; FARMER, CRIMINAL LAW, *supra* n. --, at 118-28.

<sup>176</sup> WIENER, *supra* n. --, at 185-201, 294-300.

<sup>177</sup> *Id.* at 224-256. On continental criminology, *see also* MARIE-CHRISTINE LEPS, APPREHENDING THE CRIMINAL: THE PRODUCTION OF DEVIANCE IN NINETEENTH-CENTURY DISCOURSE chs. 2-3 (1992).

<sup>178</sup> *See* FARMER, CRIMINAL LAW, *supra* n. 162, at 134-139, which discusses the figure of J. H. A. MacDonald, British judge and treatise-writer of the late nineteenth century, who treated criminal law as if it were necessarily an expression of community morality, notwithstanding the brute fact that criminal proceedings applied to numerous offenses that he did not think assimilable to that model.

“economy of illegalities”<sup>179</sup> produced new criminal doctrine in England as in America around the turn of the twentieth century. The new doctrine included the increasing use of strict liability and summary jurisdiction (the vitiating in supposedly minor offenses of the more famous protections of criminal procedure) and the connected extension of criminal law to commercial harms and industrial risk. This new approach to the protection of society also helped produce a new theory of the criminal sanction itself. The object of sentencing was no longer simply punishment or even character-building in the traditional sense – that is, an insistence on individual responsibility and self-reflection in the penitentiary. Increasingly, the object of sentencing was, instead, therapy. The goal now was reconstruction of the offender’s character – what Americans would later call rehabilitation – not through the offender’s own acceptance of personal responsibility, but through positive intervention and manipulation of character by the newly scientific, progressive state.<sup>180</sup> But here the story gets ahead of itself, and requires a return to Victorian America.

The English pattern of cultural development was closely paralleled in the United States. In America, the social and geographic mobility and individualism that had so motivated criminal law reform in early nineteenth-century England was far more advanced. In America too the new mobility and individualism initially brought a pointed Victorian emphasis on individual responsibility, soon to be challenged by views of crime as the product of forces largely beyond individual control. Underlying this pattern, again, was the apparently inevitable coexistence throughout this period of sometimes inconsistent approaches to criminal justice. Some might wax while others waned, but the history was always one of cultural negotiation between, rather than reconciliation of, the various approaches and theories.

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<sup>179</sup> *Id.* at 125.

<sup>180</sup> WIENER, *supra* n. --, at 337-81.

Alexis de Tocqueville coined the term “individualism” in the 1830s as “a novel expression, to which a novel idea has given birth.”<sup>181</sup> It helped him describe the new social order that he discovered in the United States, an “order” that seemed to have broken entirely free from the Old World’s dependence on hierarchy to control the chaotic impulses of humankind. Tocqueville observed the American liberation of the self-governing, democratic individual and thought it had proceeded to such an extent that there was remarkably little of society left, little that could be called public compared to more traditional societies. And this truth was not contradicted but only modified by the Americans’ novel talent for building civil associations and thus cultivating some measure of society out of the mass of individualists.<sup>182</sup> All of politics was organized around the question of what policies would best guarantee each citizen’s autonomy,<sup>183</sup> and American culture followed a Victorian path not unlike that taken by Victorian England itself.

The emerging dominance in the public mind of middle class individualism brought with it a culture of moral earnestness and self-control in which the self-conscious cultivation of moral character and purpose was the serious business of every well led life. Standards of right and wrong were assumed to be clear and timeless. Good behavior was the product of one’s cultivated moral character and individual choice, and it was appropriately rewarded by any civilized society. Bad behavior was equally the product of one’s failure to cultivate one’s character with adequate moral seriousness, and one’s consequently bad choices were appropriately condemned by the institutions of civilization. Life was that simple, and its moral clarity was supposedly highlighted by the failures of immigrants, African-Americans, Indians,

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<sup>181</sup> 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 98 (1840; Knopf edition, 1963).

<sup>182</sup> *Id.* at 106-120.

<sup>183</sup> LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM (1989).

and the lower classes generally to conform to the values, sexual and otherwise, of the Victorian middle class. Victorians were not so cold as to leave such people to their presumed fate but actively sought to inculcate the values of industriousness, temperance, modesty, and self-control in all classes. They recognized that the challenge of fully internalizing these values might be greater for some than for others – not even the Victorians wholly disregarded environmental influences – but any ultimate failure of self-control was nevertheless imputed to choice and to failure of character rather than to forces beyond the individual’s control.<sup>184</sup> Only such imputations of personal failure, after all, fair or not, could foster the general development of character in the mass of individual citizens.

The glorification of the individual amid the democratization of American culture after the War of 1812 thus entailed an increased emphasis on individual responsibility. This emphasis was the heart of the “Victorian moralism”<sup>185</sup> of the mid- to late nineteenth century. Confining causation generally to the level of individual moral choice, Victorians easily concluded that crime in particular was the product of the individual choice to act immorally.<sup>186</sup> Judging an individual’s choice necessarily meant abstracting that individual from context – from the environment that conditioned or even caused that choice in indeterminable degree – to judge her or him against a social standard of morality, character, and reasonableness that may not have had much to do with the individual’s personal history or with the context of the choice made. The child of working class immigrants could not automatically be expected to conceive of her or his choices regarding premarital sexual conduct in the same way that Victorians would. Yet those choices would be judged in court by Victorian standards anyway. Still,

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<sup>184</sup> LOUISE L. STEVENSON, *THE VICTORIAN HOMEFRONT* xx-xxiii and passim (1991).

<sup>185</sup>The phrase is taken from Michael Les Benedict, *Victorian Moralism and Civil Liberty in the Nineteenth-Century United States*, in *THE CONSTITUTION, LAW, AND AMERICAN LIFE* (Donald G. Nieman ed., 1992).

<sup>186</sup>*Id.* at 108.

neither that sort of cultural and moral disconnection nor the realities of environmental causation stopped nineteenth-century idealizers of the self-governing individual from presuming that every person determined her or his own fate. Consequently, each individual was presumed responsible for choosing right or wrong as measured by putatively timeless, non-contingent, usually divinely derived standards.<sup>187</sup>

Along with this emphasis on individual responsibility, though, came an emergent recognition of individual rights. Grounded in a version of Protestantism that increasingly viewed God as benevolent, this version of the Victorian world view raised to the highest level the human duty to prevent cruelty to any individual. The most salient target of this principle in mid-century America was the institution of slavery, but the principle equally suggested the right of the criminally accused to a kind of transcendent, individual justice, even at the expense of social interests. Thanks to the eighteenth-century appearance of a “newly benevolent God,” Elizabeth Clark writes, “Enlightened opinion set its face decidedly against deliberate infliction of extreme punishments by the civil state, as reflected in the constitutional ban on cruel and unusual punishments in the United States.”<sup>188</sup> This embrace of the “individual right” to be free from cruelty, a companion to the more general Victorian emphasis on the individual as the seat of responsibility, suggests that, while the individual would be afforded little excuse for her or his wrongdoing, at the same time state punishment could not be excused by anything but a

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<sup>187</sup>See Craig Haney, *Criminal Justice and the Nineteenth-Century Paradigm*, 6 LAW & HUM. BEHAV. 191, 193-95 (1982). For an extended treatment of an important judge and reformer who embodied these Victorian notions of the reducibility of events to individual moral choice, see DAVID M. GOLD, *THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM* (1990). Also see generally STEVENSON, *supra* n. --.

<sup>188</sup> Elizabeth B. Clark, “*The Sacred Rights of the Weak*”: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 *Journal of American History* 463, 488-90 (1995). For more comprehensive discussion of transformations in American Protestantism and their relationship to the more general democratizing and individualizing trends in American culture in the nineteenth century, see Nathan O. Hatch, *The Democratization of American Christianity* (1989).

convincing showing of individual violation of a transcendent moral code, more or less independent of simple assertions of utilitarian public necessity.

By no means did all Victorians embrace this primacy of individual right under a benevolent God. Even the more general Victorian ideal of the autonomous, responsible individual was never without its challengers, especially by the late nineteenth century. In the meantime, however, a Victorian moralism that emphasized divine benevolence, and thus starkly individualized and moralized rights and responsibilities, made its influence felt in criminal theory, especially in the work of the prolific and influential Joel Prentiss Bishop.

#### B. American Victorian Criminal Theorists: Bishop and Green

Among treatise writers on American criminal law in the nineteenth century, two were preeminent, Joel Prentiss Bishop and Francis Wharton. Of these two, Bishop especially strove to incorporate an intensely Christian, Victorian individualism into a treatise that grounded itself in the common law. Born to modest means in upstate New York, Bishop early showed a scholarly bent but, after moving to Boston, fell into law almost by accident in the early 1840s. Soon turning to treatise-writing, Bishop found that his lucid, explicitly Christian explications of the law of crimes (as well as the law of marriage and divorce) earned him both a comfortable living and great professional influence. In the field of criminal law, no one but Wharton would rival his stature as a writer of treatises in the common law tradition.<sup>189</sup>

True to that common law tradition, Bishop began his 1850s treatise not with a declaration that crime was defined by the choice to do evil but by its harming “the State at

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<sup>189</sup> An excellent, brief treatment of Bishop’s life and work is in Stephen Siegel, *Joel Bishop’s Orthodoxy*, 13 *LAW & HIST. REV.* 215 (1995)

large” rather than individuals as such.<sup>190</sup> He thus unsurprisingly located his treatise within the important tradition of crime as public wrong. The rest of the treatise, however, emphasized individual intent and what I am calling private justice to an unusual and perhaps unprecedented degree.

Bishop distinguished non-criminal law from criminal by noting that civil law often finds liability without blame but that “crime proceeds only from a criminal mind”<sup>191</sup> and that “the essence of an offence is the wrongful intent, without which it cannot exist.”<sup>192</sup> He found mistake of fact a full defense, as it must be “in every system of Christian and cultivated law,” as long as the mistake would have justified the defendant’s actions if the facts had been as supposed.<sup>193</sup> So far, Bishop had gone little further than most common-law commentators, but the tone of the treatise was leading to the inevitable conclusion. He asserted that law was God’s “abstract right”<sup>194</sup> and that defendants’ ignorance of the statutes under which they were charged was normally irrelevant because the statutes only reflected the law that was “written in their hearts.”<sup>195</sup> These remarks reflected his typically Victorian confidence in a timeless, divine morality’s pervasive influence on Anglo-American institutions.<sup>196</sup> And these ideas set the stage for a more doctrinally expansive claim in his discussion of unintended results: “When one has fully entertained a criminal purpose . . . [h]e cannot complain if he is punished for this mere intent,” even though “*society* has no interest to interfere until she is injured . . . .”<sup>197</sup>

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<sup>190</sup> BISHOP (2d ed.), *supra* n. --, at 3.

<sup>191</sup> *Id.* at 259.

<sup>192</sup> *Id.* at 260.

<sup>193</sup> *Id.* at 278-79.

<sup>194</sup> *Id.* at 2. On Bishop’s almost theistic, moral approach to law generally, see Stephen Siegel, *Joel Bishop’s Orthodoxy*, 13 LAW & HIST. REV. 215 (1995).

<sup>195</sup> BISHOP (2d ed.), *supra* n. --, at 275 (internal quotation marks omitted).

<sup>196</sup> See Siegel, *supra* n. --, at 233-50.

<sup>197</sup> BISHOP (2d ed.), *supra* n. --, at 293 n.1.

Bishop's discussion of unintended results thus did not dismiss but did subordinate harm to the irreducibly evil intent as the "essence" of crime. I say irreducibly because the intent was to be evaluated not against the contingent public policy that made such intent a public wrong but against God's abstract right as written on the offender's own heart. Here, he almost echoed the canonist notion of crime as wholly subjective and internal, meriting at least penance if not exactly punishment, regardless of whether the intent ever became manifest in harm to anyone in the world.<sup>198</sup>

Bishop acknowledged the limitation that, however guilty of evil intent a person may be, human society chose to punish only when it suffered an injury attributable to that intent. But that qualification did not stop him from occasionally intimating that the punishment could indeed be "for this mere intent" as much as for the harms that actually moved society to action. Moreover, that harm did not have to be what was actually intended, nor did it have to have any particular relationship to that intent except that a court be able to identify it as having "proceeded" from the immoral choices of the accused: "[T]he [injury] done, having proceeded from a corrupt mind, is to be viewed the same, whatever be the particular form of the corruption [in the intent]."<sup>199</sup>

So the case of a murderer's attempting to shoot one person but actually shooting and killing another person was an easy one. The intent to murder was itself enough to justify punishing the person who formed that intent. When that intent proved integral to the causing of a harm different from the one precisely intended, society was perfectly justified in choosing that harm as the occasion on which to punish the shooter for her or his immoral intent. And

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<sup>198</sup>For a brief account of the canonists, see Albert Lévy, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117, 128-35 (1922).

<sup>199</sup>BISHOP (2d ed.), *supra* n. --, at 294.

Bishop did mean immoral, not illegal, intent. He said that, even where one intended a harm that was itself not proscribed by criminal law but still morally evil, that intent could render one punishable if a harm that was proscribed by criminal law proceeded from that intent. Thus when an actual enticement of a minor away from home for the purpose of prostitution “proceeded from” the intent to entice an adult woman, the immoral intent was fully adequate to justify punishment even though the intended conduct was not the actual conduct nor itself illegal.<sup>200</sup> The heart of the offense was the offender’s internal corruption, not so much the public harm that moved the state to action, nor the question whether the offender had intended to do that particular harm.

When Bishop turned specifically to statutory offenses, the centrality of immoral intent was again evident, perhaps even more so. His first principle was that all laws, whether statutory or common, were to be construed together to constitute “*one harmonious system of jurisprudence.*”<sup>201</sup> Consequently, common-law criminal intent was as firmly required in the adjudication of statutory offenses as in common-law offenses, regardless of whether the legislature explicitly said so.<sup>202</sup> He thus seemed to reject the assumptions of Russell, Anthon, and their like and to foreshadow the twentieth-century critics of strict-liability statutory offenses.

For example, he preceded the likes of Francis Bowes Sayre<sup>203</sup> in criticizing the statutory polygamy cases in Massachusetts. A Massachusetts statute had criminalized polygamy but made an exception for anyone whose spouse had voluntarily withdrawn and remained absent for seven years without the abandoned spouse’s having knowledge of her or his being alive in

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<sup>200</sup>BISHOP (2d ed.), at 295; 1 BISHOP (3d ed.), *supra* n. --, at 227 (citing *State v. Ruhl*, 8 Iowa 447 (1859)).

<sup>201</sup>JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 80 (1873).

<sup>202</sup>*Id.* at 235.

<sup>203</sup>See *Public Welfare Offenses*, *supra* n. --, at 745.

that time. The defendant in *Commonwealth v. Mash* (1844)<sup>204</sup> had been abandoned without warning and for four years had been unable to get news of her husband, despite inquiries, and so had formed an honest belief in his death before marrying again. When the original husband turned up, she was convicted of polygamy. Chief Justice Shaw justified the conviction with the argument that the legislature had apparently felt so protective of the family that it had declared that no one had the “right . . . to take the risk of marrying again, unless [her or his belief in the spouse’s death was] confirmed by an absence of seven years . . . .”<sup>205</sup>

Shaw’s interpretation of the statute was true to its language and preserved a requirement of criminal intent that reflected a rather conservative perspective on marriage and divorce – that even a defendant who had virtually conclusive evidence of a spouse’s death was deemed by the legislature to take a criminal risk when she or he voluntarily married within seven years.<sup>206</sup> Still, Bishop insisted that Shaw’s interpretation had removed the requirement of criminal intent altogether.<sup>207</sup> Bishop’s position rested on his understanding of criminal intent as intent to act contrary to Bishop’s version of the unitary moral or divine law. He thought it inconsistent with the moral law to require a person to forgo marriage for seven years after the apparent death of a voluntarily withdrawn spouse. For Bishop, the anemic sort of criminal intent that Shaw used to justify an immoral conviction was no criminal intent at all, because true criminal intent arose not from statutory law but from moral law, and such intent was always essential to criminal conviction.

The point, then, is that Bishop put the private, moral perspective more firmly at the center of criminal theory than had any other American analyst of criminal law in the nineteenth

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<sup>204</sup> 48 Mass. (7 Met.) 472 (1844).

<sup>205</sup> 48 Mass. at 473.

<sup>206</sup> Shaw wrote: "If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it." 48 Mass. at 474.

<sup>207</sup> BISHOP, STATUTORY, *supra* n. --, at 236.

century. But it is important to recognize that even Bishop did not wholly substitute this notion of crime, defined by moral justice to the defendant, for a version of crime that was defined by public purposes. Bishop wrote at a time when there was little explicit debate between what are now called subjective and objective orientations to criminal doctrine, so he felt little pressure to purify his position as either objective or subjective, public or private. Thus his emphasis on intent as the “essence” of crime never completely eclipsed a concern with the public-ness of harm. When he came to discuss the actus reus, for example, he frequently noted that there must be a public harm to constitute crime and that the public character of the harm was what distinguished crime from tort (private wrongs that frequently involved blameworthiness).<sup>208</sup>

The incompleteness of his shift is further illustrated by his confrontation with the problem of how exactly to combine a particular intent with a somewhat different harm to justify punishment. That is, if a bad intent combined with a much worse and wholly unintended and even unforeseeable harm to constitute a crime, to what degree was the offender punishable? The modern subjectivist view is essentially that punishment should be graduated to intent, and some of Bishop’s language would have suggested exactly that. He wrote, for example, that, in a case of immoral choice, “when society punishes [the offender] for what was done, he is not wronged unless his act was more evil than his intent”<sup>209</sup> and that “the guilt of the un-intending [killer] must be assigned to the higher or lower degree, according as his intent was more or less intensely wrong.”<sup>210</sup> But other language would have suggested that the kind and degree of harm would remain relevant. He reported without criticism that the common law rule was to

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<sup>208</sup> See BISHOP (2d ed.), *supra* n. --, ch. 27, ch. 28 at 368-69, ch. 32 at 398.

<sup>209</sup> 1 BISHOP (7th ed.), *supra* n. --, 206 n.1.

<sup>210</sup> *Id.* at 211.

measure “legal guilt” by “the act” actually done rather than by what was intended.<sup>211</sup> And he endorsed liability in a variety of cases where the “intensity of the evil” in the intent seemed more or less equivalent to that of the harm even though the harm was wholly unintended and not even a “natural accompaniment” of the intent.<sup>212</sup> While explicitly endorsing “the evil intended” as “the measure of a man’s desert of punishment,”<sup>213</sup> then, he left the reader with the more ambiguous principle that the question of how to combine the wrong intended and the wrong done was simply a matter of policy for the legislature or the judge to determine: “[T]he true view doubtless is, that the court must look at the circumstances of each case; and decide, whether . . . the thing done and the intent producing it together make up such a wrong as should be noticed by the tribunals.”<sup>214</sup> Perhaps, as Stephen Siegel has suggested, the devout Bishop would have expected the Victorian judge to receive divine direction at such a trying moment,<sup>215</sup> but Bishop did not say so. He simply implied that the principles of criminal law – principles of intent and of public wrong – simply had to be deployed as best they could be in difficult circumstances.

Bishop was hardly alone in emphasizing criminal intent. One who shared this emphasis was Nicholas St. John Green, a young lecturer on law at Harvard and then acting dean of the new Boston University School of Law. In a series of short articles and notes published in the 1860s and 1870s, Green exhibited none of Bishop’s tendency to think in terms of a background of divine law written on the people’s hearts. But he did appear to agree that criminal intent was an affirmative “ingredient” of the crime, not just a plea, excuse, or defense (as Blackstone had asserted) that shielded the defendant from the punishment otherwise attached to a harmful

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<sup>211</sup> *Id.* at 206.

<sup>212</sup> *Id.* at 207-212.

<sup>213</sup> *Id.* at 210.

<sup>214</sup> BISHOP (2d ed.), *supra* n. --, at 292.

<sup>215</sup> Siegel, *supra* n. --, at 233-50.

act.<sup>216</sup> He wrote that it is a general rule that “either an intent or negligence, is a necessary ingredient of every crime” and that the rule would be (i.e., should be) universal but for some unspecified decision of the Massachusetts high court making an exception for statutory offenses.<sup>217</sup> Further, while accepting the doctrine that ignorance of law was no excuse, he tried to protect the principle of criminal intent as far as possible by arguing that an accused’s failure to understand the law’s application to her or his facts should be understood as exculpatory mistake of fact rather than mistake of law.<sup>218</sup> For him, then, mens rea was an ingredient of every common law offense and should be an ingredient even in every statutory offense, since “punishment, to be efficacious, must be felt to be just.”<sup>219</sup> Finally, he celebrated what he took to be the vitiation of the rule that “a man must be held to intend the natural consequences of his acts.” That maxim had supported convictions even in the absence of actual intent, since it had long functioned as a rule of law rather than a mere presumption of fact, but Green insisted that that doctrine had more recently been eclipsed by the general principle that intent was an ingredient of every crime, to be proven and not just presumed.<sup>220</sup> Green joined others in repeating the mantra of prevention,<sup>221</sup> but he also declared that Coke’s famous insistence on mens rea was the “maxim of the widest application in the criminal law.”<sup>222</sup>

A serious difficulty for writers like Bishop and Green was how to justify the traditional rule that ignorance of the law was no excuse. Bishop could wave off the difficulty, since he

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<sup>216</sup>Nicholas St. John Green, *Insanity in Criminal Law*, 164-65, in *ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME* 161, 164-65 (1933).

<sup>217</sup>*Id.* at 164.

<sup>218</sup> Green, *Mistake of Fact and Mistake of Law*, in Green, *supra* n.--, 185-86. On the conceptual problems with this view, see Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?*, 72 *U. Colo. L. Rev.* 507 (2001).

<sup>219</sup> Green, *Mistake of Fact and Mistake of Law*, in Green, *supra* n.--, 189.

<sup>220</sup> Green, *The Maxim that a Man is Presumed to Intend the Natural Consequences of His Acts*, in Green, *supra* n.--.

<sup>221</sup> Green, *Insanity in Criminal Law*, 161.

<sup>222</sup> Green, *Mistake of Fact and Mistake of Law*, in Green, *supra* n.--, 188.

thought that criminal law was overwhelmingly written on our hearts. Any injustices caused by the rule, therefore, would be few, far between, and mere unfortunate reflections of human fallibility.<sup>223</sup> But he provided surprisingly little discussion of the rule. He seemed to share the general inclination not to look too closely at it, since it seemed both indispensable and yet an obvious source of frequent injustice to defendants, a “snare for the unwary” as Blackstone had already thought a century earlier. Green’s situation was even worse. Not sharing Bishop’s faith in the degree of correspondence between criminal law and divine law, Green might narrow the rule, as noted above, but he did not reject it. In the end he could only say that without the rule the “administration of the law [would] be brought to a stand . . .”<sup>224</sup> and that at least we could be consoled by the knowledge that “some” law was so obvious that the run of society knew it as an authoritative guide to conduct without knowing it formally as law.<sup>225</sup> Like Bishop, Green ultimately threw up his hands when confronted with the rule rather than entertaining the possibility that crime sometimes departed from the considered choice to violate the law and described instead the public’s need or desire to vindicate some value or interest, even at the expense of private justice.

### C. The Codifying Philosophy

In the years of Bishop’s and Green’s writing, the context of criminal theory was further altered by the codification movement. Although Bishop hardly shared the codifiers’ positivism, his and Green’s emphasis on intent fit well with the libertarian, individualist principles of Jacksonian-Democrat codifiers like David Dudley Field and Edward Livingston. The codifiers

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<sup>223</sup> BISHOP (2d ed.), *supra* n. --, at 275.

<sup>224</sup> Green, *The Punishability of Children*, in Green, *supra* n. --, at 178-79.

<sup>225</sup> *Id.* at 179.

sought generally to subject government to law and thus to vindicate the rule of law and its master principles, liberty and equality. In an age when judicial creation of common law offenses was still authorized in most states,<sup>226</sup> the codifiers' contribution to the development of criminal theory was chiefly the libertarian principle of prospectivity (what theorists now call the principle of legality) as applied to judicial decisions. Insisting that judges must not be able to impose "law" ex post facto any more than legislatures could, the codifiers sought to confine criminal law's sanctions exclusively to those cases where the individual had ample notice that her or his presumptively infinite liberty had been authoritatively circumscribed. To do otherwise was both to hand over the same unbounded discretion to judges that the American Constitution had specifically denied to legislatures and to leave a presumptively free citizenry without access to the rules by which it was expected to govern its behavior. Thus criminal law should be applicable only to that behavior positively designated by statute, since it would then be accessible in advance to every member of the public. And no judge should be empowered to make rules that fit his peculiar sense of justice as opposed to simply applying the law of the legislature.

With these principles embraced, the way to the MPC was now open, even if, as yet, unexplored. That is, the logic of these principles suggested that criminal conviction was only just when the defendant had manifested fault with respect to each and every one of the elements in a statute.<sup>227</sup> No one should be subjected to state coercion or punishment without prior reason to know that her or his conduct violated the precisely stated prohibition of a statute, not just the "laws" of morality that might vary from judge to judge. That conclusion was not the only possible conclusion for the codifiers. They might have focused only on

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<sup>226</sup> See, e.g., FRANCIS WHARTON, PHILOSOPHY OF CRIMINAL LAW 22 n.2 (1880).

<sup>227</sup> Cf. Gardner, *supra* n. --, at 667-85 (discussing the development of mens rea's attachment to "elements").

restraining judicial discretion and, like Russell and Anthon, justified strict liability on harshly utilitarian, public grounds as long as the rule was established in advance. But, in fact, many were equally committed to a guidance theory of law<sup>228</sup> that insisted on individual freedom from state coercion except when the individual flouted some guidance genuinely offered by the law. This theory suggested that only knowing violations of the law – not accidental violations and certainly not violations of the judge’s idiosyncratic sense of morality or lawfulness – could be prosecuted consistently with modern principles of liberty. And, from the perspective of the accused, a prosecution for conduct that to all appearances was legal when done – mistake of fact – was to apply *ex post facto* law to that individual as effectively as if the rule itself had been written after the conduct. Similarly, to prosecute such a mistaken actor on the basis of some judicial evaluation of immoral or “unlawful” intent, without statutory direction on that point, was equally to apply functionally *ex post facto* law.

Codifiers generally agreed on the illegitimacy of any rule that failed to provide real notice of what conduct was unacceptable.<sup>229</sup> Robert Rantoul, a Massachusetts codifier in the first half of the century, emphasized that, “Judge-made law is *ex post facto* law, and therefore unjust. An act is not forbidden by the statute law, but it becomes by judicial decision a crime.”<sup>230</sup> Similarly, “No man can tell what the Common Law is; therefore it is not a law: for a law is a rule of action; but a rule which is unknown can govern no man’s conduct.”<sup>231</sup> And Field complained that, “No Judge should have power to decide a cause without a rule to decide

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<sup>228</sup> For discussion of this approach, see, for example, Jeremy Horder, *Criminal Law and Legal Positivism*, 8 LEGAL THEORY 221 (2002).

<sup>229</sup> Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 318 (1988).

<sup>230</sup> Quoted in Subrin, *supra* n. --, at 323.

<sup>231</sup> Quoted in PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA 302 (1986).

it by, else the suitor is subject to caprice.”<sup>232</sup> The act of a legislature was “made known before it is executed, while legislation by a court . . . necessarily supposes a party to be the victim of a rule unknown until after the transaction which calls it forth.”<sup>233</sup> Some went so far as to conclude that the common law was, therefore, unconstitutional<sup>234</sup> and that the fragmentation of the common law among American jurisdictions made a mockery of its claims to universal rationality.<sup>235</sup> In their positivism,<sup>236</sup> they insisted that individuals retained an inherent liberty from governmental coercion until a legislative act announced otherwise. Field wrote that a code was “the necessary complement of a written constitution for a free people,”<sup>237</sup> because the freedom for which America stood required that ordinary people be able to know what their rights were before they acted, not after they were dragged into court.<sup>238</sup> Judicial authority extended only to applying law that had been positively made by the democratically elected legislature, not to coercing or punishing presumptively free individuals on their own authority.<sup>239</sup>

Among the codifiers, the great Edward Livingston was the only one seriously to attempt to take some of these ideas and embody them in a penal code. An accomplished lawyer of the early nineteenth century, he also held numerous public offices in both New York, the state of

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<sup>232</sup>David Dudley Field, *Codification of the Law*, in *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS* 354 (1884).

<sup>233</sup> DAVID DUDLEY FIELD, *LEGAL REFORM. AN ADDRESS TO THE GRADUATING CLASS OF THE LAW SCHOOL OF THE UNIVERSITY OF ALBANY* 28 (1855).

<sup>234</sup> CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 160 (1981).

<sup>235</sup> *Id.* at 43-54.

<sup>236</sup> See KING, *supra* n. --, ch.5. Note, though, that Field, for example, was as much a believer in the theory of natural law as was Bishop, even though in practice he thought that only positive law should be enforced. It was one thing to believe that law derived from nature and divine will and, relatedly, to think that the substance of the common law was mostly to be preserved. It was another to think that judges were as legitimate as legislators when it came to establishing the enforceable law of a particular jurisdiction. See *id.* at 323-326.

<sup>237</sup> Quoted in DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* 22 (1986).

<sup>238</sup> VAN EE, *supra* n. --, at 54.

<sup>239</sup> COOK, *supra* n. --, 86, ch. 5; Subrin, *supra* n. --, at 324-25.

his birth, and later in Louisiana. As a Jeffersonian Republican and then a Jacksonian Democrat, he held the offices of mayor, United States Attorney, member of the House of Representatives, United States Senator, and Secretary of State under President Jackson before his career concluded in the 1830s. In the meantime, his Benthamite commitment to codification found an opportunity for full development in Louisiana. There, he found a society in transition, desperately in need of order in its laws. Seizing the opportunity, he wrote and saw enacted a code of procedure, the first in the United States, in 1805. He went on to further successes with his civil and commercial codes for Louisiana but suffered the great disappointment of seeing his criminal code of 1826 die in the state legislature. Notwithstanding this disappointment, though, Livingston's criminal code stands as an intellectual landmark in the development of American criminal theory. It was, in the area of criminal law, the great crystallization of the codifying philosophy that would gather influence across the nineteenth century.<sup>240</sup>

In some ways, this codifying philosophy could hardly have been further from the thinking of Bishop, for whom law was divine and written on our hearts and the courts closely directed by God.<sup>241</sup> In contrast to Bishop, Livingston not only declared prevention the "only object of punishment"<sup>242</sup> but feared and hated "*human reason* and the dogmas of religion" in the hands of common law judges; these were no sources of law at all but only of endless

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<sup>240</sup> For biographical information on Livingston, see William B. Hatcher, *Edward Livingston: Jeffersonian Republican and Jacksonian Democrat* (1940); KING, *supra* n. --, at 270-295; Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1099-1106 (1978). Kadish makes the case for Livingston as the only serious forerunner of the MPC. David Dudley Field's criminal code, in contrast, was something of an afterthought, not even written by Field himself but by his co-commissioner William Curtis Noyes, and, according to Sanford Kadish, amounting to little more than a chaotic rearrangement of the already chaotic common law of crimes. *Id.* at 1130-1138.

<sup>241</sup> *But see* KING, *supra* n. --, at 323-326, on Field's underlying commitment to natural law, even as he embraced positivism in practice.

<sup>242</sup> 2 EDWARD LIVINGSTON, *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* 4 (1873).

indeterminacy in adjudication.<sup>243</sup> Yet, if Livingston's proposed criminal code for Louisiana was a fair indication, the codifiers shared Bishop's tendency to define crime in terms of intent. His theory of codification, together with the fact that many states' criminal laws were in fact codified during the nineteenth century, nudged the theory of criminal law in the direction of the MPC's culpability principles: that state coercion must be triggered only by conduct previously defined as criminal and done by one who bore fault with respect to each of the offense's particulars, not with respect to the judge's notions of immorality or unlawfulness.

Livingston rejected all vaguely described offenses "against the laws of morality" because they only invited "the crude and varying opinions of judges, as to the extent of this uncertain code of good morals . . ."<sup>244</sup> Instead, only statutes that precisely described offenses were legitimate circumscriptions of individual liberty, and "The first constructive extension of a penal statute beyond its letter, is an ex post facto law . . . and is an illegal assumption of legislative power . . ."<sup>245</sup> The result of such usurpations would be erosion of the principle that penal law above all must be genuinely accessible to the people as a tool for governing their conduct and preventing harms: "[I]n all evils in government, it is amongst the greatest, that the laws, particularly the penal laws, should be a mystery to the people, and the knowledge of them confined to certain designated classes or descriptions of men."<sup>246</sup> Where law was thus left to the construction of the judges rather than to the plain expressions of the statute itself, the citizen "could have no notice that the law applied to him."<sup>247</sup> To cure this evil was to render the law no longer a "snare for the unwary" and, instead, to ensure that whoever incurs the law's penalties

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<sup>243</sup> Quoted in KING, *supra* n. --, at 274.

<sup>244</sup> 1 LIVINGSTON, *supra* n. --, at 11.

<sup>245</sup> 1 LIVINGSTON, *supra* n.--, at 13

<sup>246</sup> 1 LIVINGSTON, *supra* n.--, at 161. For a modern elaboration and critique of this "guidance" theory of positive law, see Horder, *supra* n. --, at 221.

<sup>247</sup> 1 LIVINGSTON, *supra* n.--, at 170.

does so “willfully” and that whoever is tempted to violate those laws “sees that they cannot be evaded or broken with impunity.”<sup>248</sup> Again, “Law, to be obeyed and administered, must be known . . . To know [the laws] is the right of the people.”<sup>249</sup> “[T]o be free, a people must know the laws by which they were governed.”<sup>250</sup> And, in fact, a law that was not well enough known “to guide our actions” was truly no law at all.<sup>251</sup> It was preposterous and counterproductive to punish a person “for doing an act which, in the nature of things, he could not know to be illegal.”<sup>252</sup>

Perhaps none of this emphasis on the necessity that law be knowable and accessible necessarily implied the illegitimacy of punishing when the accused was unaware of some statutorily designated fact, such as the age of the girl in a statutory rape case, as long as the offense itself was precisely defined in advance.<sup>253</sup> But a principle of precisely, statutorily defined fault – not the sort of loose judicial judgment as to unlawful intent or moral forfeiture inherited from the common law and endorsed by Blackstone – does seem a natural implication of Livingston’s philosophy. And for the most part just such a philosophy did inform his code-writing.

In what might be called the general part of his code, Livingston required at least negligence with respect to every offense<sup>254</sup> and announced that, “No event happening through mistake or accident in the performance of a lawful act, done with ordinary attention, is an

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<sup>248</sup> 1 LIVINGSTON, *supra* n.--, at 163.

<sup>249</sup> 1 LIVINGSTON, *supra* n.--, at 148.

<sup>250</sup> 1 LIVINGSTON, *supra* n.--, at 125.

<sup>251</sup> 1 LIVINGSTON, *supra* n.--, at 119.

<sup>252</sup> 1 LIVINGSTON, *supra* n.--, at 91.

<sup>253</sup> Livingston actually tossed off at one point a justification for strict liability where it might serve as a kind of negligence per se in cases where extraordinary care is called for, such as in the use of an apparently unloaded gun or in the handling of a horse among the Prussian “dragoons.” 1 LIVINGSTON, *supra* n.--, at 303-305, 305 n.a.

<sup>254</sup> 2 LIVINGSTON, *supra* n.--, at 23 (Art. 43).

offence.”<sup>255</sup> Such a negligence or fault requirement in the hands of a common law judge would not necessarily preclude liability where a merely diffuse fault or “unlawfulness” was shown, thus leaving open the door to strict liability with respect to discrete elements. But Livingston rejected this kind of diffuse, judicial judgment. For Livingston a “lawful act” was very clearly any act not positively proscribed by written law; the lawfulness that would justify the accused could not be determined by some judge’s construction of public policy but exclusively by the individual’s freedom to make any choice not expressly proscribed in advance by statute.<sup>256</sup> Guilt, therefore, depended on the accused’s having been at least negligent with respect to every material fact as defined by the statute, not by judicial morality or some diffuse public policy. To intend an immoral or otherwise less than lawful act, in Blackstone’s sense, was still to do a lawful act, in Livingston’s sense, as long as the legislature had not positively proscribed that precise act.

It seems clear, for example, that Livingston would have disapproved the strict-liability holdings later in the century, at least in those cases where the intended fornication or abduction (with an adult, as the accused supposed) was not itself reached by statute. Livingston shared the general conviction of his time that the violation of chastity was a grave wrong.<sup>257</sup> But he firmly opposed any such finding by judges rather than legislatures and declared his readiness in general to tolerate great evils until they were positively addressed by the legislature.<sup>258</sup>

Livingston arguably departed from his principles in cases where the intent was to violate some adequately promulgated statute but the result was violation of some other statute. In the carnal knowledge cases, then, he would have endorsed liability whenever the state had a

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<sup>255</sup> 2 LIVINGSTON, *supra* n.--, at 23 (Art. 42).

<sup>256</sup> 2 LIVINGSTON, *supra* n.--, at 641 (Definitions).

<sup>257</sup> 1 LIVINGSTON, *supra* n. --, at 285.

<sup>258</sup> 2 LIVINGSTON, *supra* n.--, at 15 (Art. 8).

prohibition against fornication on the statute books, since then the defendant would have actually intended an offense, even if not quite the offense he was convicted of. In such a case, the MPC approach, taking Livingstonian principles farther than Livingston did, is simply to say that one can only be guilty of the precise offense for which one meets the culpability requirements. Livingston, however, provided that, as long as what the accused had intended was indeed an offense, she or he would incur the penalty not for the offense intended but “for the act really done.” He then mitigated the departure a bit by specifying that if the intended offense were only a misdemeanor then the penalty could not be greater than the highest misdemeanor penalty, even if the offense actually done was a felony (“crime” in Livingston’s terminology).<sup>259</sup> Livingston acknowledged the departure from principle in his *Introductory Report to the Code of Crimes and Punishments*, lamenting that his endorsement of this sort of transferred intent conflicted with his adherence to the traditional rule that act and will must concur to constitute a crime. He consoled himself with the observation that the results would rarely if ever be unjust and the admission that he simply saw no way out of the difficulty.<sup>260</sup> For him, the concurrence principle was a rough equivalent of the culpability system that the MPC would adopt more than a century later and a natural consequence of his positivist principles, and it pained him when he failed fully to align those principles with what he apparently took to be just (or perhaps politic) results.

In sum, Livingston sought to remove judicial morality from the law and limit state coercion of presumptively free individuals to those circumstances announced in advance by the

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<sup>259</sup> 2 LIVINGSTON, *supra* n.--, at 22 (Art. 41).

<sup>260</sup>1 LIVINGSTON, *supra* n.--, at 234-35. This admission is a bit mysterious since he could have authorized liability only for the intended offense or for attempt. Perhaps he was feeling the pressure of his correspondents (he circulated his draft widely for comments before publication) or of presumed public opinion. In any case, his code was such a departure from tradition that he can hardly be faulted for failing to solve every last problem presented by his stated principles.

rules of positive law. Consequently, he exemplified the codifiers' tendency to limit the definition of crime to acts undertaken with a criminal intent. But those acts were to be defined in utilitarian terms, those acts that the Legislature designated as requiring "coercion or punishment to prevent or repress them . . . ." <sup>261</sup> Emphasizing intent, he ignored and implicitly rejected the rhetoric of crime as public wrong, <sup>262</sup> but at the same time his utilitarianism apparently embodied an approach to criminal law as public policy more than moral justice.

#### D. The Persistence of Public Wrong

The tendency of those who would codify the common law was thus to ignore the public-private distinction. But many legal thinkers opposed or resisted most codification and relied on the public-private distinction to do so. That is, while rejecting most efforts at codification, these thinkers often embraced it for criminal law, not necessarily because criminal law specially required notice to presumptively free individuals or required intent to justify the infliction of punishment, but because criminal law was "public law." In the nineteenth century, the codifiers succeeded mainly in passing procedural and criminal codes but not so often in passing codes for those areas normally grouped under the heading "private law."<sup>263</sup> And the arguments of the most prominent figures who resisted codification of non-criminal, private law at least suggest that the codifiers' successes on the criminal front rested on the acquiescence of those who understood criminal law as the law of "public wrongs." It was one thing to legislate for legitimately public purposes, quite another to attempt to legislate—rather than adjudicate—

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<sup>261</sup>2 LIVINGSTON, *supra* n.--, at 31 (Art. 82).

<sup>262</sup>See 2 LIVINGSTON, *supra* n.--, at 29-31 (Arts. 76-81), which, rather than distinguishing crime as "public wrong" gratuitously divides crimes into public and private offenses, although in his *Introductory Report*, in 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 243 (1873), he distinguishes between penal and civil law on the grounds that civil law is about "private compensation" while penal law is about redressing injuries received by society as a whole.

<sup>263</sup> KING, UTILITARIAN JURISPRUDENCE, 334-36

private justice between individuals. The anti-codifiers were thus one of the groups that sustained the characterization of crime as public wrong in the face of a rising individualism in criminal theory.

The leader of the anti-codifiers in New York, James C. Carter, rejected any codification of private law, since, for Carter, the common-law judge was not “a *maker*, but a *seeker*, among divine sources for pre-existing truth.”<sup>264</sup> And if the truths of private law preexisted adjudication, they could not be “made” by a legislature any more than by a judge. They could only be found, and only by the fact-intensive, evolutionary methods of adjudication. In the divine sources, the judge could only find private law, and even then the socially situated judge could only apply law that conformed to that society’s “*social standard, or ideal, of justice.*”<sup>265</sup> It was not surprising to Carter, then, to find that the statute books of New York addressed public-law matters almost exclusively. Matters such as the organization of the government and the distribution of legislative grants were obviously the province of the written law. Just as obviously, to Carter, was crime within the province of the written law. It too was “*public law*” because it did not so much regulate private conduct as secure the peace and safety of the state.<sup>266</sup> Presumably, Carter meant that, however much criminal law might in fact regulate private conduct, its actual purpose was to secure the public safety; so it addressed only that private conduct that for any particular society at any particular time became public by virtue of its capacity to threaten the security of the state.

Here, Carter’s endorsement of criminal codification might be illuminated by a glance at England’s codifying Law Commissioners of 1833-1845. In their drafts, they did not think that

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<sup>264</sup>JAMES C. CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW* 9 (1889).

<sup>265</sup>*Id.* at 10. Cf. Weinrib’s idea, in ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 19 (1995), that private law is special for its attention to justice between parties rather than to some social goal or public policy.

<sup>266</sup>CARTER, *supra* n. --, at 15.

they were creating new substantive rules of conduct – private law had already established those rules – but using criminal sanctions to declare the kinds of misconduct that should be viewed as matters of public concern, not just private justice.<sup>267</sup> The logic of this categorization, moreover, might dictate that, even when criminal law *was* used to create new substantive rules of conduct, as it was in both England and America amid the industrialization of the late nineteenth century, such rules would remain matters of public law, amenable to public-interested, utilitarian use – as in the proliferation of strict liability in “regulatory” offenses – with relatively little regard for the moral desert of the offender.

Of course, Carter may just have been grappling with the inconvenient fact that criminal law had, in fact, been codified in New York; so he simply wanted to be able to fit that fact into his neat scheme of written law’s corresponding to public law and unwritten law’s corresponding to private law.<sup>268</sup> But his explanation was consistent with the categories of legal thought at the time and thus quite plausible, even if Carter himself could do little more with that explanation than assert that, “This whole department belongs to the province of public law.”<sup>269</sup>

Carter’s widely shared acceptance of codification only for “public law” illustrates the general point of this subpart: that the important, if limited, movements toward a criminal law of closely defined subjective fault – whether impelled by Victorian moralism or codifying positivism – were met by the strong persistence of public perspectives on criminal law. Back in the criminal treatises, then, even as crime was increasingly codified, *mens rea* requirements were often subordinated or sacrificed to public purposes, particularly by Bishop’s great rival,

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<sup>267</sup> See Lindsay Farmer, *Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45*, 18 L. & Hist. Rev. 397, 417-22 (2000).

<sup>268</sup> He sets this proposition out explicitly in CARTER, *supra* n. --, at 15-16.

<sup>269</sup> *Id.* at 55.

Francis Wharton. The early editions of Wharton's treatise contained no extended discussion of the mental element in crime but took the traditional, explicitly common-law position that every person who caused a criminal harm was deemed responsible, except for a few rare exceptions.<sup>270</sup> Among these was insanity; but Wharton followed the likes of the traditional Russell in quoting Hale's warning that, while many criminals could be considered insane, criminal law had to consider the great run of criminal acts criminal anyway.<sup>271</sup> Consequently, Wharton asserted that the insanity excuse should apply only to a "total inability of the defendant to conceive the moral bearing of the transaction"<sup>272</sup> and similarly repeated the traditional assertions that ignorance of law would never excuse and ignorance of fact only rarely.<sup>273</sup> Finally, while he never felt compelled to offer a definition of crime in this intellectually unambitious early treatise, Wharton apparently never thought of defining it in terms of intent, since he reported that proof of intent was the prosecutor's burden not in every criminal case but only "when material."<sup>274</sup>

In his more mature years, Wharton did seek to do more than report the law, publishing his *Philosophy of Criminal Law* in 1880. But he did not seek to innovate. Rather, he defined crime familiarly as public wrong. Where the common law of crimes had been abrogated,<sup>275</sup> therefore, the legislature, the voice of the public, defined crimes. But where the common law remained in effect the definition had to be that "a wrong which public policy requires to be prosecuted by

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<sup>270</sup>FRANCIS WHARTON, CRIMINAL LAW 40 (2d ed. 1852).

<sup>271</sup>WHARTON, *supra* n. --, at 41. For an account of Wharton's long, Victorian struggle to prevent the plea of insanity from eroding criminal law's power to build up the individual's moral capacities, see Janet A. Tighe, *Francis Wharton and the Nineteenth-Century Insanity Defense: The Origins of a Reform Tradition*, 27 AM. J. LEGAL HIST. 223 (1983).

<sup>272</sup>WHARTON, *supra* n. --, at 45.

<sup>273</sup>WHARTON, *supra* n. --, at 57.

<sup>274</sup>WHARTON, *supra* n. --, at 232.

<sup>275</sup>For Wharton's list of these jurisdictions, see FRANCIS WHARTON, PHILOSOPHY OF CRIMINAL LAW 22 n.2 (1880).

the State is an indictable offence.”<sup>276</sup> Wharton emphasized that crime and immorality were not the same thing, since some crime did not require scienter and since much immorality was not criminal. The real test of criminality, instead, was “the public sense of right and public policy.”<sup>277</sup> Wherever the “peace, order, or health of the community [was] not concerned,” Wharton thought society should allow the parties to “settle their differences by themselves” (that is, by private civil suit if necessary). Thus, where a person let a noxious substance onto another’s land, the wrong was private and criminal law should not apply. But where public disturbance was threatened, as where a person let the noxious substance into a public stream, then the state should intervene by way of criminal prosecution.<sup>278</sup>

In the particular case of statutory crimes, Wharton thought the public quality of crime—the public purpose of preventing those harms that transcend the merely private disputes of private individuals—justified a legislature’s elimination of the mistake-of-fact defense in certain cases. Thus he endorsed the statutory-rape and other strict-liability cases, lest the statutes fail

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<sup>276</sup>WHARTON, PHILOSOPHY at 18.

<sup>277</sup>WHARTON, PHILOSOPHY at 20.

<sup>278</sup>WHARTON, PHILOSOPHY at 20-22. Wharton did more than some commentators in actually offering some examples of the distinction between a public harm and a private harm, but neither he nor anyone else was able to offer a reliable method of distinguishing the public from the private as long as one had to admit that every harm to an individual member of society could be and often was interpreted through law to be a sufficient challenge to public safety to render the harm public. *See, e.g.*, 4 BLACKSTONE, *supra* n. –, at 7. I take Wharton’s illustration of the distinction, as described in the main text above, to be a crude example of the public’s drawing a line between those situations where assertion of its authority can enhance that authority and those situations where such an assertion would actually be counterproductive. In the latter category would be those cases where assertion of public authority in the form of criminal law would exact such self-sacrificial effort from individuals as the average person could not sustain, with the result being the tearing of the social fabric more than the vindication of public authority. In such cases, public authority would only destroy itself by denying its dependence on individuals and their ineradicably private aspects. Cf. Bishop: “To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because, misled while he was cautious, he honestly supposed the facts to be the reverse of what they were, would restrain neither him nor any other man from doing wrong in the future; it . . . would harden men’s hearts, and promote vice instead of virtue.” 1 Bishop (7<sup>th</sup> ed.), at 179. And Holmes, who limited his harsh notions of justice not out of softness for the individual but because it was simply counterproductive to make a rule that was “too hard for the average member of the community to bear.” Holmes, *Common Law*, 57.

their purpose of preventing public harm. Where an activity was in itself sufficiently dangerous to the public – seduction or storing explosives, for example – the legislature might justifiably use a presumption of intent or negligence to strengthen the law’s ability to prevent harm.<sup>279</sup>

That criminal law was justified in finding liability beyond even its own artificial, post hoc findings of blameworthiness was reinforced for Wharton by the rule on ignorance of law. He recognized that ignorance of law negated a defendant’s subjective intent just as truly as ignorance of fact did. But ignorance of law was never an excuse for the same reason that ignorance of fact was rarely an excuse: either defense could simply create too many public risks.<sup>280</sup> Wharton could have then pointed out that while ignorance of fact could sometimes be admitted without implicating the public’s integrity as an entity, ignorance of law was virtually always excluded because the citizenry was presumed to know the law, presumed not as a rebuttable factual matter but as a legal rule that expressed law’s status as the fundamental constituent of the public in the first place. The presumption of every citizen’s knowledge of the law was the foundation not of individual justice but of a social, public justice that in its nature required apparent “injustice” to some individuals.<sup>281</sup>

Such hard justice, embracing the priority of the public over the private, found its hardest exponent in Oliver Wendell Holmes, Jr. Holmes’s *The Common Law*, published the year after Wharton’s *Philosophy*, did not attempt to define criminal law as such. Rather, its tendency was to collapse all fields of law together in the service of its general propositions. And these propositions included the marginality of subjective intent to a legal system that focused above all on public safety. What he did say about crime suggested that he, too, relied on the public-

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<sup>279</sup>WHARTON, PHILOSOPHY, at 116-22.

<sup>280</sup>WHARTON, PHILOSOPHY at 122-23.

<sup>281</sup> Cf. Bostjan Zupancic, *Criminal Responsibility Under Mistake of Law*, 13 AM. J. CRIM. L. 37 (1985).

private distinction but that that distinction separated objective law from subjective morality rather than separating criminal wrongs from other legal wrongs. Thus crimes and torts virtually merged, both being judged against a public, objective morality by the standard of negligence rather than intent. But if Holmes did not care to distinguish between crimes and torts, his argument regarding both of them was that liability emerged from one's violation of public-sustaining rules of order and not from an immoral choice to do wrong.<sup>282</sup>

Holmes's basic assertion, made at the beginning of his chapter on crime, was that criminal law must pursue deterrence and that, "No society has ever admitted that it could not sacrifice individual welfare to its own existence."<sup>283</sup> Criminal liability, like civil, emanated from society's inescapable rooting in physical, "frequently punishing those who have been guilty of no moral wrong, and who could not be condemned by any standard that did not avowedly disregard the personal peculiarities of the individuals concerned."<sup>284</sup> The law obviously did this not only by its "indifference to a man's particular temperament, faculties, and so forth" but also by its insistence that ignorance of the law did not excuse.<sup>285</sup> "[T]he law requires them at their peril to know the teachings of common experience, just as it requires them to know the law."<sup>286</sup> It was not that blameworthiness was irrelevant. Blameworthiness was at the root of all law, and morality was the best guide that a person had to staying clear of liability. Moreover, no society could afford to impose rules that were "too hard for the average member of the community."<sup>287</sup> Public purposes could not be served by rules that rendered the average person a criminal. But when criminal law held one liable it was not holding one personally blameworthy; rather, with

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<sup>282</sup> See Hall I, *supra* n. --, at 766.

<sup>283</sup> HOLMES, *supra* n. --, at 43.

<sup>284</sup> *Id.* at 44-45.

<sup>285</sup> *Id.* at 48.

<sup>286</sup> *Id.* at 57.

<sup>287</sup> *Id.* at 57.

due foundation in blameworthiness, it was criminal law's function, not to subject defendants to moral inspection, but to establish an external standard which all persons "at their peril" must meet, lest they be deemed objectively anti-social – objectively blameworthy – regardless of their actual intentions.<sup>288</sup>

The mood of Holmes's writing was, thus, worlds away from Bishop's. But they were both rooted in a Victorian emphasis on individual responsibility. For Bishop, that responsibility rested on a Victorian, Christian certainty in the timelessness and divine origins of morality and institutions of justice, such that every individual could be fairly and realistically assumed to share a common morality as well as the ability to adhere to its commands. After all, in a formulation that Holmes could only have snorted at, Bishop insisted that the divinely inspired criminal law was "written in our hearts." For Holmes, the question whether a defendant actually shared a public morality or the ability to adhere to it was beside the point. For him, the Victorian emphasis on moral character was not a description of what could fairly be expected of each individual but an artificial public device for inducing safe conduct on the part of the citizenry. For this device, the post-Victorian medicalizers would try to substitute therapy and even eugenics, an extreme to which Holmes, moving with the times, would not object. But, as of 1881, Victorian moralism was the device of choice for social defense.

Drawing on Victorian moralism, Holmes was not much limited by it. For him, the key to criminal law was simply the necessity of policing risk. The examples of felony murder and the seduction cases proved to Holmes that even unforeseeable harms might legitimately bring liability if they were caused by actions in which the legislator had divined excessive risk-creation: "The law may, therefore, throw on the actor the peril . . . of consequences which,

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<sup>288</sup>*Id.* at 50, 57.

although not predicted by common experience, the legislator apprehends.”<sup>289</sup> More generally, as was illustrated by the axiom that a person is presumed to intend the natural consequences of her or his acts, the fundamental principle was that, “Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them.”<sup>290</sup>

Contradicting Nicholas Green, his contemporary in Cambridge and Boston, Holmes thought that such disregard of whether a defendant actually intended to choose evil or to violate law was necessary to all law, not just criminal, because all adjudication was *ex post facto* adjudication that created new law for a new fact situation. The purpose of adjudication was not to do justice to the individual defendant as such, nor even to “improve men’s hearts” out in the world, but in the interest of deterrence to communicate the public conclusions about risk creation to the citizenry and then demand safe conduct. Every individual would then have a “fair chance to avoid doing . . . harm.”<sup>291</sup> But if one should cause a proscribed harm, regardless of subjective intent, one would justly become a means to the public’s ends (Holmes had no patience for Kant in criminal law).

In Bishop, Green, and the codifiers lay the roots of subjectivist theories of criminal law. In Wharton and Holmes lay the continuing power of the basic idea of public wrong, that criminal law was driven by the public’s need to prevent certain harms that touch society as a whole and not just the immediate victim. In all of these thinkers, one might read variations on the English, nineteenth-century history of Victorian ideology and its effort to grapple with the idea of individual responsibility in the new age of egalitarian, middle class, industrialized society. The new order brought varied initiatives with respect to crime: the character-building

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<sup>289</sup>HOLMES, *supra* n. --, at 59.

<sup>290</sup>*Id.* at 66.

<sup>291</sup>*Id.* at 144.

penitentiary; the movement to codify the law; the proliferation of strict-liability regulatory offenses; arguments for the medicalization of crime. But none of these authoritatively solved the problem of separating individual responsibility from social or biological causation. Few questioned the value of individual freedom or of technological, scientific, and commercial progress. But the equal necessity of public defense against irresponsible individuals and the impersonal forces of modern life meant that theorists of criminal law would continue to reflect the plurality of theories that undergirded the criminal law.

#### IV. VICTORIAN IDEOLOGIES OF GENDER AND THE STATUTORY RAPE CASES

This story of criminal law's negotiation of the double impulses to private and public justice, which I offer as one organizing principle for a historiography of criminal theory, has so far proceeded at a fairly general level. The purpose of this section is to offer a case study in which that basic theme is applied to one discrete doctrinal development: the origins of strict liability in statutory rape and related offenses. The statutory-rape opinions hardly contain carefully worked out theories of criminal law. They do, however, confirm that criminal adjudication was treated by most writers and judges as something more than a sphere of moral blaming. Moral condemnation of certain choices was certainly seen as an important tool of criminal law, but the prevention of public wrongs stood as an independent justification for criminal conviction.

##### A. The Victorian Ideology of Chastity

A brief history of Victorian notions of gender relations and the "social purity" movement of the late nineteenth century – one manifestation of the moral earnestness of Victorian culture, discussed above – is the necessary background for deriving meaning from

some of the opinions in the cases. The Victorian morality of sex and gender was rooted in an ancient double standard that, while often looking indulgently on male promiscuity, held that a woman's chastity was her greatest property, her indispensable asset. And yet this property was not really hers to dispose of as she wished, since a woman's "function was to cater to the needs of men. For this task the first qualification was chastity." Consequently, "This absolute property of the woman's chastity was vested not in the woman herself, but in her parents or husband."<sup>292</sup> A woman's "honor" was judged primarily by how well she cared for that property.<sup>293</sup>

Such ideas retained their vitality from Blackstone's England<sup>294</sup> all the way into late Victorian America. Thus, "The rape of white females by black men provoked such profound rage among southern white men because they viewed female sexuality as property that they owned, like slaves, and protection of this property was a key to preserving their position in society."<sup>295</sup> Complementarily, this particular piece of property, female chastity, was essential to the development of the properly Victorian moral character that any wife worth having must possess. Thus, the supreme court of Georgia: "No evil habitude of humanity so depraves the nature, so deadens the moral sense, and obliterates the distinctions between right and wrong, as common, licentious indulgence. Particularly is this true of women, the citadel of whose character is virtue [i.e., chastity]; when that is lost, all is gone; her love of justice, sense of

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<sup>292</sup> Keith Thomas, *The Double Standard*, 20 *J. of the Hist. of Ideas* 195, 213 (1959). Suggesting a similar ownership of the woman and her sexuality in French history is GEORGES VIGARELLO, *A HISTORY OF RAPE: SEXUAL VIOLENCE IN FRANCE FROM THE 16<sup>TH</sup> TO THE TWENTIETH CENTURY* 45-49 (Jean Birrell trans., 2001).

<sup>293</sup> Thomas, *supra* n. --, at 210.

<sup>294</sup> Note Blackstone's observation that the harm in rape was, indeed, violation of the woman's "chastity," such that in some countries a prostitute could not in law be raped because she lacked any chastity to be violated. English law differed on that score, according to Blackstone, only in that it assumed that the prostitute may at any time have reformed herself. 4 BLACKSTONE, *supra* n. --, at 212-213.

<sup>295</sup> PETER W. BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH* 65 (1995). See also, Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* 4-6 (1999).

character, and regard for truth.”<sup>296</sup> And for the New York codifiers, quoting William Paley’s *Moral Philosophy*, seduction was an especially grievous wrong because, for any young girl, “the loss of her chastity is generally the destruction of her moral principles.”<sup>297</sup>

The Victorian ideal of female chastity, however, never went without challenge from the realities of working-class life. In one study of late eighteenth-century New York, for example, the ideology of chastity and feminine “honor” as a cornerstone of family and state was regularly articulated in court as the background of rape prosecutions, even as the facts of those same cases, exposing the very different economic and moral world of working-class defendants and victims, challenged the ideology of chastity. The realities of life on the streets of New York were that insofar as a woman’s sexuality was property – often her most valuable property as long as women’s labor was devalued compared to men’s – it provided her some measure of leverage and resources that her economic position did not otherwise afford. Not having a parlor in which to entertain callers to her tenement apartment, lacking the money to pay for any entertainment but the sexually charged entertainment of street sociability, and compelled to work for male bosses to make ends meet, a young woman’s sexuality might well become her most valuable item of exchange.<sup>298</sup> A century later, the setting was different in some ways. Dance halls and amusement parks proliferated. Work spaces changed as young women became “typewriters” and staffed large sales floors. But in the late nineteenth century the fundamental reality remained that young, working class women relied on their sexuality as part of an

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<sup>296</sup> Quoted in BARDAGLIO, *supra* n. --, at 73.

<sup>297</sup> VAN EE, *supra* n. --, at 40-41.

<sup>298</sup> Marybeth Hamilton Arnold, “*The Life of a Citizen in the Hands of a Woman*”: *Sexual Assault in New York City, 1790 to 1820*, in *PASSION AND POWER: SEXUALITY IN HISTORY* 39 (Kathy Peiss & Christina Simmons eds., 1989).

economy in which they obtained work and entertainment alike.<sup>299</sup> Equally challenging to the old double standard as well as to its specifically Victorian manifestations were the realities of many households that did not conform to the Victorian ideal of domestic temples of moral improvement and character-building. Too many homes were instead infected with drunkenness, violence, and rape.<sup>300</sup>

In response to such anti-Victorian realities, there arose the “social purity” movement, spearheaded by such organizations as the Women’s Christian Temperance Union and such conservative feminists as Lucy Stone and her husband Henry Blackwell.<sup>301</sup> Progressive in its attack on the double standard’s legitimation of male sexual predation, this movement was nevertheless conservative in that it sought not a fundamental redefinition of women’s rights, not the range of equalities that the radical feminists of the time sought and have since achieved in some measure, not sexual and personal self-fulfillment. It had no interest in fostering a young woman’s right to dispose of her sexuality as she chose but only in preserving her chastity.<sup>302</sup> It sought mainly a Victorian liberation of young girls from the sort of male violence and sexual predation, rooted so often in drunkenness, that unleashed the girls’ sexuality and thereby ruined their characters and futures. After such ruin was accomplished, it was all but

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<sup>299</sup> Kathy Peiss, *“Charity Girls” and City Pleasures: Historical Notes on Working-Class Sexuality, 188-1920*, in *PASSION AND POWER: SEXUALITY IN HISTORY* 39 (Kathy Peiss & Christina Simmons eds., 1989). *See also*, BARBARA HOBSON, *UNEASY VIRTUE* 76 (1990).

<sup>300</sup> Elizabeth Pleck, *Feminist Responses to “Crimes Against Women,” 1868-1896*, 8 *Signs* 451 (1983); Jane E. Larson, *“Even a Worm Will Turn at Last”: Rape Reform in Late Nineteenth-Century America*, 9 *Yale J. of L. and the Humanities* 1, 21, 64 (1997); Jesse F. Battan, *“In the Marriage Bed Woman’s Sex Has Been Enslaved and Abused”: Defining and Exposing Marital Rape in Late Nineteenth-Century America*, in Merrill D. Smith, ed., *Sex Without Consent: Rape and Sexual Coercion in America* (2001); Halttunen, *supra* n. --, 135-71.

<sup>301</sup> Pleck, *supra* n. --; John D’Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 150-56 (2d ed. 1997).

<sup>302</sup> Pleck, *supra* n. --. *Cf.* Anne M. Coughlin, *Sex and Guilt*, 84 *VA. L. REV.* 1 (1998), which argues that the established roots of and context for rape law traditionally had nothing to do with sexual autonomy but with the widely accepted criminality of nonmarital sex, and Haag, *supra* n. --, at 3-24, which observes that the movement to criminalize seduction in the nineteenth century had nothing to do with protecting sexual autonomy but plenty to do with preserving chastity.

impossible that a girl could become a proper model of self-denial and domesticity, marrying with her chaste character intact and raising little families of moral exemplars. Instead, she was assumed to be on the road to degradation and prostitution. Equally true, the men who inflicted such ruin could only rarely overcome their baser selves to assume the role of self-controlled leader of the Victorian family rather than drunken abuser of wife and children.

The campaign for temperance was perhaps the chief preoccupation of the WCTU, but a related campaign for reform of the rape laws and particularly for raising the age of consent was also a fundamental part of the movement. There seems to have been little talk of reforming the resistance requirement<sup>303</sup> or other reforms familiar to the modern ear as defenses of individual sexual autonomy (although cases of genuinely violent rape seem to have provided much of the impetus for the reformers<sup>304</sup>). But intense attention was paid to the fate of young girls. The common assumption was that girls were naturally passionless, even as they harbored some inclination to lustful irrationality that might be activated by a loss of chastity.<sup>305</sup> Girls were thus acutely vulnerable to ruin at a young age at the hands of self-indulgent men. Such victimization of young women again had little to do with violation of their sexual autonomy, either in the minds of the reformers or in the facts of the cases, which often suggested the girls' willing participation. Instead the harm lay in the "ruination" of their character, the loss of chastity itself, putting them on the fast track to typically sexual female criminality and incapacitation for the role of Victorian mother. For the reformers, then, to get the age of consent raised was to emphasize the public and private importance of chastity and to publicize the vulnerability of

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<sup>303</sup> In Coughlin's understanding of the meaning of rape law — i.e., that it was essentially a matter of the woman's raising a duress defense to a fornication or adultery charge against her — it would have been quite the uphill battle to seek an end to the resistance requirement, since a potential criminal should be expected to have resisted pressure to commit the crime. See Coughlin, *supra* n. --.

<sup>304</sup> Larson, *supra* n. --, at 13-21.

<sup>305</sup> HOBSON, *supra* n. --, at 72, 111-12; ODEM, *supra* n. --.

these girls whose characters were not yet fully formed. They suggested a picture of female adolescence in which every girl between the ages of, roughly, 12 and 18 hung in a delicate balance between preparation for Victorian motherhood, on the one hand, and complete moral disintegration, on the other. Any hint of disobedience or immorality might be cause for desperate measures – such as early commitment to a female reformatory – to prevent an irreversible deterioration of the girl’s moral character, the end of which must be prostitution.<sup>306</sup> The key to choosing the right road was chastity, and chastity was always in danger from that omnipresent figure of the double standard, the lustful man, often drunken, often married, perhaps the girl’s employer or other figure of authority, ready to prey on the vulnerability of the morally unformed and latently lustful girl.

The campaign to raise the age of consent largely succeeded in the great majority of states. Where the statutory age had rested between ten and twelve in probably every state in 1885, by 1920 the age had risen to between sixteen and eighteen almost everywhere.<sup>307</sup> The reform had been resisted by quite a few legislators who worried that the laws would unjustly convert normal adolescent boys into felons and rapists, especially objectionable when the fault often lay as much with the girl as the boy.<sup>308</sup> But these objections were widely overcome, and

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<sup>306</sup> HOBSON, *supra* n. --, at 124-30.

<sup>307</sup> ODEM, *supra* n. --, ch. 1.

<sup>308</sup> Larson, *supra* n. --, at 53-57. See also the vigorous argument to this effect in *State v. White*, 44 Kan. 514 (1890), which did not forthrightly reject any basic Victorian precepts but did loudly question the justice of, in effect, renaming fornication “rape” and severely punishing the boy (five to twenty-one years’ imprisonment) while letting the girl off scot free, even when sex occurred between two minors and even when the girl might be far more to blame than the boy. It is unclear whether this judge would have thought “rape” an inappropriate term in cases where the man was much older than the girl or if he rejected altogether the Victorian notion of female adolescence – unlike male – as a period of extraordinarily delicate balance requiring the utmost protection from the law. But he certainly rejected the idea that wise public policy called for such severe and disproportionate punishment of the boy relative to the girl in cases of consensual adolescent sex.

the social purity movement saw a major part of its conservative ideology of social organization enacted into law.

As suggested above, however, the reality into which these laws intruded often departed dramatically from the reformers' model of the older, unscrupulous man taking advantage of the once passionless and chaste (now to be lustful and degenerate) girl. Still, these realities were readily assimilated to the legal hegemony of the Victorian ideology of chastity. Actual prosecutions under these laws appear very often to have involved scenarios drawn from the active working-class culture of youthful sexual exchange. The girls were anything but passionless. They were sophisticated in getting what they wanted out of sexual relationships. And the boys were indeed boys, not usually older men, meeting the girls at dance halls and theaters and amusement parks. The supposedly unfair conviction of such boys was predicted by the opponents of rape reform, but resistance to criminalizing boys who had sex in such circumstances did not indicate any cracks in the ideology of chastity. A desire to keep the statutory age low only reflected a desire to prevent conviction for rape where the girl's ruin was produced not simply by the boy's conduct but by her own as well.

Similarly, many states required for conviction that the girl have been of previously chaste character, since the point was not to criminalize youthful sexuality as such—no one was campaigning to eliminate teen marriage—but to treat violation of chastity as the rape that it was.<sup>309</sup> Proof of unchastity then often meant not just proof of previous sexual experience but

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<sup>309</sup> Statutory rape cases that required previous chaste character included the following: *People v. Mills*, 54 N.W. 488 (Mich. 1893); *Powell v. State*, 20 So. 4 (Miss. 1896); *State v. Knock*, 44 S.W. 235 (Mo. 1898); *Young v. Territory*, 58 P. 724 (Okla. 1899); *Jackson v. State* 64 N.W. 838 (Wis. 1895). Some states did not require previous chaste character in such cases. See, for example, *Holton v. State*, 9 So. 716 (Fla. 1891). But the states routinely, though not quite universally, required it in cases of abduction and seduction. See, e.g., *Lyons v. State*, 52 Ind. 426 (1876); *State v. Savant*, 38 So. 974 (La. 1905); *Com. v. Whittaker*, 131 Mass. 224 (1881); *Carpenter v. People*, 8 Barb. 603 (N.Y. Sup. Ct. 1850); *Jenkins v. State*, 83 Tenn. 674 (1885);

broadly any proof of immoral character.<sup>310</sup> The implication of this requirement was that the girl could not have been ruined by this man if her character had already been ruined before his conduct occurred. In the words of one court, “If she was not of chaste and virtuous character, then she does not possess that which the law was enacted to protect, and she has passed that stage or condition where the law longer regards her as requiring its guardianship.”<sup>311</sup> And another: “The statute was intended to preserve from licentious attack the personal purity of young females, and to punish the destroyer of the chastity of innocent girls. . . . So long as the girl remains personally pure, so long as she is free from the pollution of criminal sexual intercourse, so long is she entitled to the protection of the law. . . . So long as she preserves the flower of her virginity, just so long may she shelter herself in the protecting arms of the law.”<sup>312</sup>

Even where courts refused to read a requirement of previous chaste character into a statute, the basic values expressed by the courts remained the same. For these courts, the statutes were meant not only “to protect the chaste” but also, if possible, to “reclaim the erring” or “the unchaste” and to protect “the family, from sorrow and disgrace.”<sup>313</sup> They, therefore, extended the protection of the statutes even to “the erring.” But even such courts, while eagerly protecting those whose reputation for unchastity might attract “designing men,” wanted it perfectly clear that the law would leave such men free to follow their impulses if they chose their victims well: “We do not want to be understood as saying that the law is intended to

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West v. State, 1 Wis. 209 (1853). *But see* People v. Demousset, 12 P. 788 (Cal. 1887); State v. Johnson, 22 S.W. 463 (Mo. 1893).

<sup>310</sup> See, e.g., Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929* ch. 3 (1993).

<sup>311</sup> *Young*, 58 P. at 727.

<sup>312</sup> *Powell*, 20 So. At 6.

<sup>313</sup> *Johnson*, 22 S.W. at 466 (quoting *Demousset*, 12 P. 788).

protect, or that it does in fact embrace within its provisions, abandoned girls or harlots, who leave their homes to ply their occupation as such . . .”<sup>314</sup>

And, finally, even the most protective courts, those who would extend statutory rape protection to every girl under the statutory age—even “abandoned girls and harlots”—differed with other courts only on the question whether the law regarded certain, highly unchaste girls as salvageable, not on the basic assumption that female adolescence was defined by a moral struggle between the prospects of prostitution, on the one hand, and Victorian womanhood, on the other: “The inhibition of this statute is aimed entirely at the masculine gender, and prohibits him, under severe penalty, from holding such intercourse with any unmarried female under the age of 17 years,—the legislature having seen proper to fix that age as the time . . . when females should be considered of mature age and judgment; under that age, to be regarded as of immature age and discretion. The spirit and meaning of the act is to protect such immature females by deterring men from either starting them off on the pathway of prostitution, or by continuing them on such devious way. So that when such illicit intercourse, and the fact that the female is unmarried and under the age of 17 years, are established, the crime is made out, and it makes no difference, as before stated, whether she be previously pure or impure.”<sup>315</sup>

Similar concerns—which girls were really within the protection of a law aimed at protecting chastity not sexual autonomy?—were implied when trial judges fully explored questions of sexual history and consent, even though the statute formally made them irrelevant.<sup>316</sup> To open such questions was to say that if the sexual act had been produced more by the girl’s manipulation of the boy’s natural drives than by the boy’s imposition of his desires

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<sup>314</sup> *Johnson*, 22 S.W. at 466

<sup>315</sup> *Holton v. State*, 9 So. 716, 718 (Fla. 1891).

<sup>316</sup> ODEM, *supra* n. --, at ch. 3.

on a genuinely chaste girl, a potential Victorian mother, then no ruination had occurred and no harm calling for the attention of the public.

A quick review of the law of forcible rape at the time is illuminating here. Forcible rape prosecutions were supposed to protect the characters of genuinely Victorian women who demonstrated their abhorrence of any violation of their honor by engaging in resistance to the utmost. To resist less than one would resist a murderous assault was to forfeit the protection of the law, since a woman of appropriately protectible character valued her chastity as she valued her life.<sup>317</sup> As forcible-rape prosecutions were about protection of mature Victorian chastity, then, statutory rape prosecutions were about preventing, at all costs, the preemptive destruction of such character and the moral unbalancing of the adolescent girl. Just as an unwilling woman was taken to have consented to sex if her resistance fell a bit short of what an idealized Victorian woman's "honor" would have demanded, so a young girl could not have consented in the relevant sense, because she had not yet grown, through her family's parlor influence, into the full moral being who could understand the full consequences of "consenting"<sup>318</sup> to sex for herself, her family, and the republic.<sup>319</sup>

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<sup>317</sup> Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1130-31 (1986). Cf. Haag, *supra* n. --, at 16-17 (observing the equivalence between loss of chastity and death in the rhetoric of seduction cases). This is not to deny, though, that protection of the woman's sexual autonomy was also a major concern in some (not all) courtrooms. See, e.g., Hal Goldman, "A Most Detestable Crime": *Character, Consent, and Corroboration in Vermont's Rape Law, 1850-1920*, in Merrill D. Smith, ed., *Sex Without Consent: Rape and Sexual Coercion in America* (2001). Goldman rightly argues that the historical analysis of rape needs to recognize diversity among jurisdictions and that in some (like Vermont) the law's protection of the woman's consent was much more aggressive than has sometimes been recognized.

<sup>318</sup> On the socially constructed meaning of consent in this period, see Haag's discussion of seduction cases. Haag, *supra* n. --, at 3-24.

<sup>319</sup> Following the lead of Ann Coughlin's *Sex and Guilt*, one might also look at this through the criminal law's language of complicity. The rape laws required force, nonconsent, and utmost resistance for women above the age of consent but replaced those requirements in cases of underage girls with the mere question of age. The implicit presumption was that a young girl was incapable of consent in the relevant sense and so consent could not be a relevant question. But if a defendant were to be able to claim a mistake as to the girl's age, then, just as a failed adult-rape prosecution implied the woman's actual complicity in fornication, *see* Coughlin, *supra* n. --, so a failed underage-rape prosecution implied the girl's

Presumably, even the unchaste lacked this full capacity to consent at such a young age, but, again, the girl's autonomous consent was not what the law sought to protect. To the extent that a girl had already lost chaste character, the law increasingly deemed her not an object of its protection. Any remaining public value she had must have lain no longer in her capacity to develop into a Victorian mother but only to serve as part of that inevitable, degraded class of prostitutes that the double standard had long deemed an indispensable outlet for the man's "natural" impulses and thus an indispensable protection for those chaste women who would

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complicity in fornication, even as the statute established the impossibility of her consenting in a legally meaningful way. See, e.g., *Holton v. State*, 9 So. 716 (Fla. 1891). The complicity in fornication that would be implied by a successful mistake-of-age defense would muddle the Victorian reasoning that lay behind the statutes – the reasoning that deemed previously unruined adolescent girls victims rather than criminals when they “chose” to accede to the seductions of licentious men. See Haag, *supra* n. --, at 12-23. By insisting on the girl's incapacity to be guiltily complicit in her own ruination and her status as the object of the law's protection, the law all but implied strict liability for the man, since a mistake-of-age defense would have brought with it – to avoid a forcible rape prosecution – at least the implicit claim that the girl consented, which, in a sense, she did, but which could not be admitted without making her appear complicit in her own ruination before she was genuinely (legally) capable of such complicity.

This strict liability rule also mirrored the image, if not necessarily the doctrinal logic, of forcible-rape prosecutions; if, as Sayre later said, it was impossible to imagine a real rape being accomplished negligently, because no one could be mistaken about nonconsent when force was required to overcome it, see Sayre, *Mens Rea*, *supra* n. --, at 988, then the substitution of age alone for force and nonconsent – for the very reason that underage consent was not real consent – might suggest that no defendant should be allowed to claim mistake regarding age, the proxy for nonconsent. This “logic” seems to have informed the thinking of the Kansas high court in *State v. Frazier*, 39 P. 819 (Kan. 1895): “Under the old statute and similar ones in other states, it has always been held that the female child below the age prescribed is utterly without capacity to consent, and therefore there can be no such thing as fornication with a female child under the age of consent. As this statute has merely raised the age, it must be held under it that there can be no such thing as consent by a girl under the age of 18 years to sexual intercourse. If she cannot consent, then any person lewdly touching her commits an assault, and an assault is always an unlawful act.”

None of this rules out a mistake defense logically; a defendant could, in the face of all of these observations, simply insist that he reasonably thought he was engaged in conduct that amounted to nothing worse than fornication and that, while a greater harm was done and while the girl might not have been at fault or complicit, he was not at fault for that greater harm either. But it does point up the cultural commitments that informed criminal doctrine, that explained the nature and grievousness of the public wrong in the statutory rape cases relative to the petty unlawfulness of fornication, the charge that would have been made relevant if the mistake defense had been indulged. And an understanding of the nature of that public wrong is what is necessary to understand this instance of judges' being, as they always have been, at least as concerned with ensuring public redress for public wrongs as with gauging liability by degrees of statutory or even moral fault.

otherwise become targets of male lust.<sup>320</sup> The sort of harm that counted to the public lay not in the violation of sexual autonomy or consent but in the violation of the woman's character and the consequent "theft" or "murder" of a "valuable member of society."<sup>321</sup>

In sum, while the courts and legislatures manifested some diversity in the precise scope of criminalization they thought necessary to the vindication of chastity, there was little if any dissent from the basic point that the criminal law's "protecting arms" must be thrown around adolescent chastity, not sexual autonomy, and that the sexually impulsive man was beyond the proper reach of the criminal law as long as he did not, in fact, interfere with that project. In the balance was not the freedom and equality of individual women but the moral foundations of the family and the republic. And those stakes were established not just by a middle-class prudery or an arch moral disapproval of sexual freedom, but by the Victorian belief in an almost physical, moral mechanism. Premarital loss of virginity, it seemed, destroyed the fine instrument that was the girl's in-born moral compass. It was not absolutely impossible, then, to regain chastity and thus to repair that instrument, but it was exceedingly difficult. The care and protection of this quasi-physical moral mechanism, then, was the function of the Victorian law of carnal knowledge and abduction.

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<sup>320</sup> See Thomas, *supra* n. --, on the tradition of regulating prostitutes, not their customers, rather than banning prostitution. See also FRIEDMAN, *supra* n. --, at 227. The American social purity movement rejected the double standard and its notion that men should not or could not be expected to control themselves. See D'Emilio, *supra* n. --, at 150-56.

<sup>321</sup> Haag, *supra* n. --, at 10, 12; ODEM, *supra* n. --, at 71. Note that ODEM discusses the trial judges' concern with the girls' characters, despite the statute's concern only with age, so as to release those defendants who had had sex with an already ruined girl, but she does not note even a single claim of mistake of age. If such claims were rare, that could just reflect that the law was settled, but the law seemed equally clear on the irrelevance of the girl's consent or character. Presumably, there was no serious argument about mistake of age in the trial courts because the trial judges, like the appellate judges, had no interest in the technical "innocence" of the defendant but only the question whether the defendant had actually violated the girl's chastity.

## B. Public Wrong in the Rape and Abduction Cases

How then do the social purity movement, the Victorian model of womanhood, and the criminal law's embrace of the ideology, psychology, and morality of chastity connect to the nineteenth-century history of criminal theory in the statutory rape and abduction cases? Part of the explanation for these cases might lie in the notion that a "wrongful" intent, here the man's choice to have nonmarital sex in the first place, can be justly transferred to a somewhat different but morally comparable wrong, seducing an underage girl. That simple explanation, however, does not do justice to the language of the cases or to a history that suggests a fundamental difference between the wrongs of fornication and statutory rape.

Most judges did not actually rely on a kind of transferred intent but on an essentially utilitarian language of prevention and protection for the family. And, when they did advert seriously to the underlying immorality, the reasoning was not so much that the intent to fornicate was transferable to the resulting rape as that the defendant's self-indulgence deprived him of the status to object to his use as a means to the public's ends. The underlying nonmarital sex seems never to have been charged as an independent offense in these cases; it was rarely prosecuted at all in this period (as long as it was intraracial);<sup>322</sup> no judge that I have found ever referred to it as a statutory violation in itself; and only some judges relied on that underlying immorality as in any way significant for the rape prosecutions. Premarital and extramarital sex were common in the late nineteenth century, as they were before and after,<sup>323</sup> and not often prosecuted. For many, they reflected moral fault, but prosecution seems generally to have

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<sup>322</sup> Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 J. AM. HIST. 835, 840-42 (1991); FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 139-140 (1993).

<sup>323</sup> D'Emilio, *supra* n. --, at 73-78, illustrates the difficulty of determining anything like precise rates of premarital or non marital sex but offers some evidence of such intimacy over time as do the various studies of adolescent sexuality in this period already cited. See ODEM, *supra* n. --; Dubinsky, *supra* n. --; Arnold, *supra* n. --; Peiss, *supra* n. --.

meant that the circumstances included some specially egregious conduct beyond the simple fornication itself.<sup>324</sup> The underlying fornication simply does not seem to have been a serious concern for these judges.<sup>325</sup> Rather, the key seems to have been the qualitatively different harm of violated chastity, potentially opening the flood gates of previously unknown adolescent lust and tipping the balance from Victorian mother in the making to abandoned harlot. The lightly immoral conduct of simple fornication (as opposed to adultery or interracial fornication or statutory rape) hardly counted as a public harm,<sup>326</sup> but the destruction of the character of the adolescent girl, on whom the future of the family and of the republic rested, was certainly such a public wrong as to justify criminal liability. In the words of Friedman and Percival, many Victorians “did feel, rather deeply, that chastity and virtue were essential to a strong and durable society; that immorality and lust would rot our social timbers, sooner or later . . . .”<sup>327</sup>

Thus, while one could say that the strict liability rule was really a sort of negligence rule (since the fornication suggests a kind of unjustified risk-taking in the defendant’s conduct), that interpretation of the cases fails to capture important aspects of the culture in which the judges worked. The judges in these cases could easily have allowed a mistake-of-age defense, leaving the authorities to bring a fornication charge along with the rape charge so as to gauge degrees of liability precisely according to the defendant’s mental state. But the judges were not thinking in

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<sup>324</sup> Berry, *supra* n. --, at 838-842. Friedman describes a “Victorian compromise” in which much immorality was outlawed even though the real goal was not so much to stamp it out as to drive it from public view. Thus fornication might be officially disapproved, but private indulgence drew little condemnation. Only specially egregious, public flouting of official prudery was likely to provoke the law to action. FRIEDMAN, *supra* n. --, at 127-132. Similarly, Edward Livingston, while eager to criminalize seduction, determined that fornication was a different matter altogether: “[T]he private excesses of the passion between the sexes cannot, with propriety, be made the subject of the penal law . . . .” 1 Livingston at 285-86.

<sup>325</sup> See Berry, *supra* n. --, at 838: “The primary reason for the prohibition was to protect the sanctity of marriage, not to prevent sexual activity as such.”

<sup>326</sup> *Id.* at 838-842.

<sup>327</sup> Friedman and Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910*, 11 (1981).

terms of criminal liability's being dependent on mental state so much as on the public importance of the harm. These were rape and abduction prosecutions, not mere fornication. Offenders faced and often served very long prison sentences, even first-time offenders.<sup>328</sup> And the point of the strict liability rule was to emphasize the seriousness of the harm and the importance to all of society that men attend fully to the needs of the public, as defined by the Victorian ideology of the family, rather than to private desire.

It was not as if such private desires were objects of universal moral condemnation. They had been all but fully legitimated by the double standard<sup>329</sup> and retained a good deal of indulgence in the law.<sup>330</sup> But the public interest absolutely required that such private indulgences not end in the ruining of young girls' characters, and the law gave men a way of generally avoiding that harm and the criminal liability that went with it. The way clear was not to be careful about age, even though age was a core element of the offense, but to manifest a fully virtuous character by not engaging in nonmarital (premarital or extra-marital) sex at all. The ancient ideology of the double standard declared this path a highly burdensome one, given the "natural" needs of men. But it was not impossible. If one did indulge, therefore, one had assumed, not necessarily such a terrible moral position, but a legally responsible or "unlawful" position, given the pressing public necessity of protecting the chaste. Thus the prosecution in a statutory rape case, where a vitiated kind of consent was presumed, took its life not so much from the underlying immorality of the fornication – for which the girl could equally well be prosecuted and for which there were few prosecutions and relatively little concern generally –

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<sup>328</sup> Friedman and Percival, *supra* n.--, at 207-209. Moreover, while one might guess that some of these sentences were responses to evidence of actual violence in particular cases that were charged as statutory rape, evidence from Friedman and Percival at least suggests the contrary. See pp. 139-40.

<sup>329</sup> See FRIEDMAN, *supra* n.--, at 227; HOBSON, *supra* n.--, at 151; Thomas, *supra* n.--.

<sup>330</sup> For example, as mentioned above, fornication prosecutions were rare; legal regulation of prostitution fell largely on the prostitutes, not on their customers; and legislatures and courts commonly required that a girl have maintained a previously chaste character before she could claim the protection of the laws.

as from the simple fact that the harm done was of such grave public consequence as to demand the conviction of the male who perpetrated it as long as he had voluntarily placed himself in a responsible – not necessarily immoral but responsible – position.<sup>331</sup>

If the harm targeted by the statutes was the loss of chastity and moral character, the language of the cases suggested that the law sought less to give the defendants what they deserved than to use them for the purpose of protecting society at large from the designated harm. Many courts simply claimed to take the law as they found it,<sup>332</sup> but insofar as the judges justified the strict liability rule, they widely relied on deterrence, explicitly and implicitly, often but not always in combination with suggestions of moral forfeiture. In Massachusetts, for example, *Commonwealth v. Murphy* noted that the legislature had created a number of crimes (like selling liquor under certain circumstances or admitting a minor to a billiard room or selling adulterated milk) that were “punishable without proof that the defendant understands the facts that give character to his act.”<sup>333</sup> The question, then, in this case of first impression under the Massachusetts statutory-rape law, was not how to ensure justice to the accused but simply whether the legislature’s purpose and the available means of achieving that purpose showed that “the intention of the legislature was to make knowledge of the facts an essential element of the offence or to put upon everyone the burden” of determining those facts.<sup>334</sup>

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<sup>331</sup> Although I found no cases on the question, even a mistaken belief that he was married to the girl would probably not have saved him, given the strictness with which courts generally treated such mistakes in adultery and polygamy cases and the like. *State v. Whitcomb*, 2 N.W. 970 (Iowa 1879); *State v. Goodenow*, 65 Me. 30 (1876); *Commonwealth v. Mash*, 48 Mass. (Met. 7) 472 (1844); *Com. v. Thompson*, 93 Mass. 23 (1865).

<sup>332</sup> See, e.g., *People v. Lewellyn*, 145 N.E. 289 (Ill. 1924); *State v. Newton*, 44 Iowa 45 (1876); *Commonwealth v. Murphy*, 165 Mass. 66 (1896); *People v. Gengels*, 188 N.W. 398 (Mich. 1922); *State v. Duncan*, 266 P. 400 (Mont. 1928); *Zent v. State*, 3 Ohio App. 473 (1914); *Lawrence v. Commonwealth*, 71 Va. 845 (1878).

<sup>333</sup> 165 Mass. 66, 70 (1896).

<sup>334</sup> 165 Mass. at 70.

Similarly, in New York, *People v. Marks* had this to say about the state's statutory-rape law: "The manifest purpose of this legislation was to protect the morals of young girls; and to render the enactment effective neither the consent, . . . nor her representations nor information derived from others as to her age, nor her appearance with respect to age, is a defense to prosecution . . . ." <sup>335</sup> The stark question, again, was not whether it was fair to the defendant to convict him despite his mistake but whether the public purpose of "protect[ing] the morals of young girls" might be advanced by denying the mistake of age defense.

And in Alabama, again, the rationale was cleanly utilitarian. Without considering whether some version of justice to the defendant might require otherwise, the court determined that allowing a mistake defense was simply too dangerous to the public purpose of the statute. It would leave vulnerable the very girls the act sought to protect, those who were apparently fully mature but in fact still hanging in the adolescent balance between moral maturity and "irreparable injury": "If into this statute should be injected the knowledge of the age of the girl, or if the fact [that] her appearance would indicate she is more than 16, will justify the defendant in the commission of the offense, in many instances the very purpose of the statute would be thwarted, for it is a matter of universal common knowledge that many girls under the age of 16 are more precocious and more fully developed than are those of 16 and even 17 years of age, and it is manifest that these are the very girls, those who are more mature in appearance, whom the statute is intended to protect, and who most need the protection of this statute. As said by an eminent writer and jurist: 'We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have

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<sup>335</sup>146 A.D. 11, 12 (N.Y. App. Div. 1911).

been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury.”<sup>336</sup>

Some of these judges, then, felt no need even to mention any underlying immoral intent, but many judges went further, imparting a measure of ambiguity to the rule’s rationale. Thus some of the cases can be read as if they were not really cases of strict liability at all but simple transferrals of one sexually immoral intent to a similar sexual harm. Even in these cases, however, utilitarian reasoning generally persists, and the language is not that of transferred intent but “at peril” – the language of strict liability.

First in this series of cases was Iowa’s *State v. Ruhl* of 1859. The court there was the least explicitly utilitarian, finding the immoral purpose of enticing a woman into prostitution “transposed” as criminal intent to the criminal harm of enticing a minor girl into prostitution.<sup>337</sup> But *Ruhl* was not even cited by the next important Iowa case, a statutory-rape case called *Newton* in 1876, in which the court held flatly that, “The crime does not depend upon the knowledge of defendant of the [age of the girl] . . . but upon the fact itself.”<sup>338</sup> Iowa had thus moved to denial of the mistake-of-age defense without even retaining *Ruhl*’s explicit reliance on a generally immoral and thus “criminal” intent in the act.<sup>339</sup>

Similarly, in California, *People v. Ratz* suggested some reliance on underlying unlawfulness in a statutory rape case: “The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in

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<sup>336</sup> *Miller v. State*, 79 So. 314, 315 (Ala. Ct. App. 1918)

<sup>337</sup> 8 Iowa 447 (1859).

<sup>338</sup> 44 Iowa 45, 47 (1876).

<sup>339</sup> *Newton* did cite *Jamison v. Burton*, 43 Iowa 282, 284 (1876), in which the moral questionability of selling liquor had played a strong rhetorical part, if not an explicitly logical-doctrinal role as in *Ruhl*, in justifying the denial of the mistake-of-age defense.

peril of the fact” that the girl might be under age.<sup>340</sup> So did the Texas case of *Zachary v. State*: “one who has connection with a female which would, in any event, be unlawful, must know at his peril whether her age is such as to make the act a rape.”<sup>341</sup> In Virginia, “If he choose to have carnal connection with a female, he must do the act at his peril in regard to her being under the age of twelve years.”<sup>342</sup> And an appellate court in Ohio too combined a rhetorical recognition of the offender’s unlawfulness with a legal holding of strict liability. While not using the words “at peril,” the court made it crystal clear that the legislature might make and, in the case of statutory rape had made, intent and guilty knowledge no parts of the statute at all. It could not help noting in something of a coda to the case that the defendant’s act constituted a despicable act of adultery as well, but the court had already held flatly that “where the act is made an offense by statute without reference to the intent, the intent with which such act is done is immaterial.”<sup>343</sup>

Note that each of these courts could easily have chosen words to the effect that the underlying immorality in the case was essentially indistinguishable from the immorality of statutory rape itself; that is, that the intention to fornicate was the very immorality targeted by, and directly transferrable to, statutory rape. But, as the argument above suggests, mere fornication was a kind of immorality or wrongdoing of a totally different order from statutory rape or abduction. It is not too surprising, then, that these courts, rather than transferring intent, straightforwardly imposed strict liability, simply indicating that the defendant’s conduct was sufficiently unclean that he could hardly complain when he was held strictly responsible, “at peril,” for the very different harm that resulted.

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<sup>340</sup>115 Cal. 132, 135 (1896).

<sup>341</sup>122 S.W. 263, 265 (Tex. Crim. App. 1909) (internal quotation marks omitted).

<sup>342</sup>71 Va. 845, 855 (1878).

<sup>343</sup> *Zent v. State*, 3 Ohio App. 473, 474, 476 (1914).

It is also important to see that, in whatever exact way and degree these courts relied on the defendant's underlying wrongdoing or private indulgence, they were not relying on an underlying criminality as such, the way Livingston's code had uneasily done. Even when a court used the word "unlawful," as suggested above, it did not mean criminal. The *Zachary* court, after relying on the defendant's "unlawful" intent, went on to cite no Texas fornication statute or the like but, instead, Bishop's assertion that an intent "to violate the laws of morality" was enough to sustain criminal liability when different harm resulted.<sup>344</sup> The supreme court of Missouri quoted Bishop to the same effect: "'His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case when he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences.'"<sup>345</sup> In Louisiana, simple fornication was apparently not against the law, and so the high court there had occasion to be even more explicit that the "unlawful" intent that rendered one responsible for public harm comprised a broad category. When an appellant argued that "unlawful sexual intercourse" must mean intercourse that violated positive law, such as incest or rape, not mere fornication, the high court made clear that, "'Unlawful' does not necessarily mean contrary to law." Rather, it could mean "the infringement of the moral law, and not necessarily of the civil law; the popular, not the technical, meaning."<sup>346</sup>

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<sup>344</sup> 122 S.W. 263, 265-66 (Tex. Crim. App. 1909).

<sup>345</sup> *State v. Houx*, 109 Mo. 661 (1892).

<sup>346</sup> *State v. Savant*, 38 So. 974, 974-75 (La. 1905). To the same effect are *State v. Whealey* 59 N.W. 211 (S.D. 1894) and *Carter v. State*, 234 S.W. 535 (Tex. Crim. App. 1921). Similarly, in *State v. Frazier*, 39 P. 819, 821 (Kan. 1895), where again there was apparently no fornication statute in the jurisdiction, the court relied both on the idea that lack of positive legal authorization might render conduct "unlawful" and on the idea that the immorality of conduct would conclusively show its lack of legal authorization in the absence of positive law to the contrary: "No law, statutory or moral, sanctions intercourse between the sexes except within the bonds of lawful wedlock. However remiss lawmakers may have been in prescribing punishment for what is denominated simple [i.e., adult] fornication, nothing is clearer than that the moral sense of mankind, the recognized customs and usages of society, and the plainest dictates of morality deny the lawfulness of all fornication."

Moreover, although in the statutory rape cases it was natural enough for the broadening of “unlawful” intent to be articulated as if it extended only to “immoral” intent, there was other evidence that it could easily be extended further. For example, in the federal case that the Louisiana court quoted above, the defendant was charged with receiving mail in connection with a lottery. The statute did not designate lotteries as among the “unlawful” practices it targeted, and lotteries were perfectly legal in many states. The court did not even assert the immorality of lotteries. It just suggested that “unlawful” meant without legal authorization: “‘Un’ is a preposition used indiscriminately, and may mean simply ‘not,’ and ‘unlawful’ may mean simply ‘not authorized by law.’ Congress has . . . not authorized matter concerning a lottery business to be sent through the mails . . .”<sup>347</sup> A similar meaning must have informed the district court in *U.S. v. Watson*, when, in a voting fraud case that required the showing of “unlawful” inducement of a state election officer to violate his duty, it wrote the following: “[A]ny unlawful means used to induce [an officer] to make a false count of the votes cast in such election would constitute an offense against the United States. By unlawful means is meant any fraudulent means, as well as the means expressed in the statute as unlawful.”<sup>348</sup> Thus “unlawful” did not mean conduct expressly made illegal. It might sometimes mean immoral, but, more generally, it seemed to indicate any conduct in tension with public policy or “not authorized by law.”

Finally, one might glance across the ocean to the famous *Prince* case. That case, like some of those discussed above, involved significant circumstantial immorality. The holding,

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<sup>347</sup> *MacDaniel v. United States*, 87 F. 324, 326 (1898). The court went on to say that Congress had, in fact, criminalized the sending of lottery materials through the mail—a provision that did not apply to someone receiving the materials as in *MacDaniel*—but indicated that “unlawfulness” was satisfied independently by the mere fact that Congress had not positively authorized the use of the mails in connection with lotteries.

<sup>348</sup> *U.S. v. Watson*, 17 F. 145, 149 (D. Miss. 1883).

however, relied on a notion of unlawfulness that was not strictly synonymous with immorality but with a peculiarly legal sort of wrongfulness. In this case of abduction, where the jury had found that the accused had held a reasonable belief that the girl he was “taking” was above the statutory age, Baron Bramwell elucidated the meaning of “unlawfully” as a matter of positive legal justification: “Now the word ‘unlawfully’ means ‘not lawfully,’ ‘otherwise than lawfully,’ ‘without lawful cause,’ such as would exist, for instance, on a taking by a police officer on a charge of felony, or a taking by a father of his child from his school.”<sup>349</sup> And Prince had no such lawful cause for taking the girl even on his own understanding of the facts,<sup>350</sup> not simply because his behavior was decidedly immoral or because it was illegal – it was *not* illegal on the supposed facts – but because it was “wrong” in the legal sense of lacking positive justification: “The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases, which are not immoral in one sense, I say that the act forbidden is wrong.”<sup>351</sup> Although clear immorality was certainly enough to render conduct “unlawful,” Bramwell argued, immorality was not necessary; nor was illegality, criminal or civil. The mere lack of sufficiently “lawful cause” – of a cause sufficiently, positively full of law, one might say – was enough.<sup>352</sup>

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<sup>349</sup> *Regina v. Prince*, 2 L.R.-C.C.R. 154, 173 (1875).

<sup>350</sup> *Prince*, 2 L.R.-C.C.R. at 173.

<sup>351</sup> *Prince*, 2 L.R.-C.C.R. at 174.

<sup>352</sup> Bramwell’s colleague, Denman, offered another way of putting the point: “[I]t appears to me reasonably clear that the word ‘unlawfully,’ in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words ‘without lawful excuse,’ using those words as equivalent to ‘without such an excuse as being proved would be a complete legal justification for the act . . . .’” *Prince*, 2 L.R.-C.C.R. at 178.

“Unlawful” did not mean against the law. Rather, whether the offense was using the mails for “unlawful” purposes or abduction or statutory rape, once the court determined to its own satisfaction that the accused meant to do “wrong,” the court could conclude that an “illegal motive is present, and that illegal motive becomes a criminal intent” not when formed but “when the facts, at whose peril he acts, are shown to exist.”<sup>353</sup> That is, when society experienced a harm that required public redress, it might well use an unintended and even morally clean accused as the vehicle of that response. Still required was an inquiry into responsibility. That inquiry would sometimes overlap completely with the question of the defendant’s moral quality in the act. But it was never conceptualized as a matter of element-specific fault, and it sometimes left the question of morality behind to focus simply on legal responsibility, a legal responsibility determined not strictly by moral position but by a lawyerly investigation into authoritative, though fluid, sources of public policy.

The language of these cases was decidedly the language of Victorian public policy and deterrence — “protection of society, of the family, and of the infant.” And, while it is crucial not to miss the moral disapproval in these and many other cases, no case insisted on a finding of immorality, as such, nor a finding of negligence (let alone intent) with respect to age. Routinely, the courts used the classical language of strict liability — “at peril” — and emphasized the public purpose of deterrence, not the question of individual justice to the defendant, even though every judge was well aware of the general availability of a limited defense of reasonable mistake of fact.<sup>354</sup> The immorality of the defendant’s acts, when adverted to, was generally invoked not as a surrogate for the criminal intent that might measure the defendant’s individual

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<sup>353</sup> *People v. Griffin*, 49 P. 711, 712 (Cal. 1897).

<sup>354</sup> On the availability of a reasonableness limitation, *see, e.g.*, 1 BISHOP (7<sup>th</sup> ed.), *supra* n. --, at 179-96; Timothy S. Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890*, 45-50 (1999).

blameworthiness and consequent punishability. Rather, that immorality was invoked explicitly to justify the use of strict liability. Like Richard Wasserstrom some decades later, these courts recognized that even strict liability rested on some finding that the accused had voluntarily put himself in a responsible position relative to serious public risks.<sup>355</sup> Strict liability could prevent public harm, the logic of the cases implied, not because it would deter intentional infliction of the proscribed harm but for other reasons: first, because it might deter the self-indulgence – the “unlawful” inattention to the Victorian family that was the foundation of the state<sup>356</sup>--that opened the door to public harm; and, second, because it would simply provide an appropriately public vindication of a value – chastity – and a victim, the violated adolescent girl. Even if society were unwilling to prosecute the offender’s self-indulgence standing alone as fornication – the only conduct that the accused intentionally indulged in – it could find that such private-interested, de facto assumption of responsibility was adequate to sustain liability in the name of deterrence when it actually led to a public harm. By refusing to prosecute fornication but declaring carnal knowledge of a minor a strict liability rape the public announced that the rape inflicted on the Victorian family (and not the offender’s own immoral intent) threatened the public and justified the deployment of criminal law.

There is clearly some ambiguity in the statutory rape cases. The occasional attention to the accused’s immorality might suggest that, in a clumsy way, courts were simply giving offenders what they deserved, although they were not carefully aligning punishment with

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<sup>355</sup> United States v. Park, 421 U.S. 658 (1975); United States v. Dotterweich, 320 U.S. 277 (1943); HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 342-363 (1979); Douglas N. Husak, *Varieties of Strict Liability*, 8 CANADIAN J. L. & JURISPRUDENCE 189, 203-07 (1995); Kelman, *Strict Liability*, *supra* n. --, at 1512; Wasserstrom, *supra* n. --, at 742-44. Cf. Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999).

<sup>356</sup> On the centrality of marriage and family to the state, see, e.g., SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 137-42 (2002).

formal findings of intent to do wrong. But the argument above suggests that the courts were not thinking in terms of desert so much as utilitarian social protection. Or perhaps they were insisting on simple vindication of public values and priorities, even at the expense of private justice. In this respect, one might today condemn these cases as perversions of justice, but one must recognize that they were rarely thought perversions at all in their own day. The utilitarian approach in the statutory rape cases was well within the mainstream of the history of criminal theory. Or should I say mainstreams? Because there is no doubt that public and private perspectives on criminal justice coexisted back through the nineteenth century to Blackstone and beyond. Both those perspectives had some play in the statutory rape cases, although their language more strongly reflects the public perspective that saw great value in simply holding certain persons responsible for certain public harms. These persons were identified as responsible not because they intended to do harm, not because they should have foreseen harm, not even necessarily because they indulged in an immoral intent transposable as an intent to do the harm. Rather, they were identified simply because the defense, perpetuation, and vindication of society as a whole—“in its social aggregate capacity”—required not private justice but the use of a legally responsible individual for the social purpose.

### C. Public Wrong Beyond the Rape and Abduction Cases

This view of these cases is supported by a look at the strict-liability regulatory cases, with which the sex cases were doctrinally intertwined. That is, the necessary context for the statutory rape cases is not only the shape of Victorian culture beyond the courtroom but also, of course, the other criminal cases that judges widely saw as doctrinally related to the statutory-rape cases. The sex cases often relied on regulatory cases for precedent and vice versa, but, in the regulatory cases, circumstantial immorality—the bare beginning of desert—was often hard

to find. Consequently, some judges occasionally suggested that these crimes were not “really” criminal.<sup>357</sup> But the separation of “regulatory” crimes from others was not easily sustained then or now and does not ultimately excuse the exclusion of mistake-of-fact defenses for those who truly think that criminal law is and must be about moral blaming.<sup>358</sup>

The New Jersey case of *Halsted v. State*,<sup>359</sup> decided in 1879, provides an unusually thoughtful consideration of these matters. Halsted was the director of the board of freeholders of Hudson County, New Jersey, when that board violated state law by incurring obligations in excess of the applicable annual limit. That misconduct, morally blameless and well motivated though it apparently was, was punishable by as much as three years’ imprisonment at hard labor as well as a large fine. Halsted did not contest the facts but insisted that he had acted in good faith and without the “corrupt motive” that, he argued, the law required to constitute crime. Halsted’s defense appeared to be a claim of mistake of law and so could have been dismissed (justly or not) simply by citing the appropriate maxim. The court, however, recognized that questions of justice to the defendant might be raised with equal plausibility by mistake of law and mistake of fact. It therefore discussed both kinds of mistake and recognized the double traditions of criminal law on its way to holding that this statute carried strict liability.

The court assumed that the defense could have shown that the accused acted “under the advice of counsel, and in good faith, and from pure and honest motives.” It freely admitted that the defense’s argument “is well calculated to strike the mind with great force.” After all, it was “undeniable that in some cases, when the prohibition in a statute against doing a certain act, or

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<sup>357</sup>See, e.g., *United States v. Leathers*, 26 F. Cas. 897 (D. Nev. 1879); *Jamison v. Burton*, 43 Iowa 282 (1876).

<sup>358</sup>See Hall’s embrace of my point here in *Hall II*, *supra* n. --, at 994; *Hippard*, *supra* n. --, at 1045.

<sup>359</sup> 41 N.J.L. 552 (1879).

series of acts, is couched in general terms, courts have . . . imported into the statute a proviso that the denoted act shall be done from a guilty mind." Yet, at the same time, "Nothing in law is more incontestable than that, with respect to statutory offences, the maxim that crime proceeds only from a criminal mind does not universally apply. The cases are almost without number that vouch for this." The rule against mistake of law was exhibit number one, but just as truly "in many cases an honest mistake in regard to a state of facts will not exculpate." Refreshingly, this court, rather than insisting on the inevitability of its ultimate position, then acknowledged the deep-running tension between the cases that read mistake defenses into statutes and those that did not: "[T]hese two classes of cases, diverging as they do, and seemingly standing apart from each other, may at first view appear to be irreconcilable in point of principle. . . . [T]he decisions have fallen into two classes, because there have been two cardinal considerations of directly opposite tendency, influencing the minds of judges; the one being the injustice of punishing unconscious violations of law, and the other the necessity, in view of public utility, of punishing, at times, some of that very class of offences." Frankly recognizing the two-faced quality of criminal law, the court accepted that, under the rubric of statutory construction, many courts had read corrupt motive into statutes but denied that the cases ever did so "on the sole ground that otherwise it would be opposed to natural justice" and asserted that the cases showed that "the maxim, '*actus non facit reum nisi mens sit rea*,' has no controlling effect" as doctrine but only a just influence in doubtful cases.

This court, therefore, simply had to infer or, as a practical matter, impute the legislature's intention. Here, it read the statute as ultimately establishing a fairly simple substantive rule for local officials, although the court admitted that the "verbal obscurity" of the statute made the rule harder to decipher than it should have been. The court then inferred from the simplicity of the rule that the legislature likely intended to apply it to "every one who

should violate its letter," not just those who acted from corrupt motive. The mere fact that that simple rule was enacted in a statute of some "verbal obscurity," perhaps explaining the defendant's predicament, could not change the fact that the legislature must have thought it straightforward enough and therefore applicable regardless of corruption of motive. Perhaps the result was "too rigorous," but that was not for the court to say once it had found out the legislature's intention and once it concluded that "such a regulation" may well "be subservient to a wise public policy."

In this opinion, then, the criminal law became openly bivalent, concerned with "the injustice of punishing unconscious violations of the law" but equally or more concerned with wholly public considerations of "utility." Any statute might lean in one or the other direction, and all the resulting substantive law would coexist, no matter that the two perspectives embodied in these various laws were of "directly opposite tendency." And, as the cases cited in the opinion and in the parties' capable arguments (complimented by the court) indicated, this bivalence sprang up in all sorts of offenses, cases of underlying immorality and cases without such.

In this connection, it might be worth looking at one more example. In *United States. v. Leathers*, one U.S. trial judge imposed strict liability on another morally blameless individual (as the court supposed), partly because the charge did not seem like a real crime but also for straightforward reasons of public utility, citing cases of pure regulation and cases of moral wrong more or less indiscriminately. Leathers had been charged with residing as a trader in "Indian country" without a license even though he probably had not known he was in Indian country. He pleaded his mistake of fact as an excuse, but the court read the statute to exclude such claims: "The statute contains nothing requiring these acts to be done knowingly. . . . The object of the law is not to punish men for these acts as crimes, so much as to prevent [certain

activities]. There is nothing infamous in the punishment prescribed. Under these circumstances, I think it is immaterial with what intent the acts were done.”<sup>360</sup> For this proposition the judge did not just cite other regulatory cases lacking “infamous” punishments. Instead, he cited seduction, polygamy, liquor, libel, and voting cases that carved out a wide variety of crimes, many of which carried prison terms and all of which rested along a vague continuum from cases of circumstantial immorality to cases of little or no immorality at all.<sup>361</sup> This judge may have been reluctant to find “real” criminal liability in the absence of intent, but not so reluctant that he would hesitate to cite cases that did so in support of his ruling. Moreover, he found the government’s use of criminal proceedings without a requirement of *mens rea* perfectly appropriate to its “object” – deterrence.

The sex crimes and the regulatory crimes were bound up with each other. Cases of one kind often cited the other to sustain the exclusion of mistake-of-fact defenses, even though such defenses might have enhanced a certain private version of justice to the individual. They did so because, according to public legislative judgment, such defenses would have undermined the capacity of criminal law to deter misconduct and to vindicate public values (just as surely as excusing ignorance of the law would have). They would, thus, have undermined the public’s capacity to reproduce and maintain itself against the impulses of and claims to moral precedence of individuality. Justice to the individual was never dismissed as wholly irrelevant, an extreme to which only medicalizers and determinists were regularly willing to go. But, when a public purpose, such as supporting the chaste character of rising Victorian womanhood, seemed to call for strict liability, the criminal law could deploy a well entrenched public

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<sup>360</sup>*Leathers*, 26 F. Cas. at 901.

<sup>361</sup>*Id.* at 901.

perspective just as adeptly as at other times it deployed a private perspective on criminal justice.

## V. ORIGINS OF THE MODEL PENAL CODE AND MODERN CRIMINAL THEORY

Decades after the firm establishment of strict liability rules in the cases discussed above, the Model Penal Code ambitiously attempted a rationalization of the traditional criminal law. To the reformers, the law seemed obscure, chaotic, and, especially in cases of strict liability, sometimes unjust. This effort was, in part, an attempt to reconcile the public and private perspectives on criminal law, although its authors and champions did not put it quite that way. First, incorporating some of the public perspective, the movement to write a model code drew on a “treatmentist” approach to crime. Coined by one of the few scholars who have attempted any historical treatment of the MPC,<sup>362</sup> that label is meant to highlight the utilitarian, almost medicalizing motivation of Herbert Wechsler and his allies in the reform of American criminal law in the years between, say, the 1920s and 1950s. But, second, this apparently objective, public orientation to criminal law was ultimately tempered by a commitment to private justice, to the idea that criminal law must always retain the quality of personal moral condemnation. This section will offer a brief history of criminal theory in the twentieth century, climaxing with the publication of the Model Penal Code as an emblem of the dual commitments of criminal justice.

The history of criminal theory in the twentieth century has never been adequately treated, but that gap is now being filled in large part by the work of Thomas Green. Green’s focus and mine are significantly different, since Green is studying the problems of free will and

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<sup>362</sup> Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 62-79 (2000).

determinism within criminal theory, whereas I am tracking the ins and outs of the public and private perspectives on criminal justice. But, in both published and unpublished work, Green has given shape to the twentieth-century history of criminal theory. In his work, he has closely analyzed every major figure I discuss below (and many more) and provided pathbreaking explication of the scientific approach to criminal justice that became central to the public perspective in the new century.<sup>363</sup>

The scientific approach to criminal law had its origins long before the Progressive Era's efforts to scientize so much of American public life. From the inventors of the character-reforming penitentiary<sup>364</sup> to the proponents of "moral insanity"<sup>365</sup> to the continental criminologists,<sup>366</sup> the nineteenth century had seen theoretical extensions of the public perspective that would have virtually purged morality from criminal theory. By 1900 or so, then, a medicalized approach to crime was in the air and ready to inform the scientifically oriented reformers of the Progressive Era. In the field of criminal law, these reformers tended to focus on corrections and treatment, not yet turning to the goal of a model code of substantive law. The new behavioral science, so eager to identify hereditary and environmental causes for virtually all social problems, called into question the very notion of individual free will and thus the idea that crime was the offender's freely choosing evil rather than good.<sup>367</sup> Into the 1930s, the reformers pressed this radically scientific orientation to crime and its associated goal of

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<sup>363</sup> See Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound*, 93 MICH. L. REV. 1915 (1993); Thomas Andrew Green, *Conventional Morality and the Rule of Law: Perspectives on Freedom and Criminal Responsibility in Twentieth-Century American Legal Thought* (unpublished manuscript).

<sup>364</sup> See Michael Meranze, *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1830* (1996); David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971).

<sup>365</sup> See *supra* text at nn.--.

<sup>366</sup> See MARIE-CHRISTINE LEPS, *APPREHENDING THE CRIMINAL: THE PRODUCTION OF DEVIANCE IN NINETEENTH-CENTURY DISCOURSE* chs. 2-3 (1992); Wiener, *supra* n.--, at 228-42, 253-56.

<sup>367</sup> Green, *Freedom and Criminal Responsibility*, *supra* n. --.

crime prevention with little attention to blame or retribution.<sup>368</sup> Only in that decade would a new generation, ultimately led by Herbert Wechsler, spark the movement for a model code. This phase of reform would try to incorporate the best of the new treatmentism into a criminal law that nevertheless blunted the radicalism of the scientists with a retained commitment to individual justice.

Roscoe Pound led the early efforts to bring science to bear on the reform project, beginning with his leadership in the American Institute for Criminal Law and Criminology founded in 1909. In the 1910s, Pound wrote manifestoes on behalf of scientific approaches to crime reduction while funding was gathered to do crime surveys and the like. Pound himself would prove one of the first to worry about the excesses of such an approach, warning in the 1920s that Progressive attention to social interests and state-building, as well as the deterministic view of humans that seemed to come along with the advances of science, threatened to obscure the importance of individual freedom and creativity. But these worries proved for the time being peripheral to the march of science. Pound himself never gave up on the idea that deterministic behavioral science and the more morally oriented “science” of the law would eventually be fully harmonized. And other reformers maintained an even greater enthusiasm for the promise of science.<sup>369</sup>

For these other reformers, free choice to do wrong often had little to do with the meaning of crime. Thus some writers in the early twentieth century argued explicitly that criminality was defined not by the intent or knowledge of the offender but by the mere doing of an act that society, in its own defense, had deemed worthy of public response. According to

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<sup>368</sup> Cf. DAVID ROTHMAN, *CONSCIENCE AND CONVENIENCE* 55 (1980) on the supposed decriminalizing of criminal law in Progressive Era.

<sup>369</sup> Green, *Freedom and Criminal Responsibility*, *supra* n. --.

Albert Lévitte, writing in 1923, “The intent has nothing to do with the crime. The intent has much to do with the treatment of the offender.” For Lévitte, crime was defined by society’s taking a “peculiar interest” in certain conduct – independent of the offender’s intent – and authorizing the state to address that conduct by way of an investigation that culminated in the offender’s being liable to “treatment.” The offender’s act took its criminal quality not from the offender’s evil intent but from the state’s becoming a party to the prosecution.<sup>370</sup>

As for a defendant’s claim to have caused the harm by mistake or by accident, such a claim might be relevant to a plan of “treatment” but not to the question of conviction. Conviction simply meant that society had identified a harm to itself and the doer of that harm. The convicted might then be released if no treatment were necessary, but the state would be free generally to determine whether “treatment” of this person might redound to the public interest. The MPC would ultimately reject such radicalism – the model code moving toward the position that only free choosers of evil conduct should be subject to state treatment as “criminals” but that after conviction the state might take a fully utilitarian approach to its charges<sup>371</sup> – but in the 1920s reformers commonly sought to drain the morality out of the notion of conviction and conceptualize it entirely as a matter of social defense.

Among the most radical was the psychiatrist William White, who in the 1920s explained the doing of harmful acts in terms of anti-social urges deep in the psyche, beyond the control of what people generally meant by moral choice. Such urges were shared in different degrees by everyone and, in fact, gave rise to the criminal justice system itself by a general sublimation of the urges into punishment of the offender as a scapegoat.<sup>372</sup> In so describing the sources of

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<sup>370</sup>Lévitte, *supra* n. --, at 583.

<sup>371</sup>Dubber, *Panopticon*, *supra* n. --, at 362-79.

<sup>372</sup>Green, *Freedom and Criminal Responsibility*, *supra* n. --, at 2017.

crime, White added a psychiatrist's variation on the criminologist's and sociologist's themes of hereditary and environmental causes of crime, none of which made much room for free will and moral or immoral choice.

By the mid-1920s, the intellectual cachet of such medicalized approaches allowed writers like the legal scholar Sheldon Glueck<sup>373</sup> to declare that “[n]o thoughtful person” took retribution or expiation seriously as a justification for criminal justice.<sup>374</sup> Emphasizing the dangerousness of the defendant's “*personality*” rather than the seriousness of the offense committed,<sup>375</sup> Glueck's *Principles of a Rational Penal Code* called for treatment, not blame, and ridiculed the notion that the state should mete out such punishment as was “fatuously believed to ‘fit the crime.’”<sup>376</sup> Of little interest was “*the gravity of the particular act for which an offender happens to be tried.*”<sup>377</sup> Of great interest was the scientific evaluation of the offender's “*unique personality.*”<sup>378</sup> Not only was Glueck eager to distinguish sharply between the sentencing phase (as the reconceptualized “*treatment . . . feature of the proceedings*”) and the guilt phase,<sup>379</sup> but he seemed to have no interest in the guilt phase at all. Glueck implied that rational crime control was simply a matter of isolating dangerous personalities, almost entirely independent of whether the persons behind those personalities had actually committed any crimes, and treating those personalities until they were safe to be let loose in society. In this picture, the “*guilt-finding phase*” appeared almost completely anachronistic. It might be a useful way to channel some of society's

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<sup>373</sup> For a more complete discussion of Glueck, see Green, *Freedom and Criminal Responsibility*, *supra* n. --, at 2019-2024; Green, *Conventional Morality and the Rule of Law*, *supra* n. --.

<sup>374</sup> Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 456 (1928).

<sup>375</sup> *Id.* at 460.

<sup>376</sup> *Id.* at 462.

<sup>377</sup> *Id.* at 469.

<sup>378</sup> *Id.* at 464.

<sup>379</sup> *Id.* at 475. The problem of giving the two phases of criminal adjudication distinctive meanings is a major theme of Green's *Freedom and Criminal Responsibility*, *supra* n. --, and his *Conventional Morality*, *supra* n. --.

dangerous types – never identified as free choosers of evil but only as objectively dangerous – into the system of state coercion, where their personalities could be evaluated. But it was hardly designed for or efficiently adapted to the purpose of identifying those personalities generally.

Glueck's arguably totalizing approach to crime control was the sort of extreme approach that Pound had already begun to worry about after the Great War. It was also the sort of extreme against which Wechsler would react in developing his own "treatmentist" approach to a reformed criminal law. But the general utilitarian, anti-retributivist, treatmentist approach remained dominant through the 1930s.

This same period was also the heyday of the legal realists, and, although full-fledged realists tended to be skeptical of any single approach to criminal law,<sup>380</sup> the realist attack on formalism and conceptualism did serve to undergird the treatmentist reformers in some degree. Realism called for frankness in the setting of policy goals and a recognition that law is not some autonomous science but simply a tool for reaching those goals.<sup>381</sup> It thus supported the reformers' unanimous view that criminal law was merely a means of crime control.<sup>382</sup> Consequently, useless retaliation must give way to rational, tested principles of general deterrence, incapacitation, and especially the newly prestigious strategy of "reform" (rehabilitation).

The medicalization of crime control finally prompted legal thinkers in the 1930s to call for a full-fledged effort to recodify criminal law as a whole. Lawyer-reformers viewed the new behavioral science variously as offering something between a limited aid to lawyers' work and

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<sup>380</sup> See, e.g., Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 Yale L.J. 987 (1940).

<sup>381</sup> See, e.g., Thurman W. Arnold, *Criminal Attempts – The Rise and Fall of an Abstraction*, 40 Yale L.J. 53 (1930).

<sup>382</sup> See Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. of Contemporary Legal Issues 97, 107-115 (1996).

a panacea for all that ailed criminal justice. But the lawyers all agreed that the inherited criminal law was a chaotic, irrational, arbitrary, leftover mélange of ad hoc case law and badly drafted statutes resting on no particular principle. They sought to replace this inheritance with a rational, clearly written code, designed to advance a single, central purpose, crime control, consistently with the findings of the new behavioral, natural, and psychological sciences.

A handful of articles in law reviews were later cited by Wechsler<sup>383</sup> as founding statements of a sort for the movement that resulted in the MPC. Alfred Gausewitz, for example, wrote in conjunction with Wisconsin's nation-leading legislative effort to rewrite its criminal law. His two-part "Considerations Basic to a New Penal Code" anticipated many of the themes and particulars of the MPC but also illustrated some of the variability in the approaches of the reformers. He noted first that criminal law had never been tied to a single purpose, but he thought that that should not stop Wisconsin from boldly declaring and adhering to the purpose of crime control and even more boldly eliminating retribution as a purpose of the law. More particularly, he wanted to promote "disablement" (incapacitation) and "reformation" (rehabilitation) as "the primary aims of the law," while allowing notions of deterrence a merely marginal place in criminal theory.<sup>384</sup> Apart from the demotion of deterrence, these arguments largely anticipated the MPC.

Gausewitz may possibly have gone beyond where the MPC would ultimately go when, in fully realist fashion, he rejected the notion that "crime" even had a durable meaning. It was simply that which public policy indicated would best be redressed through "criminal" procedures.<sup>385</sup> But he generally anticipated the doctrinal directions the MPC would follow by

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<sup>383</sup> See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 n.3 (1952).

<sup>384</sup> Alfred Gausewitz, *Considerations Basic to a New Penal Code*, 11 WIS. L. REV. 346, 364, 365-369 (1936).

<sup>385</sup> *Id.* at 368-71.

backing off the extreme medicalizations of Levitt, Glueck, White, and their like and emphasizing the importance of intent or at least negligence to ensure that the defendant really did manifest “anti-social tendencies.”<sup>386</sup> Note, however, that he did not say that the coercive power of the state needed to be restricted short of using the blameless for social ends but only that the diagnosis of anti-social tendencies could not be soundly made without a finding of at least negligence.

While defending the importance of mens rea to such diagnoses, he again anticipated the MPC in suggesting that attempted offenses, where no harm was actually done, should be treated generally the same as completed offenses, since the attempt was just as good an indicator of anti-social personality as was the completed offense.<sup>387</sup> Intent thus became all the more entrenched as central to the project of crime control, even more central than the particular harm done in the case, but only because of its relationship to psychological diagnosis and thus to long-term dangerousness. The importance of intent did not rest on any stated relationship to crime as a matter of moral blame.

Gausewitz’s emphasis on crime as a matter of social interests rather than individual rights, even as he emphasized mens rea, was further illustrated by his un-MPC-like endorsement of common-law crime creation. For him, the treatmentist model of crime control implied maximum discretion to treat the offender rather than punish for the offense (thus, also, his advocacy of the “wholly indeterminate” sentence<sup>388</sup>), and the legitimacy and utility of such

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<sup>386</sup> *Id.* at 384-387.

<sup>387</sup> *Id.* at 377.

<sup>388</sup> *Id.* at 365.

discretion seemed equally to imply the legitimacy and utility of the discretion inherent in judicial crime creation.<sup>389</sup>

Here the MPC would break with the radical Gausewitz decisively. While the MPC too would grow out of the treatmentist model, it embraced as well the principles of private justice that demanded prospectivity and fault. It thereby indicated its greater concern with legalistic restrictions on the state's ability to apply coercion to its citizens, at least in the guilt phase, and signalled its drift away from the realist part of its intellectual origins.<sup>390</sup>

A year later, Albert Harno, the dean of the University of Pennsylvania Law School, joined Gausewitz in pressing for a criminal code that would fully incorporate the medical approach. Largely reprising anti-retributivist, social-protection ideas that had appeared in Gausewitz and Glueck, as well as elsewhere, Harno went a step further, arguing that in principle the treatmentist program should indeed extend to the period before a crime is committed.<sup>391</sup> After all, the reformers generally agreed that an administrative board would be competent to diagnose prisoners on an ongoing basis. Committed to the board's discretion with no limit at all on sentence length, the fate of these prisoners rested on the theory that such a board was competent to determine when they were cured, just as a board of physicians could be expected to determine when a carrier of a contagious disease had been cured, and thus might be released without danger to society.<sup>392</sup> Why, then, Harno wondered, should such competence not be brought to bear on anyone who showed adequate signs of dangerousness?

While Gausewitz, Harno, and other lawyers were important early advocates of a model code, the key figure was Herbert Wechsler, and Wechsler always harbored a good deal more

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<sup>389</sup> *Id.* at 399-400.

<sup>390</sup> See Seidman, *supra* n.--, at 107-115.

<sup>391</sup> Albert Harno, *Rationale of a Criminal Code*, 85 U. PA. L. REV. 549, 562-563 (1937).

<sup>392</sup> *Id.* at 554-562.

skepticism of the scientists' powers than did many other reformers. He also gave increasing play over time to the individual's right to be free of state coercion until the principles of legality and culpability were fully satisfied. But he carried the fundamentals of treatmentist crime control through to the last draft of the MPC.

Already in 1937, Wechsler expressed grave doubts as to the scientists' ability really to reduce crime. In his brief "A Caveat on Crime Control," he noted serious dangers in grants of broad administrative discretion, dangers blithely overlooked by Harno, for example.<sup>393</sup> And he expressed doubts that any expert could really tell whether rehabilitation or general deterrence was more effective or to what degree the two approaches might prove incompatible (for example, because rehabilitation might look like a kind of coddling that would actually encourage certain types to commit crimes).<sup>394</sup> But none of this led him to doubt the value of reforming criminal law. It only led him to the cautious position that some reforms are good in themselves. They should be undertaken in the hope that they will reduce crime but also in the knowledge that they were reward enough in themselves even if they did not visibly reduce crime. Examples of such inherently worthwhile projects included the reduction of poverty and corruption.<sup>395</sup> But this short piece also sounded like a rationale for the MPC itself—for going ahead with a coherent rewrite of the substantive criminal law for its own sake, even in the absence of proof that it would improve deterrence or other mechanisms of crime control.

Before a new code could be written, however, some fundamental, theoretical decisions had to be made. First advancing the public perspective, Wechsler tried to domesticate the

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<sup>393</sup> Herbert Wechsler, *A Caveat on Crime Control*, 27 J. of the Am. Institute of Crim. L. and Criminology 629, 633-34 (1937).

<sup>394</sup> *Id.* at 633-634.

<sup>395</sup> *Id.* at 637.

scientists by endorsing treatment but only within a larger commitment to deterrence.<sup>396</sup>

Wechsler argued that retributivism was obsolete except as a popular prejudice that might have to be accommodated in some degree. Treatment was promising but untested as a justification for the criminal justice system and ungrounded in lawyerly traditions. Deterrence, though, was obviously rational, and a rewrite of the substantive criminal law to provide greater clarity and consistency could not reduce deterrent effect and might well improve it. Wechsler's attachment to deterrence as the established form of utilitarianism and as a central part of any theory of criminal law, however much he looked to treatment's potential, was made clear the year before his "Caveat" in his brief review of Glueck's book, *Crime and Justice*.<sup>397</sup> There, he rejected Glueck's claim that traditional criminal law was saturated with irrational retributivism. Instead, Wechsler said, criminal law had long been shaped by deterrence and that sensible theory should not be tossed out with the bathwater of retributivism just because the new treatment approach also merited a place at the table.

These ideas were worked out at length in Wechsler's collaboration with Jerome Michael, "A Rationale of the Law of Homicide," published in two parts in 1937. Embracing deterrence, incapacitation, and rehabilitation as legitimate purposes of criminal law,<sup>398</sup> Wechsler and Michael analyzed the substantive law of homicide in light of those purposes and the more general goal of prevention.<sup>399</sup> Intentionality and carelessness were relevant to such judgments; so were motive and circumstances. And all these considerations might interact in complex

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<sup>396</sup> See Herbert Wechsler, Book Review, 37 COLUM. L. REV. 687 (1937).

<sup>397</sup> *Id.*

<sup>398</sup> Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 730-33 (1937).

<sup>399</sup> See also Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261 (1937).

ways.<sup>400</sup> Harm, however, would be largely irrelevant in a rational code, suitably purged of retributivism, because, as far as Wechsler and Michael were concerned, the object of the law's search was culpable character. As far as criminal law was concerned, it was more or less irrelevant that an *offense* might be worse or better depending on the amount of damage actually done; rather, the key was that the *offender* was worse or better depending on the character exhibited in the conduct, done under particular circumstances with particular knowledge and motives.<sup>401</sup> The criminal conviction thus meant that the offender had shown bad character in the event and that the offender was therefore a suitable object of state "treatment" (whether rehabilitation or incapacitation). It was also a moment for society at large to take notice, to be educated and deterred.

The authors thus were not in the simple reformers' line of Glueck and Harno. They had a more modest view of the reach and potential of criminal justice and a more conservative attachment to the traditions of what they saw as a venerably deterrence-oriented criminal law. Still, they endorsed the movement toward treatment--as long as deterrence remained preeminent for the time being--and toward a criminal law that targeted the offender's "character" much more than the particular conduct for which she or he was prosecuted.<sup>402</sup> The implication was that a reformed criminal law should combine a relatively traditional guilt phase, governed by a thoroughly rewritten substantive law of crimes, with the novelty of a treatment phase in which there was to be no punishment to fit the crime as such, but only "treatment" to fit the character of the offender or an appropriately deterrent (not retributive) punishment. The likes of Levitt and Glueck had largely ignored the guilt phase -- for them, a

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<sup>400</sup> See, e.g., Michael and Wechsler, *Rationale II*, *supra* note --, at 1272-90.

<sup>401</sup> Wechsler and Michael, *Rationale I*, 733; Michael and Wechsler, *Rationale II*, 1294-98.

<sup>402</sup> Michael and Wechsler, *Rationale II*, *supra* note --, at 1313-1325.

misnomer – in their rush to refashion criminal law as treatment and therefore refashion criminal process as centered on the post-conviction phase. Harno had even seemed ready to unify the phases by extending treatment to every dangerous character regardless of whether she or he had happened to commit a crime, a position that Wechsler and Michael called “obviously unwise.”<sup>403</sup> But, for Wechsler and Michael, the guilt phase remained important, if ambiguous. Echoing Livingston’s individualist libertarianism, they treated the guilt phase as an indispensable limitation on state power, subjecting to state coercion only those who had chosen illegally and thereby abused the predefined scope of freedom guaranteed to them by the liberal state. But they also echoed the scientists, declaring the general irrelevance of harm in the substantive law and the centrality of “character” or “personality.” And this influence of the scientific reformers became dominant at the post-conviction phase. For Wechsler and Michael, then, there remained tension between the two phases. The theory of conviction still embraced event-specific guilt-finding and condemnation, although with little retributive edge. The theory of sentencing, then, rapidly broadened to encompass not just the acts that legalized the conviction but the offender’s entire character. In this way, the jurisdiction of the criminal law would be extended even beyond that justified by the conduct underlying the conviction, since the state’s interests in crime control justified “treating” the offender’s dangerous character and not just punishing guilty acts.<sup>404</sup>

No doubt Wechsler believed and hoped that he was combining the best of both the private and public perspectives on criminal law. His model limited the reach of the state and the stigma of conviction to cases where the offender had chosen immorally and was fully

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<sup>403</sup> Wechsler and Michael, *Rationale I*, 731-32.

<sup>404</sup> Again, much more complete discussion of the two phases of criminal adjudication and their meanings in the hands of different commentators can be found in Green, *Freedom and Criminal Responsibility*, *supra* n. --, and Green, *Conventional Morality*, *supra* n. --.

responsible for putting her- or himself on the wrong side of the line. At the same time, it maximized the capacity of the state to respond to and especially to prevent public wrongs through comprehensive attention to the characters – the dangerous personalities – that produced crime. It could have been argued just as easily, however, that Wechsler was combining the worst of both worlds, handcuffing the state in its pursuit of the dangerous at the guilt phase while, at the treatment phase, creating a scope of state discretion far wider than could be justified by the true state of behavioral science.

Fifteen years later, as the MPC project finally got underway, Wechsler reiterated most of his points,<sup>405</sup> but was even more explicit about retaining the guilt in the guilt phase. “Crime means condemnation and it is not right to pass that judgement if the bench can not declare that the defendant’s act was wrong.”<sup>406</sup> Consequently, strict liability had no place in criminal law and even negligence should be used rarely and with care. This position appeared to be something of a retreat from his 1937 analysis of homicide law (which seemed less reserved in embracing liability for unintentional killings) and seemed to entrench the tension between his view of the guilt phase and the sentencing phase. As his subsequent treatment of inchoate offenses reemphasized, sentencing was less about deterring dangerous conduct than about enabling “corrective process” for those “disposed towards criminal activity,”<sup>407</sup> neutralizing “dangerous personalities” not punishing or deterring dangerous acts.<sup>408</sup>

Although retributivism was very much on the outs in these years, Wechsler was hardly alone in emphasizing that crime must never be stripped of its essential meaning of “moral

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<sup>405</sup> Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952).

<sup>406</sup> Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 528 (1955).

<sup>407</sup> Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 572-573 (1961).

<sup>408</sup> *Id.* at 589-590.

condemnation.” Even at the lowest ebb of retributivism, there had remained scholars who bridled at what they saw as the reformers’ de-criminalization of criminal law. Francis Bowes Sayre, for example, a Harvard professor writing in the 1920s and 1930s, laid the modern foundation for a scholarly tradition that has persistently championed the mens rea requirement and that has virtually defined crime in terms of intent. Sayre did not identify himself as a retributivist or otherwise break decisively from a dominant utilitarianism, but he did emphasize moral condemnation as the heart of the criminal law in contrast to the reformers’ medicalized rhetoric. Sayre’s analysis of “public welfare offenses” – a category of crimes that supposedly dispensed with intent – began by disparaging those writers, including Lévy, who had suggested that “criminality depends upon behaviour, and only behaviour” and by denying that crime can ever be separated from mens rea.<sup>409</sup> And in a related article he made clear that “blameworthiness . . . is necessarily based upon a free mind voluntarily choosing evil rather than good.”<sup>410</sup>

Sayre’s object was to vindicate mens rea as a definitional element of crime, even as he carefully revealed the many variants in meaning that term had always had.<sup>411</sup> He did so by arguing that public welfare offenses, like selling adulterated milk or violating liquor-selling regulations, could plausibly dispense with mens rea only because of the impracticality of proving intent in a multitude of cases bearing minor sanctions. These offenses were more regulatory than criminal and could only be enforced by easing the burden on the prosecution. Moreover, the rise of intent-free public welfare offenses had largely halted out of respect for the individual and out of recognition of the centrality of the mental element to effective

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<sup>409</sup> Sayre, *Public Welfare Offenses*, *supra* n. --, at 55.

<sup>410</sup> Sayre, *Mens Rea*, *supra* n. --, at 1004.

<sup>411</sup> See Sayre, *Public Welfare Offenses*, *supra* n. --, at 55 (quoting Bishop’s assertion that “the essence of an offense is the wrongful intent” and asserting for himself that “Criminality is and always will be based upon a requisite state of mind as one of its prime factors.”)

deterrence.<sup>412</sup> In short, public welfare offenses constituted a violation of the rule but one that could be justified in utilitarian terms or otherwise explained away.

In trying to cover the field, Sayre then moved on to the statutory-rape cases as well as cases regarding adultery and polygamy that also seemed to have shed the intent requirement. But these cases were not as easily assimilated to his insistence on criminal intent as the public welfare cases were. He had suggested a two-part test for identifying offenses that could justify their dispensing with intent because they were plausibly characterized as not really criminal: whether the statute sought mainly to regulate the social order rather than to single out wrongdoers; and whether the penalty prescribed was minor rather than serious.<sup>413</sup> Apart from the fact that this test can be criticized on its own terms (since every criminal statute regulates the social order and since the test for seriousness of penalty was so vague), Sayre had to recognize that by his own lights the statutory-rape cases singled out wrongdoers and imposed the serious penalty of imprisonment. He tried to explain them away as no attack on mens rea but only a necessary accommodation to the victims' need for protection.<sup>414</sup> Thus, again, he suggested a bedrock utilitarianism (and perhaps the staying power of the ideology of chastity<sup>415</sup>). But his quick treatment of these cases and his gliding over his own previous argument that protection and deterrence were best achieved by emphasizing rather than dispensing with the intent requirement suggests that, within his model of criminality, the statutory-rape cases were simply wrongly decided. After all, he concluded that, while relaxation of intent requirements in even fairly serious public welfare offenses may be

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<sup>412</sup> Sayre, *Public Welfare Offenses*, *supra* n. --, at 62-68.

<sup>413</sup> *Id.* at 72.

<sup>414</sup> *Id.* at 74.

<sup>415</sup> See also his off-hand declaration, so jarring to modern ears attuned to the value of sexual autonomy, that of all crimes "rape . . . cannot possibly be committed through mischance" but must be accompanied by a "design" to do evil. Sayre, *Mens Rea*, *supra* n. --, at 988.

justifiable,<sup>416</sup> in cases of “true crimes” courts must never relax the requirement lest criminal law be sapped of its power – beyond merely imposing sanctions – to condemn.<sup>417</sup>

Scholars who followed Sayre, in the 1940s and after, would often join him in finding that criminal law was the sphere of moral blaming, some going so far as to condemn even the use of a negligence standard, let alone strict liability. In 1943, Jerome Hall observed that both the utilitarians and Oliver Wendell Holmes had tended to collapse the distinction between torts and crimes.<sup>418</sup> Hall insisted, however, that crime’s complete dependence on findings of “moral culpability” distinguished it from torts, which could mandate compensation completely apart from any finding of guilt on the part of the actor.<sup>419</sup> Punishment for negligence, therefore, was indefensible.<sup>420</sup> The very definition of negligence in criminal law included the actor’s lack of awareness that she or he was creating any unwarranted risk. And negligence, defined as excessive risk creation regardless of the actor’s state of mind, was the very heart of tort law. Hall saw that the use of negligence as a category of mens rea could serve some apparently valuable functions, such as educating the public (however clumsily) about what risks they ought to be aware of, or providing factfinders with a means of mitigation. But he bridled at the distortion of the fundamental principles of criminal law involved in achieving those ends.<sup>421</sup> And, naturally, he rejected the line of cases represented by *Prince* that seemed to impose not just negligence but strict liability to vindicate society’s sexual mores, regardless of the integrity of criminal law.<sup>422</sup>

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<sup>416</sup> Sayre, *Public Welfare Offenses*, *supra* n. --, at 78-79.

<sup>417</sup> *Id.* at 80.

<sup>418</sup> Hall I, *supra* n. --, at 760-66. See also JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (1947).

<sup>419</sup> Hall II, *supra* n. --, at 971.

<sup>420</sup> *Id.* at 981.

<sup>421</sup> *Id.* at 984-85.

<sup>422</sup> *Id.* at 994-95.

A few years after Hall wrote, Justice Robert Jackson joined the defenders of mens rea when he declared for the Supreme Court that mens rea, in the sense of freely choosing to do wrong rather than right, was “no transient notion” but an essential dimension of criminal justice.<sup>423</sup> Jackson thus implied a view of criminal law focused on justice to the individual rather than on utilitarian social defense. Yet the very same opinion embraced the idea of rehabilitation and accepted the existence of “public welfare offenses.”<sup>424</sup> Only a few years earlier, the same Court had vindicated in *Williams v. New York*<sup>425</sup> an extraordinarily broad sentencing discretion, regulated by almost no law and extending to life and death decisions, on the basis of rehabilitationism’s reworking of criminal justice as a matter of fitting the sanction to each unique criminal rather than to the crime. Rather than fully adopting a Hall-like purity of approach to criminal theory, then, the Court embraced something like Wechsler’s own dual approach.

Wechsler’s sometime co-author, Henry Hart, also came to the defense of mens rea, declaring that crime was defined by the use of conviction as the “formal and solemn pronouncement of the moral condemnation of the community.”<sup>426</sup> Hart’s targets were the rehabilitationist theory of crime as sickness,<sup>427</sup> the punishment of “mala prohibita” that the citizenry cannot be expected to have internalized,<sup>428</sup> and the dispensing with the mental element in so-called strict liability crimes.<sup>429</sup> He also questioned the punishment of negligence as such<sup>430</sup>

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<sup>423</sup> *Morrisette v. United States*, 342 U.S. 246, 250-51 (1952).

<sup>424</sup> *Morrisette*, 342 U.S. at 251-55. For a nice discussion of the double character of *Morrisette*, see Seidman, *supra* n.--, at 141-46.

<sup>425</sup> 337 U.S. 241 (1949)

<sup>426</sup> Hart, *supra* n.--, at 405.

<sup>427</sup> *Id.* at 406-11.

<sup>428</sup> *Id.* at 419.

<sup>429</sup> *Id.* at 422.

<sup>430</sup> *Id.* at 417.

and condemned the statutory-rape cases,<sup>431</sup> but, like the Court, he barely questioned the broad discretion enjoyed by the state after conviction.<sup>432</sup>

At the same time, in England, it is worth noting, J. W. C. Turner and Glanville Williams were bringing life to criminal theory, partly in response to England's own moves toward a medicalized criminal law. Turner manipulated common law cases to prove that history legitimated criminal punishment only for actual, subjective foresight of the risk that the statutory harm would happen.<sup>433</sup> Williams was far more careful. Writing in 1955, he acknowledged that historically it was impossible to define crime in terms of "moral wrong." Whatever one might prefer, there simply was too strong a tradition of using the word "crime" to label conduct that Turner would not have considered a crime.<sup>434</sup> The only definition of crime that was true to history was that conduct for which the state had prescribed the use of criminal procedures.<sup>435</sup> That said, however, Williams too preferred to confine "crime" to morally condemnable choice,<sup>436</sup> and he was joined by England's Court of Criminal Appeal in cases like *Regina v. Cunningham* that closely paralleled the thinking and terminology of the developing MPC. In that case, the court read the all-purpose mens rea term "malice" to imply at least subjective awareness of a risk of the statutory harm.<sup>437</sup> Such initiatives only went so far, however, as the House of Lords retained the power to revert to a more objective standard, as it

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<sup>431</sup>*Id.* at 430.

<sup>432</sup> While he believed that judges must have the power to establish a fixed minimum term for some offenders to express community condemnation, he was less concerned that the judges have power to set a maximum term by which the discretion of correctional authorities would be limited. *Id.* at 439.

<sup>433</sup> J.W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31 (1938). In my view, the inadequacy of Turner's argument is manifest on the face of the article. See also, Smith, *Lawyers*, *supra* n.--, at 297-304; Horder, *supra* n.--, at 98-100.

<sup>434</sup> Glanville Williams, *The Definition of Crime*, 8 CURRENT LEGAL PROBS. 107, 110-20 (1955).

<sup>435</sup> *Id.* at 123-25.

<sup>436</sup> See, e.g., GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 255-61 (2d ed. 1961). See also Horder, *supra* n.--, at 118.

<sup>437</sup> *Regina v. Cunningham*, 2 Q.B. 396, 399-401 (1957).

did in the *Smith* case of 1961, which authorized a capital murder conviction on the basis of gross negligence.<sup>438</sup>

Back in the United States, the MPC was finally published in 1962 as a sort of synthesis (by brute force, perhaps) of subjectivist rationalization of traditional criminal doctrine and realist adaptation of the criminal justice system to utilitarian crime control. The treatmentist approach, emphasizing the offender's character more than her or his acts, survived with little qualification into the penal provisions of the MPC. These provided for quite wide sentencing ranges as well as substantial involvement of corrections officials in determining sentences according to "the history, character, or physical or mental condition of the offender."<sup>439</sup> They also bled over into the substantive definitions of crimes, at least in the case of inchoate offenses, where liability was broadened well beyond what many traditional jurisdictions would have permitted. Where those jurisdictions seemed to have shown a good deal of reluctance to punish in the absence of harm, the MPC eagerly extended its reach. It swept in even those who had not come close to completed offenses on the theory that the mere crystallization of a purpose to do a crime—crystallization in the sense that the subject had done some bit of conduct sufficient to corroborate that purpose—sufficiently revealed a "culpable character" or "dangerous personality." And such "personalities" were appropriately subject to coercive reeducation by the state.<sup>440</sup>

This treatmentist realism, however, did not fully control the writing of the MPC. In many respects, the MPC was simply an effort to clarify the established law of crimes. Its

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<sup>438</sup> D.P.P. v. *Smith*, 3 All.E.R. 161 (1961). English law's continuing ambivalence is reflected in the cases discussed in R. A. Duff, *Caldwell and Lawrence: The Retreat from Subjectivism*, 3 OXFORD J. LEGAL STUDIES 77 (1983). Horder shows that English courts continue, at least some times, to flatly reject the full subjectivist position. See Horder, *supra* n.--, at 112-114.

<sup>439</sup> See Dubber, *Panopticon*, *supra* n.--, at 67.

<sup>440</sup> Wechsler et al., *Inchoate*, *supra* n.--.

provisions on causation, voluntary act, and intoxication, for example, did not pretend to be substantive advances on traditional doctrine.<sup>441</sup> The drafters might have hoped to add some formulaic clarity but not to change the substance of the law, even, as in the case of intoxication, where the traditional law did not fully comport with principles of culpability announced elsewhere in the Code.<sup>442</sup>

And the Code went further, adopting some more or less subjectivist principles that were not necessarily reflective of traditional criminal law or of utilitarian crime control. These principles reflected, rather, the post-realist and post-War resistance to the totalization of the state and a defense of absolutist notions of individual justice as restraints on state power. If the penal provisions of the code were to rest on a theory of state remodeling of personalities, then the substantive provisions needed to incorporate a high level of fault on the part of the offender before such state action could be thought legitimate. Thus the MPC emphasized, first, the principle of legality, the importance of requiring the state to make clear beforehand what conduct it would consider criminal lest the state choose its targets without the restraint of law.<sup>443</sup> And, second, it emphasized that every offender be subject to coercion only after being shown culpable with respect to every element of the state's predefined offense.<sup>444</sup> A modern state that necessarily had awesome coercive powers for dealing with crime must also be systematically and rigorously limited by law in its targeting of its citizens. The result was a firm rejection of strict liability in virtually all cases<sup>445</sup> despite its wide use in many jurisdictions, a quite stingy use of negligence liability despite its widespread use in virtually every jurisdiction,

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<sup>441</sup> Seidman, *supra* n.--, at 107-15.

<sup>442</sup> See MODEL PENAL CODE § 2.08(2), which authorizes convictions for crimes of recklessness, such as manslaughter, even in the absence of foresight of risk where the factfinder is willing to say that the lack of foresight was caused by voluntary intoxication.

<sup>443</sup> *Id.* at § 1.05(1).

<sup>444</sup> *Id.* at §2.02(1).

<sup>445</sup> But see *id.* at § 2.05; 213.6(1).

an element structure for every offense<sup>446</sup> to ensure that strict liability or otherwise inadequate culpability provisions did not slip in the back door, and newly careful definitions of four levels of culpability designed to replace the gaggle of manipulable mens rea terms inherited from the common law.<sup>447</sup>

Although the MPC grew from a highly utilitarian impulse, it thus came to emphasize “subjective” principles of liability, although not to the full satisfaction of new retributivists. One consequence of the MPC, then, although other causes have also been at work, has been the explosion of academic work in criminal theory since the 1960s. The new scholarship has seen a dramatic revival of retributivism, which has inspired the newly stark distinction between subjective and objective approaches to criminal law. Thus Jerome Hall argued in 1943 (and for the rest of his career)<sup>448</sup> that negligence was an illegitimate ground of liability. These arguments have been repeated and disputed ever since.<sup>449</sup> In the 1960s H. L. A. Hart responded with an effort to distinguish culpable, though unknowing, risk creation from non-culpable risk creation,<sup>450</sup> and in the new century refinements on the debate continue.<sup>451</sup>

A similarly extensive literature on strict liability, a term never used by the nineteenth century courts that so freely deployed its substance, has also grown up since the birth pangs of

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<sup>446</sup> MODEL PENAL CODE § 1.13(9).

<sup>447</sup> MODEL PENAL CODE § 2.02(2).

<sup>448</sup> Hall II, *supra* n. --, at 981-85; Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Colum. L. Rev. 632 (1963).

<sup>449</sup> For arguments sympathetic to Hall’s position but a bit more ambivalent, see, e.g., Moore, *supra* n.--, at 56-58; Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHILOS. & POL’Y 84, 96-104 (Spring, 1990).

<sup>450</sup> H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968).

<sup>451</sup> See, e.g., A. P. Simester, *Can Negligence Be Culpable?*, in Jeremy Horder, ed., *Oxford Essays in Jurisprudence*, 4<sup>th</sup> Series (2000); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 Calif. L. Rev. 931, 949-53 (2000). Alexander says he has added nothing to his 1990 argument on this question, but, at least, I think his latest articulation is a little less ambivalent than the earlier statement.

the MPC.<sup>452</sup> These debates have also produced intermittent forays into the history of criminal theory. Markus Dubber, for example, has offered an account of the MPC that treats it as something of an aberration in the history of criminal theory insofar as it embodies a “treatmentist” philosophy and abandons the notion of “punishment.” The latter, according to Dubber, is what criminal law must always, ultimately be about.<sup>453</sup> Richard Singer agrees and has written a series of articles under the general title “The Resurgence of Mens Rea,” which purports to show that departures from a rigorously subjectivist approach to mens rea and to criminal justice generally have been a nineteenth- and twentieth-century aberration within a longer history of subjectivist orthodoxy. For Singer, in contrast to Dubber, the MPC, despite its anomalous sentencing provisions, is the chief (but not only) evidence of a return to an almost “fully subjective concept of mens rea.”<sup>454</sup> These historical investigations are intended to buttress Singer’s argument that, having endured an interlude of theoretical corruption and injustice, criminal law must regain “its primary, indeed its only focus – imposing social stigma on those who knowingly, purposely, or recklessly act in disregard to social and moral duties.”<sup>455</sup>

As welcome as such efforts at historical investigation are, however, they stand more as entrants in the distinctly modern debate between utilitarians and retributivists than as efforts to historicize that debate. I think that the historical evidence presented in this article shows that, however concerned jurists have been with fairness and justice to the accused, the history of

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<sup>452</sup> A start on this literature might include Brady, *supra* n. --; Husak, *supra* n. --; Kelman, *Strict Liability*, *supra* n. --, at 1512; Simons, *supra* n. --; Singer, *Resurgence*, *supra* n. --; Singer, *Duty to Inquire*, *supra* n. --; Wasserstrom, *supra* n. --, at 742-44; Wiley, *supra* n. --. See also the extensive literature on mistake of law, generally a doctrine of strict liability, which can be traced in Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?*, 72 U. Colo. L. Rev. 507 (2001).

<sup>453</sup> Dubber, *Panopticon*, *supra* n. --, at 62-79. See also, Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW HIST. REV. 113 (1998), which suggests the illegitimacy and historical peculiarity of any criminal theory that simply asserts the subordination of individual autonomy to social interests.

<sup>454</sup> Singer, *Part I*, *supra* n.--, at 246.

<sup>455</sup> Singer, *Part III*, *supra* n.--, at 408.

criminal law is a history of ambiguity and oscillation in the concerns that seem to drive judges. Even in the sometimes more systematic writing in criminal treatises, it is nearly impossible to find pure retributivism or pure utilitarianism before the twentieth century. Rather, from the age of Blackstone to the middle of the twentieth century, the rhetoric of prevention and public policy predominated, even as a concern with private, moral justice made itself persistently felt as well.

## CONCLUSION

In a recent essay, Andrew Ashworth asked whether the criminal law had become a “lost cause.” For him, criminal law must be about preventing and punishing only faulty conduct that threatens serious social harm. Consequently, he worried that the frequent use of criminal law for regulatory purposes and the consequent drumbeat of strict liability in criminal doctrine were leaving behind the defining characteristics of criminal law in the rush to respond to every social problem with force. Ashworth understood that his definition of crime did not square with the actual history of criminal doctrine, but he insisted anyway that individual justice must never be sacrificed to mere consequentialism.<sup>456</sup>

Ashworth’s article is just one of the more recent efforts to insist that criminal law is a matter of private justice. I say “private” not because Ashworth uses that term but because it creates an appropriate contrast with consequentialist or public approaches to criminal law in light of the history offered by this article. The sort of justice that Ashworth and others would identify as definitional to criminal law is closely akin to the sort of justice that, according to Ernest Weinrib, distinguishes private law from public law. Weinrib argues that private law is

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<sup>456</sup> Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 LAW Q. REV. 225 (2000).

defined by its lack of attention to general social policy and its single-minded pursuit of “corrective justice and Kantian right” between individual parties to a dispute.<sup>457</sup> Criminal law may not be completely assimilable to his model of private law, since one of the parties in a criminal case is the state. But the sort of Kantian justice that modern retributivists embrace — focusing narrowly on justice to the accused and categorically rejecting the use of that individual as a means to larger social ends — is all but indistinguishable from the sort of “private” justice at the center of Weinrib’s version of private law.<sup>458</sup> Hence this article’s contrast between, on the one hand, a “private” version of criminal law focused on justice to the accused and, on the other hand, a “public” version, derived in part from the historical designation of criminal law as a branch of public law, focusing on public policy and social consequences (often subsuming considerations of blameworthiness or individual justice into the consequentialist calculation).

If the advocates of private justice take a more single-minded view than the history, at least, can support, then so do many advocates and analysts of public justice. Utilitarians from Bentham to modern day economists, for example, have sought to reduce the law to a calculation of social utility or efficiency.<sup>459</sup> In such analyses, the notion of private justice to the accused seems hardly intelligible, let alone a central analytical principle.

From a more critical perspective, left-leaning critics of criminal justice have sometimes portrayed criminal law as a device hardly concerned at all with abiding notions of moral justice, but only with perpetuating certain arbitrary definitions of deviance<sup>460</sup> that permit the privileged (most of us?) to indulge some of our less admirable impulses and call the result community.

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<sup>457</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 19 (1995).

<sup>458</sup> WEINRIB, *supra* n. --.

<sup>459</sup> See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

<sup>460</sup> See, e.g., LEPS, *supra* n. --, which studies the development of European criminology to suggest, among other things, that criminal law is inevitably about the objective, social defining of deviance as much as it is ever about individual justice or the experience of individual moral choice.

For Alison Young, the components of “crime” are “an imagined community,” “an identifiable subject” designated as a “threat to the community,” and an elemental “desire to inflict violence upon that subject in the name of community.”<sup>461</sup> All this does not reflect a natural coalescence of community in defense of an abiding morality, but a “contingent and arbitrary” indulgence of the “continuing desire for sacrifice.”<sup>462</sup> “Crime” is that socially constructed sphere in which “the violence of all against all is translated into the violence of all against one, with one member of the community arbitrarily singled out for destruction.”<sup>463</sup>

In a tone more charitable to the notion of crime, Marshall and Duff initially concede the absence of a generally accepted definition of that concept but then go on to derive a public-oriented conception of crime from some widely held notions of criminality. Drawing on Blackstone’s notion of public wrong, among other sources, they argue that crime is any wrong that implicates the community’s definition of itself as a body of shared fate, such that the victim must share that wrong with the community and must expect the community as a whole to stand against that wrong.<sup>464</sup> Similarly, after rejecting a Kantian private approach to criminal justice,<sup>465</sup> Nicola Lacey suggests that criminal law exists “to preserve the framework of values perceived as necessary to the maintenance, stability and peaceful development of the community.”<sup>466</sup> It serves both to define the community and to foster deliberation about the values that the community enforces through criminal law.<sup>467</sup>

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<sup>461</sup> ALISON YOUNG, *IMAGINING CRIME: TEXTUAL OUTLAWS AND CRIMINAL CONVERSATIONS* 9 (1996).

<sup>462</sup> *Id.* at 12.

<sup>463</sup> *Id.* at 16.

<sup>464</sup> S. E. Marshall and R. A. Duff, *Criminalization and Sharing Wrongs*, 11 *CANADIAN J. OF L. & JURISPRUDENCE* 7 (1998).

<sup>465</sup> NICOLA LACEY, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* 171-73 (1988).

<sup>466</sup> *Id.* at 176.

<sup>467</sup> *Id.* at 182-84.

These public perspectives on crime have no more hope of completely describing the phenomenon of criminal justice than do the private perspectives adverted to above. Valuable as all these approaches are, none of them have refuted Glanville Williams's 1955 argument that the category of "crime" as actually and persistently used by legal institutions simply has no essence.<sup>468</sup> Young's arguments, for example, may ring true in some cases, but they hardly capture the common experience that in many other cases criminal justice is, indeed, a matter of vindicating the abiding, almost natural, notions of moral justice that contribute to community in the best sense. On the other hand, insistence on such private justice in every deployment of criminal law, whatever its transcendent merits may or may not be, hardly describes the doctrinal and intellectual history of the criminal law. The closest one can come to a definition of crime, according to Williams, is simply that conduct which the state makes the occasion for prosecution, although even that begs the question of precisely which attributes of adjudication constitute prosecution and which add up to other kinds of litigation.<sup>469</sup> Thus, as Lindsay Farmer argues, Williams's anti-definition of crime "simply reflects the diversity of functions of law in an interventionist state."<sup>470</sup> Consequently, definitions will always be contingent and inadequate, and, whatever the merits may be of philosophizing about what criminal law should be, an account of what it actually is and has been should begin with a recognition of that diversity of functions and the fluid ways in which different functions ebb, flow and put pressure on each other in the actual practice of criminal law.<sup>471</sup>

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<sup>468</sup> Williams, *Definition*, *supra* n. --.

<sup>469</sup> *Id.* at 123-30.

<sup>470</sup> Lindsay Farmer, *The Obsession with Definition: The Nature of Crime and Critical Legal Theory*, 5 SOCIAL AND LEGAL STUDIES 57 (1996).

<sup>471</sup> *Id.* at 68-69. Farmer exemplifies his recommended approach in CRIMINAL LAW, TRADITION AND LEGAL ORDER: CRIME AND THE GENIUS OF SCOTS LAW, 1747 TO THE PRESENT (1997). But so do Lawrence M. Friedman and Robert V. Percival in their much earlier but less theoretically explicit book, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (1981), in which they declare a

This diversity in functions is reflected in the doctrinal tensions within criminal law that have been so well described in recent years. Mark Kelman’s famous “Interpretive Construction in the Criminal Law” is a catalogue of the doctrinal tools by which judges are equipped to choose, more or less arbitrarily, whether liability will attach in any particular case.<sup>472</sup> Alan Norrie’s *Crime, Reason and History* pursues the same point even more comprehensively and with more explicit reference to the history of criminal law, which reveals to Norrie a persistently “two-handed” sense of justice,<sup>473</sup> reflecting an ever present tension between ideals of individual justice and social control.<sup>474</sup> And Nicola Lacey’s more focused investigation into the evolution of corporate criminal liability suggests similar lessons. The modern expansion of the scope of “crime” to encompass more and more corporate activity, she argues, cannot really be explained by a new, deductive discovery that such criminalization is consistent with traditional mens rea doctrine after all. It must be explained, instead, by combining an understanding of the changing social context of corporate misconduct with an understanding of the criminal law’s persistent reliance on two arguably inconsistent models, the “quasi-moral” and the “regulatory.” These alternative models together give judges and theorists the flexibility to adapt criminal law to Farmer’s “diversity of functions” as society changes and as politics dictates.<sup>475</sup>

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“central argument of the book” to be that, “The criminal justice system of Alameda County, in our period, had no single function, and cannot be summed up in a single, simple formula.” See p. 14.

<sup>472</sup> Mark Kelman, *Interpretive Construction in the Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>473</sup> ALAN NORRIE, *CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION* 12-14 (2d ed. 2001).

<sup>474</sup> *Id.* at 46-58. My own work on mistake of law contributes to this project as well. See Leonard, *supra* n. -, at 559-64, 583-91

<sup>475</sup> Nicola Lacey, “*Philosophical Foundations of the Common Law*”: *Social Not Metaphysical*, in OXFORD ESSAYS IN JURISPRUDENCE, 4<sup>TH</sup> SERIES (Jeremy Horder, ed. 2000). On the long history of tension between public and private perspectives—or what Odujirin calls “political” and “moral” perspectives—in English law, see ODUJIRIN, *supra* n. --.

This article, then, is intended as a contribution to the project of working out historically the multiplicity of approaches to and functions of criminal law, as reflected in judicial opinions, treatise-writing, and theoretical work. It is one thing to make the theoretical point that this multiplicity is characteristic of criminal law. It is another matter to work out how a multivalent criminal law and criminal theory have actually developed through changing times and contexts. The story offered here attempts to advance that project for the American history of criminal theory. To that end, it suggests, first of all, that the modern distinction between subjective and objective liability was not particularly salient before the twentieth century. Instead, the real focus of criminal theory in that time was the post-Enlightenment goal of “prevention” of distinctively “public” wrongs, as opposed to the “private” wrongs that were thought not to implicate public policy. Moreover, a newly explicit attention to the regulatory needs of a society enmeshed in the market and industrialization reinforced this public perspective across the nineteenth century. But concern with moral justice to the individual accused was never absent and became especially salient at particular historical moments. It reached a low ebb during the Progressive era when radical criminal reformers attempted to purge criminal law of its moral dimension, substituting a scientific model of “treatment” for the traditional model of punishment. This radicalism, however, ultimately prompted an equally radical reaction, which gave retributivism’s focus on moral justice to the individual a preeminence it had never before enjoyed. The Model Penal Code, finally, exhibited both the strong, residual influence of the Progressive reformers and the emerging, critical power of the retributivists.

Finally, to crystallize these arguments, the article has offered a close examination of the statutory rape cases in the late nineteenth century. Viewed in light of the Victorian ideology of chastity, the cases and commentary provide a case study of the ways in which the judges negotiated the values of private and public justice in criminal law. They persistently gave pride

of place to a public justice that deployed the ideology of chastity and stringent demands on the citizenry's public character to justify the rule of strict liability in the sex cases. But, at the same time, they often worked to assimilate the results to at least some measure of private, moral justice. The production of doctrine in these cases thus provides a concrete lesson in the historical contingency and flexibility of criminal doctrine and, consequently, the necessity of understanding the interactions of both the larger cultural context in which the courts operated and the internal imperatives of criminal law as a discipline.