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Jerome Hall

Indiana University School of Law

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INTERRELATIONS OF CRIMINAL LAW AND TORTS: II

JEROME HALL

INDIVIDUAL DAMAGE AND SOCIAL HARM

The major problem raised in the context of the above discussion inheres in comparison of torts and criminal law in the common field of intentional invasions. Analysis of the interrelations of these harms is much more complex than has usually been assumed. To indicate the ramifications of the problem, and to deal with those writers who have been content to observe that the two fields "overlap" in intentional harms, it is necessary, first, to analyze the relationship of "culpability" to tortious and criminal "wrongs." The purpose is to determine whether moral culpability serves the same function in both fields, or, more precisely, whether its integration with the other respective elements of tort and crime produces identical harms.

The rules of law on intentional invasions in both torts and crimes run in terms of certain "effects" produced by conduct, termed "culpable." "Legal harm" unites various "effects" (invasions of interests) with human behavior, viewed as cause and thus "imputed" to specific actors, whose conduct is "culpable" in light of the defining principles of that term.¹ What needs emphasis is that for purposes of analysis and discussion, we must distinguish "effects" from the conduct that produces them, but we must realize that actually these two basic components of harms are so integrated as to be inseparable.² A simple illustration is presented by contrasting a death caused by lightning with one produced by conduct amounting to "murder in the first degree." The physical effects are identical as are the pecuniary losses to dependents, yet in no other sphere of significance are the effects even superficially similar.

1. Hence it is fallacious to consider justification, privilege and the like as independent elements. They are simply modifiers of the general rules—no legal harm has occurred if there is a privilege.

2. See Hall, *Interrelations of Criminal Law and Torts: I* (1943) 43 COLUMBIA L. REV. 753, 760 n. 37.

The value-judgments not only of those immediately touched but also of outside observers commingle with the respective physical results so as to constitute social facts of sharply distinctive meanings. The physical effect in each instance is seen and evaluated through the prism of its respective causation. Despite their actual integration, however, it is necessary to distinguish causal factors from effects because these basic elements combine variously, and we must differentiate those combinations that carry certain legal significances from others.

With reference to the foregoing relationship of "culpability" to "effects" (which together constitute the "harm" or wrong) we may now examine the position of those writers, stemming from Austin, who assert, chiefly on the basis of the intentional aggressions, that torts and crimes are not mutually exclusive. The first elaboration of that view was presented by Stephen,³ who rejected distinction on the basis of morality, asserting "the moral nature of the act has nothing to do with the question . . . there is no reason why the same act should not belong to both classes, and many acts do."⁴ Since Stephen held that criminal law is generally founded on morality,⁵ his refusal to adopt that as a sound criterion for distinguishing that law from torts was obviously based on his recognition of the immorality of intentional invasions in the latter field as well. Kenny reaffirmed Stephen's view that torts and crimes are not mutually exclusive. "In the vast majority of cases" crimes are also torts since they damage some individual. But he rejected Blackstone's unqualified generalization that every crime is also a tort,⁶ noting sedition, possession of counterfeit dies, and attempt to commit suicide, in support. Paraphrasing Stephen, Kenny concluded that "Criminal wrongs and civil wrongs thus are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being not one of nature but one of relation."⁷

This position is rendered more plausible by the use of a common terminology to designate many torts and crimes, especially in the area of intentional invasions. That these harms are related in some manner is apparent, but it is submitted, nonetheless, that it is fallacious to regard them as identical or as "merely" the same behavior seen from a differ-

3. See Hall, *supra* note 2, at 770, n. 79, 80, 81. I have not found any discussion of this problem in his later *HISTORY OF THE CRIMINAL LAW*.

4. *GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND*, 5, 7. That Stephen had in mind intentional torts when he wrote the above, is shown by his context. See *id.* at 6.

5. Citations in Hall, *supra* note 2, at 770, n. 79, 80, 81.

6. *IV. BL. COMM.* 5.

7. *OUTLINES OF CRIMINAL LAW* (1936) 22.

ent viewpoint. The assumption underlying this view is that "facts" constitute intelligible "entities" that have significance apart from legal rules or other general ideas. In truth, as Whitehead has remarked, "fact" is "a triumph of the abstract intellect." It is one of the most complex notions in the entire history of human thought and presupposes an involved array of theory and considerable sophistication. The basic error in Stephen's analysis is illustrated by his observation that it is just as fallacious to distinguish torts from crimes as it is husband from brother. The assumption is that "man" refers to a single "entity," that it denotes an unchanging natural phenomenon that can have but one meaning. But this assumption is the very issue, itself, and it is no more tenable than the like view of any "fact." "Man" may mean almost anything—depending upon how we regard him, *i.e.*, upon the body of theory we employ and the particular questions that direct our scrutiny. To a physicist, "man" is a quantity of matter no different from a sack of flour of like dimensions and weight. The chemist rather cheerfully informs us that "man" equals 80% water, and so on. It is precisely the fact that different relations are involved that produces differences in the phenomena. Hence the real problem concerns the significance of the particular distinctions that segregate and determine the meaning of "the facts."

The essential difference as regards the instant problem is that in torts, "effects" almost invariably include actual damage to some person, whereas in crimes, damage is not essential—instead the notion of a "social harm,"⁸ supplies the requirement there. It follows even with reference to intentional invasions, that integration of immoral conduct with effects that damage a particular individual constitutes a different fact-situation from the integration of such conduct with essentially different consequences.

In support of this theory, it is necessary to note at the outset that it cannot rest merely upon such crimes as treason. The crucial test of its validity obtains only where both criminal prosecution and civil action are relevant. It is necessary to stress this because the common refutation of Blackstone's assertion that all crimes include torts⁹ has been little more than a mere pointing to treason, possession of counterfeit dies and the like, *i.e.*, to crimes which obviously include no damage to any individual person. This criticism of Blackstone is valid so far as it goes, but it is inadequate to solution of the problem because it leaves untouched a vast area of wrongs which

8. See Hall, *supra* note 2, at 760 n. 37.

9. IV BL. COMM. 5.

pose the major issues, including, especially, the troublesome cases where both criminal and tort actions are available. Moreover, the implication of such criticism, namely, that many crimes do "include" torts, is precisely the crude sort of generalization that confuses analysis and requires correction. Such criticism has proceeded on a restricted empirical level, employing "tort" and "crime" to denote various behavior-circumstances. The important question from a theoretical standpoint is whether the above offences (treason, etc.), designating the absence of any particular injured individual, and, consequently, of damage, are merely fortuitous, or whether they indicate essential differences. For such differences we must refer to the rules which "select" and define legally significant phenomena. And the major principle thus suggested, in contrast with that usually put forth, is that damage is not an essential element anywhere in the criminal law (not merely in the "inchoate crimes" etc.). This would seem a plain inference from the common fact that money judgments are not assessed against criminals for harm to the community. But are there rational grounds to support the current practice and the rules that sustain it?

The presence of a particular individual to press his suit seems obviously to account to some extent for the legal recognition of individual interests. The long history of individual prosecution of criminal offences in England would reinforce rather than offset this influence. But this cannot be the entire explanation, if, indeed, it is valid to any degree, since the State has been represented by public prosecutors for many years. Why have they not brought civil actions for damages against those guilty of criminal offences? The absence of tradition and precedent simply transfers the incidence of the problem. So, too, the fact that the vast majority of offenders are notoriously judgment-proof leaves a satisfying answer still wanting. A much more persuasive reason than any of the above is the theoretical and not merely practical difficulty of determining the damages. Even today a prosecutor who had cut through the full intricate web of tradition would be at a loss to provide any valid measure of damages. This would follow not merely because he had no precedents to consult but, also, and chiefly because the harm, however figuratively localized in a personified "body corporate," is so devious in its ramifications and consequences as to render it impossible to place any definable boundaries whatever on its extent. Moreover, even if a definite public harm could be circumscribed in some fairly acceptable manner, there is no recognized basis for computing the pecuniary value of the damage to the social interest. By contrast, though damages to individual persons seem frequently to rest on little

more than a guess, e.g., the pecuniary value of certain injuries to reputation, peace of mind, privacy, and the like, there is a basis in experience, some actual index, for monetary evaluation; the guesses are relatively informed ones, supportable on rational economic grounds. These are so lacking as regards computation of pecuniary loss to the entire community for injury to a social interest as to suggest that "social harms" belong to an entirely different order of phenomena from individual ones.

This incalculability of money damages is implemented by moral judgments and by the influence of the mores on the legal institutions. These principles and public attitudes are the decisive factors that render punishment the appropriate sanction in the penal law. Ancient attitudes equate punishment and compensation by way of proportionate retribution, and it is possible to see certain rough analogies in the early classical criminal law and in the older law of torts, when "fault" reigned supreme in both fields.¹⁰ This cannot be extended to "explain" punishment generally in the modern criminal law, but, to an extent, it does account for the limited development of a law of public torts and for satisfaction via punishment rather than reparation. The punishment, proportioned to the harm, is emotionally felt as "compensation" for the public damage done. The public, so to speak, takes its pay in the pelf of the offender himself.

The nature (commensurability) of the proscribed "effects" in conjunction with the relevant moral principles and attitudes leads to the ultimate points of reference in the field of wrongs, the two elemental, irreducible realities—the individual human being and the community. These ultimate units are grounded in a configuration of ideas that comprise a cross-section of a total culture and include conceptions integrated in economic organization as well as political ideals. The relevant ethical standards postulate the autonomy of the individual and his "right" to be made whole. So, too, the above postulates, reenforced by moral attitudes, give a distinctive meaning to designated "social harms," which, though nonmeasurable in money, are as "real" as is the damage to a particular individual. Thus the damage requirement in tort law serves to select and limit "the facts" to those that constitute harms to particular persons. It follows that moral culpability is of secondary importance in tort law—immoral conduct is simply one of various ways by which individuals suffer damage. But in penal law, as seen from the analysis above of the principles of culpability, the immorality of the actor's conduct is essential—whereas pecuniary damage is irrelevant.

10. See 1 MAZEAUD, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE* (1934) 63-64, quoting Saleilles.

These conclusions support those put forth rather vaguely by Blackstone¹¹ and recently reaffirmed by Professor C. K. Allen.¹² But Blackstone simply asserted that torts and crimes differed in their "nature or tendencies," he found no essential criterion to support him and hardly sought any. Professor Allen quite correctly points out that at least one essential differentia is provided by the moral culpability required for criminal liability, but his analysis is confused by his separation of "intrinsic wrongfulness" from "social expediency" (an aspect of his acceptance of the *mala in se*—*mala prohibita* distinction) and by his insistence that "a wrong does not become two kinds of wrong because it gives rise to two separate legal processes"—a view that is hardly consistent with his general thesis.¹³ It is the immorality of the offense, implemented by the mores, which gives it its social import—which alone renders it a harm to the community—and not the number of persons killed, or the amount of property damaged.

This principle has been alluded to but incorrectly applied by writers who, like Professor Allen, argue that torts may be as harmful as, or more harmful than, crimes. They point to negligent operation of a train with much loss of life or to mismanagement of large businesses with vast economic damages on the one hand, and to "stealing a handkerchief," on the other, to refute the assertion that crimes are more injurious than torts.¹⁴ But it is apparent that such argument relies upon accidentals, and, even more, that the comparison sought is applied to such disparate phenomena as to render comparison illogical and impossible on any rational basis. Sound comparisons can be made only if all variable facts are ignored or held identical and some standard for comparison is

11. "... every public offense . . . affects the individual, and it likewise affects the community." IV BL. COMM. 5.

12. ALLEN, LEGAL DUTIES (1931) 233-4. Cf. 1 BISHOP, CRIMINAL LAW (1923) Sec. 32, and HOLLAND, JURISPRUDENCE (1917) 328.

13. ALLEN, *id.* at 235-8.

14. KENNY, *op. cit. supra* note 7, at 6-7, believed that "crimes, taken as a mass" (*id.* at 5) provided much greater and widespread harm than that produced by torts. In general, "this public mischief ought undoubtedly to be made the salient feature." (6) But that criterion, he concluded, is not sufficiently precise. It does not give "the whole thing and the sole thing . . ." (*id.* 6) Also, penal actions stood in the way of Blackstone's generalization, since they were admittedly harmful to the entire community, but were nonetheless "civil" wrongs. Thirdly, Kenny stresses the police offences. (*id.* 18-19, 9) Fourthly, he noted that some acts that arouse indignation—such as corporate negligence and omission to rescue a child when that can easily be done—are not crimes at all. (*id.* 8) Kenny concluded by accepting Austin's view that there is no valid substantive difference; there is only a difference in procedure, characterized by the state's control of criminal prosecution. His chief point of disagreement with Austin was his reaffirmance of the traditional difference between punishment and compensation. (20) Winfield comes to similar conclusions. THE PROVINCE OF THE LAW OF TORT (1931) 196-198. See, also, the articles by Hitchler in volumes 38 and 39 DICKINSON L. REV.

selected for application to the differences. This is implied in the legal method of describing and evaluating types of harm regardless of particular factual variations, *e.g.*, robbery is more serious than larceny. Only if we premise that moral values transcend all others, can it be asserted that crimes constitute greater harms than do torts. Thus, holding particular facts constant, one may compare a death caused by negligent operation of a train with one caused by a deliberate killing, or the loss of \$10,000 caused by negligent misrepresentation with the like loss by fraud.

But when the distinctions in terms of individual and group, drawn above regarding intentional invasions, are borne in mind, it is apparent that even such comparison is dubious because the respective harms belong to essentially different spheres of significance. Ultimately the confusion of attempted comparisons and their criticism, stimulated by Blackstone's scant analysis, inheres in the difficulty of separating "social" from "individual," and, consequently, in the premise that tort law is solely a matter of individual interests, whereas criminal law is concerned only with community interests.

The logic of manipulation of the relevant variables may be briefly indicated. If we say the individual is part of the group, therefore individual interests are included in social interests, we obliterate the individual harm—it becomes a social harm; the overriding commonsense rationalization is that harm to any individual, whether by lightning or morally culpable misconduct, is harm to the group. The fact that injuries to the individual are redressed by law supports this general insight. In addition, the implications of the above premises require the conclusion that judgment for an individual in a tort action is also a social accretion on the literal ground that since he is part of the group, his gain is also that of the group. This ignores the fact that the shifting of the loss from one person to another does not increase existing economic goods. But on social grounds such distribution is defensible as a "gain."

The obvious conclusion of these premises is abandonment of "individual" and "social" as mutually exclusive. But it is at least equally apparent that "individual" means something more than merely "part of the group." The logical modes are altered if the individual is premised not merely as part of the group, but, also, as independent of it, *i.e.*, as both a member of the group and as an autonomous entity. Thus the individual participates in the community's interests in the institution of private property, but his interest in his own property is assuredly something different—as every taxpayer understands. But analysis of such apparently simple assertions raises very intricate problems. After allo-

cation of the physical and biological aspects of human beings as "individual," it becomes difficult to proceed further, *i.e.*, in the really relevant area of social phenomena. This problem has been the central preoccupation of much of social philosophy, and this is obviously not the place for elaboration of it. The relevant implications of the writer's analysis may be epitomized in the generalization that morally culpable conduct which injures any individual gives rise to two distinctive axioms—reparation and punishment, and that the harms associated with the latter, because of their immorality, may be designated "social" in this sense. To facilitate analysis of positive law, a system of implementing the attainment of certain ends by ordering behavior and consequences, it is necessary to distinguish the terms "individual" and "social," and to treat them as mutually exclusive. As noted, there is factual warrant to support this; it is not fictitious usage nor a mere dialectical device.

The significance of the principles enunciated above (that the individual harm can be rationally evaluated in money whereas this is impossible as to the social harm, and that morally culpable conduct is essential to the crime but not for the tort) depends on their verification in the positive law of both fields and on the extent of their application. The first supporting data, it will be recalled, were such crimes as sedition, possession of burglar's tools, and the like, *i.e.*, situations that represent social harms but have no individual incidence whatever. The converse, representing the basic tort principle, may be most readily induced by reference to the negligent invasions; they are not social harms because moral culpability is lacking.

But we come to closer grips with the crucial testing of the above principles in the field of intentional invasions. Here the conduct of the actor is morally culpable in both fields, the same terms are employed, and common ideas are generally intermingled in the decisions. If we carefully examine the relevant phenomena, however, we note important differentiae that support the theory suggested above. Thus obtaining property by false pretenses is committed even though the prosecutor has sustained no financial loss,¹⁵ but a civil suit for misrepresentation cannot succeed in such circumstances.¹⁶ In libel, too, the distinction between the social and the individual harms is registered in the torts requirement that there be publication to a third person whereas prosecution lies if the communication was sent only to the one defamed. This is the rationale, also, of decisions holding that whereas truth is a defense to the suit for damages, it is necessary in the criminal law, in addition, that

15. MILLER, CRIMINAL LAW (1934) 389.

16. See HARPER, LAW OF TORTS (1933) § 226.

publication be for the public benefit. Although it is arguable whether the circulation of such matter is harmful if it is true, and, also, whether a true publication does not damage the individual concerned, the consistency of the questionable premises implicit in the above holdings with the underlying principles of torts and criminal law, respectively, is apparent. These principles also suggest a likely reconciliation of the presently diverse holdings regarding consent to a criminal act. An adult might well be permitted to waive any personal damages, *i.e.*, his consent would eliminate the tort, but this should not determine the issue in the criminal law. A like significance is indicated by the related doctrines on contributory negligence, participation in a wrong, and condonation, which normally bar civil recovery, but not prosecution.¹⁷

The most difficult testing ground of the distinctions drawn above is the seemingly simple "assault." Here we encounter a term whose ambiguity is hardly suspected because of the common assumption that the denotation is to a single typical situation. The term actually has many denotations including such diverse situations as putting another in fear of an immediate battery, mere apprehension, attempted battery on an unconscious person, various menaces, taking indecent liberties, and others. Decisions that vastly oversimplify the problem rely on tort and criminal assaults so indiscriminately that almost every possible combination of facts and *rati*i can be found in either class of case law. Whatever else may be discoverable regarding this complex and utterly diverse body of law, it is certain that the assertion that "the same facts" constitute both a tort and a crime is clearly untenable. Reference to the two most difficult situations in the law on assault illustrates this, and also indicates the utility of the suggested principles for tort-crime relations generally. One of these presently most confused situations is provided by attempted batteries on persons who are not aware of them. On the thesis presented, such conduct is not tortious because no damage is involved, but it is a criminal assault because a social harm is produced. Again, adherence to the suggested thesis can effect a rational ordering of decisions in diverse situations typified by the pointing of an unloaded gun, the actor knowing the facts but the victim being reasonably mistaken. The tort requirement is met because injury is effected by an apparent intent, but the social harm, as defined generally by the criminal law, requires actual intent to injure.¹⁸

17. For an argument that the rules of causation should operate differently in the criminal law and in torts, especially in intentional infliction of serious injuries, see Note (1933) 31 MICH. L. REV. 659, especially 675 *et seq.*

18. Since there is an actual intent to frighten, there is no theoretical bar to holding the conduct criminal. The difficulty in the cases is not so much their extension of criminal assault to intention to frighten as it is the reliance on tort assaults to support the decisions.

Even in the most complex of all such situations for testing the suggested thesis, battery or menacing with a loaded gun, *i.e.*, where identical terms are employed in both fields to denote identical behavior, the tort "effects" are distinguishable from the social harm, comprising the crime. The difference is clear as regards such wrongs as conversion of chattels and larceny, and as to conduct by an insane person or a child, that is tortious but not criminal, but the same principle obtains even when moral culpability is also a component of the tort, as in the above illustrations. The tort rules integrate the culpable conduct with the injury to the individual whereas the criminal law integrates that conduct with the pecuniarily non-commensurable social harm. That this means something more than the logical extension of principles whose validity is elsewhere more readily evidenced, is attested by the social significance of the respective sanctions—though, in this area of intentional invasions, there are limitations on the scope of the suggested principles, which will shortly be pointed out.

The above wrongs are of particular importance as regards tort-crime interrelations because seemingly identical behavior-circumstances and identical terms are involved in both fields. The principle suggested by the inchoate crimes is supported and extended by reference to the law of these invasions; even more important is their illustration that the two fields do not "overlap," but that, on the contrary, they are distinctive. The challenge to the suggested basic principles can hardly bear on that which states that the social harm comprising crimes requires no damage. But the companion proposition that torts premise damage, though defensible, also, in the largest part of the field is opposed by a number of instances that must be examined.

Although the function of tort law generally, as the vehicle of a just distribution of economic losses, and the logic of the doctrine that could serve best as a unifying principle require restriction of the field to harms that actually damage, the traditional classification of torts includes a number of wrongs where damage is not essential. It is this area of *injuria sine damno* which opposes the sweep of the general principle stressed above. These torts invite careful attention because they reveal the pervading influence of experience and expediency as perennial obstacles to generalization. They comprise two types of cases. Trespass to land is perhaps the most representative of one of these and most indicative of the sort of influence that restricts the march of logic. The action functions as a defence of the right to possession. Invasion of water rights, nuisance, and infringement of trade-marks seem to involve the same principle of invoking tort law to establish a property

right. In these instances, equitable relief is frequently available to secure the desired results; in any event some expansion of other remedies would eliminate the need for suit at law in the above torts where damage is non-existent.

The other type of these exceptional wrongs¹⁹ is represented by the minimal definition of assault. Mere apprehension, not fear, is all that is required. Battery is closely related, for though some contact is required, it need not cause substantial harm. False imprisonment, libel, the special forms of slander, criminal conversation and malicious prosecution are likewise actionable without proof of actual damage sustained. In contrast to the first group of harms, those involving authoritative determination of property rights, the damages awarded in this latter group are usually substantial. To some extent, *e.g.*, in defamation actionable per se and in false imprisonment, the difficulty of proving damage coupled with the high probability that substantial harm was sustained, has furnished some support for the prevailing rules. But the more potent factor is the element commonly found in all of these wrongs; whereas the first group does not involve personal security or reputation, most of these are intentional aggressions which usually imply moral culpability, and almost always stimulate resentment. As Holt put it: "If such an action [against one denying a vote] comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right."²⁰ In this type of harm the law of torts frequently functions as a punitive apparatus—the "fine" going to the injured victim of the aggression, and many of the cases that defy explanation on other grounds can be understood as preferences to impose substantial judgments rather than the nominal penalties provided by the criminal law.

This sort of phenomenon, distressing to an aesthetic appreciation of the logic of the basic principle of torts, is persuasive to common sense, nonetheless.²¹ The civil judgment is an authoritative vindication of the injured person's rights. Besides he is here not dependent on the public authorities for prosecution and he remains master of the proceedings. Moreover, as in England, even the assessment of costs alone may be no trifling matter. Thus the tort law, by the above combination of circum-

19. For citations on all of these harms, see McCORMICK, *LAW OF DAMAGES* (1935) 89-91.

20. *Ashby v. White*, 2 Ld. Raym. 958 (K. B. 1701-2). Cf. *Kennedy v. Davis*, 171 Ala. 609, 55 So. 104 (1911) and *Pratt, C. J. in Wilkes v. Wood*, 19 How. St. Tr. 1167 (1763).

21. Cf. Bentham's proposal to indemnify the victim of any crime. Here the common law is grossly unsystematic as compared with the French and other systems that provide for the *partie civile*. In a pragmatic way these exceptional tort cases tend in the like direction.

stances, sometimes serves as a more drastic and effective agency than does the penal law.²² But the punitive function is rarely exclusive here for it frequently coalesces with compensation for the indignity suffered by the victim of the aggression. This is apparent, also, as regards punitive damages, the merits of which have been widely argued.²³ They have been defended by a distinguished French scholar,²⁴ but his suggestion that they be regarded as occupying an intermediate zone between torts and criminal law seems to confuse important established distinctions rather than to facilitate clarification of the problems involved.

Related to the above are the special problems raised by penal actions—the *bête noire* of all the systematizers since Austin. Penal actions antedate professional police. They have been severely criticized,²⁵ and, assuredly, reliance on informers and pecuniary rewards for discharge of the duties of a citizen are hardly to be encouraged. They limit systematization; whether the tests be formal or substantive, these actions are hybrids which can hardly be ignored as “freaks.”²⁶ They are made of that same larger cloth which includes the intentional aggressions noted above,²⁷ and especially those where punitive damages are awarded. On the one hand, these wrongs fall within the province of the penal law—the procedural variations and disposition of the “fines” being of secondary importance. But on the other hand, in many of these cases, there is some actual harm—hence the relevance of tort law and the award of damages. The legal analyst, viewing such rules that check the range of theory, must recognize that practical classifications are, to some extent, invariably at odds with the requirements of legal science. The practical arrangement may be justifiable on grounds of social policy, but the analyst must try to pierce the veils of historical contingency, practical utility and traditional vocabulary, and construct his theory on the actualities—the nature of the harms and of the sanctions. After he has done all of that he must be willing to recognize that at the periphery of his subject-matter there may be phenomena that evade his general theory—just as the biologist knows organisms that in some ways are “animal,” in others, “plant.” But these exceptional concatenations

22. Cf. Note, *Restitution and the Criminal Law* (1939) 39 COLUMBIA L. REV. 1185.

23. Cf. Willis, *Measure of Damages when Property is Wrongfully Taken by a Private Individual* (1909) 22 HARV. L. REV. 419, and Morris, *Punitive Damages in Tort Cases* (1931) 44 HARV. L. REV. 1173; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 479-482.

24. Demogue, *Validity of the Theory of Compensatory Damages* (1918) 27 YALE L. J. 594.

25. FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) 268.

26. ALLEN, LEGAL DUTIES (1931) 226.

27. See Note, *Statutory Penalties—A Legal Hybrid* (1938) 51 HARV. L. REV. 1092, and (1909) 27 L. R. A. (N. S.) 739.

of fact are amenable to sound methods of analysis. They sometimes provide the chief stimuli to discovery of more inclusive knowledge.

RATIONALE OF LIABILITY FOR NEGLIGENCE

The sanctions, both penal and civil, imposed for negligent misconduct rest upon diverse grounds, not easily defended. A first step towards unravelling the multiple strands of this complex problem would seem to be the separation of normal persons from those of sub-ordinary capacity. Holmes' frequent reiteration of the law's failure to take account of individual temperaments and lack of education, his observation that the law falls hardest on the weakest and the like—these imply that a different rule, a less arduous standard should be applied to those persons who are sub-ordinary but not incompetent, as legally defined.

In the case of such handicapped persons, who do not fall within the rough extremities of legal incompetence, it has been argued that the objective standard is justified because of the difficulties of proof. This ground has been rejected by Holmes and others because that issue seems no more difficult than many now attempted in judicial proceedings. Especially in these latter days when all sorts of testing devices have been utilized for many purposes, determination of individual abilities does not seem an insurmountable obstacle. Hence the plausibility of the suggestion that such persons should be required to do only "the best they can do." But the problem is much more involved than is suggested either by the common sense reform or by the argument as to difficulty of proof. To consider the simpler of the difficulties first, it may be noted that the application of lower standards in such cases would stimulate efforts to escape the ordinary classification by indulging in poor performance. The incentive would be to build up a record of such failure to use due care as to provide the helpful evidence for future use. Such a course of conduct would, of course, be hazardous in the initial stages before the lesser capacity was established. But it would nonetheless be an influence of some potency.

But the major difficulty concerns the theory of such standards, and not whether they can be administered—their existence and validity assumed. It is common experience to note that on certain occasions one did not perform up to his best. This lends persuasiveness to the thought that it is possible to discover and to lay down a "standard" for each individual, and that this can be done also for those of less than ordinary skill. But a standard implies adequacy; it also requires comparison and generalization on the basis of numerous correct performances. If investigation is confined to one person, the defendant whose individual

temperament, etc. is the subject of study, it is impossible to say anything about standards without inserting covertly, the assumption that some previous performance by him provides an adequate measure. In the case of an individual with less than ordinary skill, the investigation would presumably disclose a history of inadequate performances, just as in the cases of persons quickly provoked to kill, the history would reveal numerous hot-tempered acts. No "standard" could be induced from such behavior.²⁸ The fact is that there are no standards of "unreasonable" or negligent conduct. There are only standards of reasonable conduct and of due care; solely by reference to them is it possible to evaluate specific instances of conduct. If we exclude normal standards and their function, and confine our thinking entirely to the sub-ordinary, unreasonable sphere, we simply cannot judge whether any particular sub-ordinary actor performed to the best of his sub-ordinary capacity or not. The moment we attempt to do so by comparison with some earlier conduct on his part, we select, necessarily, conduct that was "reasonable," that met ordinary standards. If we rigorously resist such temptation, we must recognize that there are no standards for measuring sub-ordinary performance by comparison with other like conduct, which itself cannot be a measure, except arbitrarily.

Thus assertions that sub-ordinary persons should be held only to the best of their individual abilities are either meaningless if the entire judgment is confined to unreasonable or negligent conduct; or, they imply that some past conduct by the actor was reasonable or adequate as judged by ordinary standards. But the effect of the latter would be to hold these persons subject to ordinary reasonable standards of performance.²⁹ The choice, actually available, is implied in the existing rules. The standard is the objective one provided by the reasonable man, and judgments by reference to that standard are defensible. The only alternative is total exception from liability on the ground of recognized incapacity.

28. This is apparently the basis for the assertion that if the rules on provocation took account of individual deficiencies, "it would be difficult to convict of murder any person who was in fact provoked if he killed while under provocation, no matter how trivial." Burrows, *Criminal Law and Procedure* (1935) 51 L. Q. R. 46. Cf. *Rex v. Alexander*, 9 Cr. App. 139 (1913).

29. Existing rules on the tortious liability of infants would seem to support a contrary view. But these rules are not completely subjective, they do not assert that a child must do only the best he can. They purport to apply the standards of performance of children of the given age and intelligence. It is debatable whether these rules amount merely to instructions to juries to ignore the usual standards applied to adults, or whether they actually represent existing standards of adequate performance by typical classes of children. In either event, whatever the future possibilities may be for applying the like principle generally, the fact is that we now completely lack standards of adequate performance for sub-ordinary adults.

The conclusion that it is impossible to evaluate sub-ordinary conduct except by reference to normal standards does not imply that it is right to apply these rules of liability. It merely indicates the invalidity of distinguishing among negligent actors on the above basis. The conclusions drawn from the analysis above of the general principles of culpability challenge the entire law of negligence. They raise the question whether any negligent conduct whatever, including that of normal persons, should invoke penal or even civil sanctions. For although we resent thoughtlessness and lack of due care in everyday affairs, we are loath to accept the rigorous mediaevalism that some time in the past, the actor "willed not to will." Punishment implies previous harm and moral culpability. It, accordingly, is here excluded, and the like must be true of civil sanctions, also, unless reparation can be justified on other grounds. Certainly the criminal law should not function as a punitive agency in cases of negligence. The only morally tenable goal in such circumstances is education. The thoughtless should be sensitized to the occasions that call for exercise of care and consideration; common sense holds that the lack, whether intellectual or spiritual, can be diminished through association with painful consequences and by other instruction. Though this objective is also part of every rational punishment, here it should be the sole end, deliberately sought. The instruction or "conditioning" of infants is a relevant illustration.³⁰ The decisive distinction is that the sanction is not imposed for any past moral wrong; the purpose lies entirely in the future.

In the area of negligent harms, especially in involuntary manslaughter by very ignorant parents, by persons whose religious faiths bar the summoning of medical aid, and by primitive persons who for some reason find themselves subjected to the law of a culture that is totally different from their own, it should be recognized that the criminal law remains a crude instrumentality, that we simply have not reached the point of treating such persons as morally innocent agents of social harm. Nor have we begun to distinguish the various types of negligence, such as those occasioned by faulty attention, lack of moral sensitivity, inexperience, overwork, and other environmental factors.³¹ Fortunately the rigor of the existing rules is sharply mitigated by the statutes, verdicts, and judgments which leave little doubt that moral cul-

30. As Puffendorf put it, with reference to "delirious persons," "the blows given to one in this condition have no more the proper nature of a punishment answering to a fault, than those we give to a kicking horse, to break him of that custom." *LAW OF NATURE AND NATIONS* (1703, Oxford, Kennett) 39.

31. See SCHMIDT, *FAUTE CIVILE ET FAUTE PÉNALE* (1928) 103.

pability bears a close correspondence to gravity of penalty actually imposed.³²

The rigorous restriction of negligence in the criminal law contrasts significantly with the broad expanse of this field in torts. Its only important role in penal law is in involuntary manslaughter and in "negligent assault" by automobile. Except for the latter anomalous development in this century,³³ only when a death was caused did the common law of crimes proscribe negligent misconduct. The likelihood is that the instinctual reaction overrode basic principle, and required punishment. "Criminal negligence" has not been clarified by judicial efforts to distinguish it from civil negligence. The judicial essays run in terms of "reckless disregard for the safety of others," "wanton and wilful negligence," "gross negligence," and more illuminating yet, "that degree of negligence that is more than the negligence required to impose tort liability." The apex of ambiguity is "wilful, wanton negligence," which suggests a triple contradiction—negligence implying inadvertence, wilful, intention, and wanton, indifference. Most consistent with the basic doctrines of penal liability is that "criminal negligence" means recklessness. This interpretation would not extend criminal behavior beyond the bounds of moral culpability, since recklessness is volitional misconduct.³⁴ The difficulty, however, is that a careful reading of numerous cases fails to reveal any considerable correspondence between verdicts and fact-situations. The combination of particularly aggravating circumstances such as intoxication, serious defect in a potentially dangerous machine (automobile brakes) and death seem to preponderate in the convictions. But juries have frequently found only ordinary negligence in fact-situations that are indistinguishable from the above.³⁵

32. "The normal sentence for involuntary manslaughter is reputed to be six months' imprisonment." KENNY, *op. cit. supra* note 7, at 141 n.5. See MICHAEL AND WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940) 1276 n. 15.

33. See L. Hall, *Assault and Battery by the Reckless Motorist* (1940) 31 J. CRIM. L. 133.

34. The A. L. I. includes the reasonable man test in its definition of "recklessness." 2 RESTATEMENT OF TORTS (1934) § 500, p. 1293. On the analysis in the text above, this addition is either superfluous, or it confuses the distinction between volitional misconduct and mere inadvertence.

35. In cases like *Bailey v. State*, 176 Miss. 579, 169 So. 765 (1936), where the defendant was driving a heavily loaded truck faster than thirty-five miles per hour, without lights and on the wrong side of the road, and in *Collins v. State*, 66 Ga. App. 325, 18 S. E. (2d) 24 (1941), where the defendant, going seventy miles per hour, passing a gas truck on a hill and driving in the left lane, caused collisions, it is rather elementary to find "reckless disregard for the safety of others." But in *People v. Anderson*, 310 Ill. 389, 141 N. E. 727 (1923), an assault case, although the defendant was driving on a busy Chicago street, he did not see the policeman stationed there nor hear the whistle he blew, and ran into several pedestrians, his conduct was held "ordinary negligence." In *Njecick v. State*, 178 Wis. 94, 189 N. W. 147 (1922), a motorcycle driver who had taken several drinks, whose speedometer did not register and who hit a lighted wagon was held not to have a "constructive" intent to injure others.

The distinction between criminal and civil negligence serves as a caveat and a practical guide but it does not seem suited to direct application.³⁶

That private liability for individual harms caused by negligence rests on other bases than moral culpability is suggested by the fact that, except for the English positivists, reparation has generally been distinguished from punishment. The implication is that moral culpability is not the only rational ground for requiring compensation. Since it has hardly been doubted that reparation should be made for damage caused by volitional misconduct, it is the harms caused by negligence which provide the crucial area for testing the validity of any distinctive principle of tort liability. The usual rationalization is that, as between the innocent victim and the negligent person, the latter should bear the loss. It is usual to stop with some such assertion, but the difficulties really begin at that point. For the dictum appears to admit that the rules represent merely a choice of the lesser of two evils. If we press for reasons why the loss should fall on the negligent person, we encounter major complexities, amplified by the exclusion of moral culpability as a possible justification. For, as seen, persons of sub-ordinary intelligence or skill and even normal persons cannot be required on moral grounds to make reparation for damage caused unwittingly and unwillingly. On these premises, negligent harms are like natural forces, and the damages should lie where they fall. From this viewpoint, the existing rules of tort law on negligence actually impose strict liability.

The major reservation on acceptance of the above is expressed in doubts concerning the "necessity" of the negligence and in widespread beliefs that skill can be inculcated by application of unpleasant consequences. If the former is merely a restatement of the formalism that negligence means "willing not to will," it is invalid for reasons stated. If it is put forth as a phase of the prevention theory, *i.e.*, deterrence of potentially careless persons, reparation is morally untenable. Accordingly, possible justification for the prevailing tort rules is reduced to instruction of the inefficient. But this objective can be achieved better than at present by methods that are much more flexible than compensation and that need not be determined by the fortuitous damage caused by the defendant's conduct. But the rationalization that the injured person ought to be made whole persists nonetheless. The sentiment is supported by the salient fact that in an economic organization dominated by private enterprise, the one who caused the damage is the most "likely" source of reparation. We dismiss annoying questions of rational justification by believing the actor a reasonable man who was "at fault." In

36. Cf. GREEN, JUDGE AND JURY (1930) 153 ff.

these cases the levy on the defendant's estate to compensate for damage negligently caused is hardly more than a tax on incompetence. The implication that the tax is unfair is met by countervailing values that support private enterprise and signify that a system which fosters individual interests necessarily imposes special burdens on individuals. If the community were to bear all of the burdens including those arising from individual differences in ability, it might be expected to impose standards accordingly—and as suggested by collateral needs for all-inclusive control.

Much of the dispute concerning the underlying rationale of tort law results from support of implicit conflicting policies.³⁷ If attention is centered on the injured plaintiff, the temptation is strong to find that he should have reparation. The difficulties of proof that especially confront indigent plaintiffs combine with sympathetic attitudes alleviating the ills of fortune to produce impatience with a mass of restrictions on recovery. The reasonableness of this view is indicated by studies of the actual operation of the law—such as those on automobile cases.³⁸ On the other hand, tradition, private enterprise, and countervailing moral principles induce emphasis on individual responsibility. The inevitable corollary is insistence on "fault" as the only proper ground for shifting the loss to a particular wrongdoer. The two objectives and their underlying policies run at cross-purposes, and to many, the escape from the consequent dilemma is offered by insurance—the injured person is compensated but the loss is distributed over a wide field, hence want of culpability is of minor consequence. The difficulty with most proposals of this sort is that they terminate with application of legal reforms that clearly premise vast social and economic reorganization, which is to say, they pass over the really difficult problems.

The sentiment that one who negligently causes damage should repair the loss, though indefensible on rational ethical grounds, is supported not only by the need to instruct the unskilled, but also by ancient attitudes induced by the expectation that normal persons will carry on their activities with decent efficiency. Inefficiency is deemed a "fault," and this notion, though not equivalent to moral culpability, is almost as

37. In an especially stimulating discussion of civil liability, Salmond argues that "compensation is not a rational end of the Administration of justice," but he draws the non-sequitur that "compensation, therefore, . . . must be supported as being a species of punishment." Immediately thereafter he asserts that "the principle of punishment demands that there shall be liability where, and only where, there is fault; that of compensation . . . requires liability . . . irrespective of any fault. . . ." These assertions are hardly reconcilable. SALMOND, *ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY* (1891) 128, 129, 132.

38. See *Compensation for Automobile Accidents: A Symposium* (1932) 32 COLUMBIA L. REV. 785.

firmly rooted. It is based in practical reason itself, exemplified in the manipulation of ordinary means to attain common ends, and the supporting data are provided by the history of labor and industry generally,³⁹ specific instances being guild regulations and the like.

The instinct of workmanship was not invented by Thorstein Veblen. It is grounded deep in human experience and manifests itself not merely in the artifacts that distinguish human societies nor only in the creativeness of poet and scientist. Every man feels the urge to use his capacities productively, to achieve simple ideals of creative enterprise. In our own times, the deadening influence of mechanization in no small measure accounts for the revolt of the masses against the blocking-off of instincts rooted in the innermost recesses of human nature. The common attitudes that manifest pride in a job well done likewise supply the social sanctions of laughter and ridicule or promotion and other recognition with regard to incompetent performance and to work well done, as the case may be. So, too, these attitudes implement the tort rules on negligent conduct. Philosophers may probe behind the wretched job for causes; the generality of men stop with disapproval, sometimes disgust, at the indecent operation, the inept management of common instrumentalities. As to the troublesome marginal persons, it seems sufficient to assert that they have enough sense to know their incapacity, and should not have attempted the act—but again the speculative mind is quick to note the inconsistency in assuming that incompetence in performance is accompanied by ability to gauge one's skill adequately. Thus in these marginal cases, at least, morality is at odds with mores. The public conscience is salved by contrasting punishment with compensation; as the French put it, the tort judgment is directed not against the person, but represents "*une perte à un patrimoine*."

There is a further reason for retaining negligence both in the criminal law and in torts—apart from those stated. It is the need to provide a residuum of liability for those whose misconduct cannot be proved intentional, and, also, where extremely extenuating circumstances are not legally provided for. On a strictly logical view, this is insupportable: a defendant has either voluntarily inflicted a harm, is morally culpable and legally liable or he has not acted voluntarily, is not morally culpable, hence should not be liable. But as a practical problem, in a difficult investigation into facts, there is frequently serious doubt even though the misconduct was, in fact, intentional. The frequency of convictions of manslaughter where the charge is murder attests the

39. Veblen comments on Adam Smith's conception of industry as handicraft, and his description "of the skill, dexterity and judgment with which it is commonly applied." VEBLER, *THE VESTED INTERESTS* (1919) 28.

utility in this regard of the lesser degree of harm, though here other considerations are also involved. So, too, and on a much greater scale, in tort law, many of the interests protected against intentional invasions are also protected against negligent conduct. Punitive damages are excluded, but actual reparation is thus provided.

STRICT LIABILITY

For approximately seventy-five years "strict liability" has occupied the center of interest in an enormously extended and repetitious polemic by legal disputants. The battle has been symbolized by "risk" versus "fault"; these notions and their temporo-spatial location in the distinctive culture of industrial society designate the chief bases of the dialectics as well as the social import, not only of the controversy, but, also, of the major concomitant shifts in the positive law itself. The literature on strict liability⁴⁰ is voluminous in Europe as well as here. But the significance of such liability in torts as compared with that in criminal law has been but little explored.⁴¹

The chronological development of strict liability in the two fields is highly significant. For despite the fact that *malum prohibitum* is an ancient dogma, the deliberate construction of a separate law of so-called "public welfare offences" dates from the middle of the past century. So, too, despite the highly questionable reliance on nuisance and trespass in *Fletcher v. Rylands*, it is clear that strict liability in torts assumes a prominent role in that law about the same time. Indeed, much of the history could be focussed on the judicial career of one judge—Blackburn (1859-1886), who wrote the principal opinion not only in *Fletcher v. Rylands*, but also, in the decisions that extended strict liability in conversion,⁴² and definitely eliminated *mens rea* in the public welfare offences.⁴³ It was Blackburn, too, who wrote the majority opinion in *R. v. Prince*;⁴⁴ this same judge found no difficulty, in another criminal prosecution, in imputing the knowledge of his partner to an admittedly innocent person.⁴⁵ But Blackburn did not live to see the strict liability he fostered firmly established and threatening to swallow much of the

40. For an excellent history, see BETREMIEUX, *ESSAI HISTORIQUE ET CRITIQUE SUR LE FONDEMENT DE LA RESPONSABILITÉ CIVILE* (1921).

41. The most helpful studies which the writer has seen are LABORDE-LACOSTE, *DE LA RESPONSABILITÉ PÉNALE DANS SES RAPPORTS AVEC LA RESPONSABILITÉ CIVILE ET LA RESPONSABILITÉ MORALE* (1918). Laborde-Lacoste was a student of Duguit, and his thesis strongly reflects the teacher's views; SCHMIDT, *op. cit. supra* note 31; and DITTE, *DE LA FAUTE CIVILE ET DE LA FAUTE PÉNALE* (1911).

42. *Hollins v. Fowler*, L. R. 7 H. L. 757 (1875).

43. *Regina v. Stephens*, L. R. 1 Q. B. 702 (1866); *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337 (1873).

44. (1875) L. R. 2 C. C. R. 154.

45. *Davies v. Harvey*, L. R. 9 Q. B. 439 (1874).

law built on "fault"—although Europe did see the first Workmen's Compensation Law (1884) enacted just before his retirement.

The coincidence of strict liability with high industrialization, especially the mechanization consequent on the Industrial Revolution, has not escaped the attention of writers, especially in torts. But the relation of this legal development to the broad current of philosophy and social theory that stimulated and accompanied it have been neglected. It is these ideological conditions that deserve particular attention because they challenged the basic principles of the entire criminal law, and the like impact on torts was a necessary implication.

The positivism of the last century which drew its direct sources from Gall,⁴⁶ Comte⁴⁷ and Bernard⁴⁸ as well as from the early evolution movement found its warmest advocates among German and Italian criminalists. Uniting a laudable emphasis on facts and economic organization with a dogma that restricted theory to observable behavior, these writers assailed the citadels of Volition and Responsibility, and their corollary, Punishment. In their places rose all-embracing Determinism, enigmatic "Social Accountability" and euphemistic "Treatment." The positivists, quite consistently with their premises, attacked traditional distinctions between penal and civil law, Ferri asserting that "there is no essential difference,"⁴⁹ and protesting "the illogical and absolute separation."⁵⁰ But while positivistic ideas were widely espoused in intellectual circles, their effect on criminal legislation was conspicuous only as regards the expansion of *mala prohibita* by way of the so-called public welfare offences. Traditional ideas on morality and the firm association of punishment with culpability rigorously limited their influence in the major crimes except in the revolutionary states—and even in Russia the pendulum has for some time moved back to the older doctrines of punitive justice even in the area of juvenile delinquency. As regards penal law, the French rejected positivism as "une theorie aussi brutale."⁵¹

But in torts, the positivistic ideas underlying strict liability attained a signal success.⁵² Thus in France, "carried over to the terrain of civil responsibility, the Italian theory of risk found there the complete success

46. SUR LES FONCTIONS DU CERVEAU; SUR L'ORIGINE DES QUALITÉS MORALES, ETC. (1822) esp. 1, 336 ff.

47. COURS DE PHILOSOPHIE POSITIVE (1830-42) tr. by Martineau (1893).

48. INTRODUCTION À L'ÉTUDE DE LA SCIENCE EXPERIMENTALE. (1865).

49. FERRI, CRIMINAL SOCIOLOGY (trans. Boston, 1917) 413.

50. *Id.* at 511-512. See also DITTE, DE LA FAUTE CIVILE ET DE LA FAUTE PÉNALE (1911) 138.

51. I. H. ET L. MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE (1934) 74.

52. For the influence of the Positivist School on civil responsibility, see LABORDE-LACOSTE, *op. cit. supra* note 41, Ch. 2.

which it failed to achieve in the penal law."⁵³ This was hardly the result of the merits of the theory; practically all writers agree that modern mechanized industrialism is the major cause of the spread of strict liability in the civil field. Saleilles' essay⁵⁴ on accidents (his first professional work was in criminal law) was among the early tracts on that subject, which, together with the legislation on Workmen's Compensation at the end of the last century, won wide acceptance of strict liability in the private law. But the opposition to its spread even there continued vigorously. A distinguished scholar, supporting the traditional "fault" theory, argued that objective risk was immoral since it assumed the inevitability of accidents whereas the former views them as preventable by diligence.⁵⁵ Others contended that strict liability should be applied only where the person who will be compelled to make reparation can be known in advance, and can protect himself by insurance.⁵⁶ Even Duguit, who vigorously championed the then relatively new principles, did not propose total elimination of fault, he urged its restriction to individual relationships. Only where the activity is carried on by a group would he substitute objective risk. Here he would reject all considerations of blame and simply ask "Which is the group that ought finally to carry the burden of the risk?"⁵⁷ While he recognized that the entire community benefits from the activities of the various industrial groups, he argued that they profited the latter more abundantly and directly.⁵⁸

These ideas on risk liability have found wide acceptance in all industrialized societies. Although the trends of controversy and the social legislation may be rather easily related to the direction of economic change, it is difficult to appraise these important reforms. All that need be noted here, supplementing what was said above,⁵⁹ is that the apparent inevitability of accidents in industrial enterprise together with the rise of insurance casts the relevant ethical questions into an entirely different aspect from their traditional ones, that were suited to a simple economy with handicraft under the actual control of a few individuals. The legal problems merge into much broader issues of social policy and utility; but, it is certainly no forgone conclusion, as is sometimes assumed, that even the least challenged aspect of strict liability, Work-

53. 1 MAZEAUD, *op. cit. supra* note 51, at 75-6.

54. LES ACCIDENTS DU TRAVAIL ET LA RESPONSABILITÉ CIVILE (1897).

55. Hauriou, cited in 1 MAZEAUD 373. Planiol's criticism was much harsher. See his *Etudes sur la responsabilité civile* (1905) 34 REV. CRIT. 378-9.

56. RIPERT, LE RÉGIME DÉMOCRATIQUE ET LE DROIT CIVIL MODERNE (1936) 330 ff. Ripert's complaint is that "the modern law is no longer concerned with the interests of the actor, but rather with the victim." *id.* at 331.

57. DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ D'APRÈS LE CODE NAPOLÉON (1912) 138-139.

58. *Id.* at 140.

59. See *supra* p. 984.

men's Compensation, actually functions in the best interests of the masses of injured workmen,⁶⁰ to say nothing of the wider implications of the insurance of incompetency in other fields.

Whatever its merits, and despite Jeremiah Smith's prognostications regarding the "true" subject-matter of torts only a quarter of a century ago, strict liability has expanded enormously in private law. The historic examples of trespass, nuisance, wild animals, carriers', and innkeepers' liability have joined more significant developments in conversion, vicarious liability, liability attached to ownership of an automobile, to various hazardous activities, to manufacturers, industry, in defamation, and the rules on liability for unforeseeable damage to constitute a major division of tort law. The relatively minor inroads of strict liability in criminal law and the rather general criticism of it even in the petty offences contrast sharply with the sweep of the doctrine in torts and its wide approval in that field. The persistence of traditional ideas on morality, at least in the public mind, accounts for the continued rigorous demarcations of punishment from civil sanctions regardless of technical and sophisticated critiques.

The more difficult questions concern the meaning of strict liability in both fields—for it cannot be assumed that this is uniform. On the surface, to be sure, "strict liability" is an identical formula in both torts and criminal law. At least the dicta, clipped from their factual contexts, run in identical phrases, notably of "action at peril." But there are grounds for believing that the difference in the two fields inheres not merely in the extent of the doctrine, for, even within the limited area of penal law where strict liability is invoked, interpretation of it is apt to be distinctive. The special frame of relevance for the criminal law is set by the so-called *mala prohibita*. The writer has elsewhere criticized the ancient distinction *mala in se—mala prohibita* in detail;⁶¹ he concluded that it is invalid and a persistent bar to correct analysis of numerous relevant problems including the instant one. The chief criticism in that discussion was directed against the traditional notion that some acts are immoral "in themselves" whereas others are wrong only because they are forbidden by law. It was argued that a more defensible conception

60. "... the indemnity assured to the workman—or to his family in case of a fatal accident—is considerably less than the loss sustained." Demogue, *Validity of the Theory of Compensatory Damages* (1918) 27 YALE L. J. 594. Cf. MASS. JUD. COUN. 8th ANN. REP'T. (1932) 25 *et seq.*

61. *Prolegomena to a Science of Criminal Law* (1941) 89 U. OF PA. L. REV. 549, especially 563 *et seq.* This article is reprinted in LEGAL ESSAYS, BICENTENNIAL CELEBRATION VOLUME (1941) 309. More than a year after publication of the writer's *Prolegomena* he came upon an important French study which agrees with his major arguments and conclusions. See HEITZMANN, *DE LA NOTION DE CONTRAVENTION* (1938) especially 25 and 45. This thesis bears the Columbia University Library's stamp, "June 19, 1940."

was provided by "a continuum of moral principles" to include the major felonies at one extreme and the petty offenses at the opposite. This analysis was attempted as an essential but preliminary attack on a problem of paramount importance for all serious thinking in the criminal law field, and it terminated with the recommendation that further study was desirable of "non-penal functions of criminal law"—such offences as vagrancy, prostitution, gambling, and the new penal "regulations" being specifically mentioned.⁶²

Mr. Francis Sayre, in his careful study of *Public Welfare Offences*⁶³ criticizes decisions on the necessity of proof of *mens rea* that are made by reference to the distinction, *mala in se*—*mala prohibita*. He purports to reject this basis for decision, because "many offenses which are held not to require proof of *mens rea* are highly immoral; and many requiring it are not inherently immoral at all."⁶⁴ But the difficulty with this criticism, despite the soundness of appraisal of the confusion in the cases, inheres in the continued acceptance of the traditional distinction between *mala in se* and *mala prohibita* and, also, in an unfounded restriction of ethics. This latter attitude is similar to those represented in many English writers for whom "immorality" seems to be confined either to a major wrong such as a felony or to some form of sexual misconduct. At the same time, these attitudes in highly competent quarters,⁶⁵ whatever their validity, do indicate the limitations on the utility of "morality" as an instrument of analysis. It is too broad a concept to function fruitfully in the area of lesser harms, unless it is supplemented by additional relevant theory—and our problem concerns the availability of any for the instant purpose.

The conclusion⁶⁶ that the public welfare offenses are indistinguishable from criminal behavior generally, requires particular study of convictions despite lack of knowledge by the defendant. For the most part, the situations dealt with in the public welfare offenses indicate that ordinary care would have produced compliance with the enactments, and that elimination of *mens rea* in these cases is consequently not all-defeating of the paramount principles of penal law. The history of this body of case law reveals considerable reluctance on the judges' part to concede the irrelevance of *mens rea* and to engage in dubious dogmatics distinguishing "civil penalties" from punitive sanctions, and "public wrongs" from crimes. Thus Wright J., in quashing a conviction for supplying liquor to a constable on duty, observed "It is plain that if

62. *Prolegomena*, *op. cit.* *supra* note 61, at 329.

63. (1933) 33 COLUMBIA L. REV. 55.

64. *Id.* at 71.

65. Cf. STEPHEN, 2 HISTORY OF THE CRIMINAL LAW (1883) 80.

66. *Op. cit.* *supra* note 62.

guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction. . . ."⁶⁷ So, too, as regards a number of statutes, *e.g.*, the English Merchandise Marks Act, although the prosecution need not prove *mens rea*, the defendant is permitted to establish its non-existence. And the Cour de Cassation has held in certain instances that though the facts give rise to a presumption of fault, the defendant can rebut this by proving *force majeure*.⁶⁸ But in the generality of public welfare cases the doctrine is definitely enunciated that *mens rea* is not essential, and that its proof by the defendant is irrelevant and presumably not permitted—except to mitigate the penalty.

More serious yet are a number of cases where, in addition, not only due care, but even a very high degree of care apparently would have altered neither facts nor decisions. Thus a seller of cattle feed was convicted of violating a statute forbidding misrepresentation of the percentage of oil in the product, despite the fact that he had employed a chemist to make the analysis and had even understated the chemist's findings. Alverstone C. J. conceded "this is . . . a hard case."⁶⁹ So, too, it has been held that a butcher, who innocently and without negligence sold diseased meat, violated the statute, and that the provision for imprisonment as one of the sanctions did not require proof of *mens rea*.⁷⁰ It was implied that if it required an expert to discover latent imperfections, one who engages in the meat business must incur that expense.⁷¹ But the most suggestive parts of the opinion are the remarks to the effect that if a defendant acted without knowledge, "the justices would impose either a reasonable fine or no fine at all." And Kennedy L. J. thought that in such a case the magistrate would not only inflict "a merely nominal fine," but, also, that "under modern legislation, . . . he need not even convict at all when there is only a trifling breach of the law."⁷² Such cases, where it clearly appears that the violation did not

67. *Sherras v. DeRutzen*, [1895]. 1 Q. B. 918.

68. *Arret du 6 Mar. 1934 Pas. 1934, I, 207*. The English Fertilizers and Feeding Stuffs Act, 1926, 16 & 17 GEO. V. § 7 (1) provides that reasonable care is a defence.

69. *Laird v. Dobell*, [1906] 1 K. B. 131. Even in such cases there is a possibility of connivance, but in the above there was no suggestion that the chemist was not reliable, or that the defendant was insincere.

70. *Hobbs v. Winchester Corp.*, [1910] 2 K. B. 481.

71. *Cf. Groff v. State* 171 Ind. 547, 85 N. E. 769 (1908).

72. *Hobbs v. Winchester Corp.*, *supra* note 70, at 485. In the *Hobbs* case the butcher was suing the town to recover statutory damages for wrongful seizure of the meat. It seemed shocking to Farwell L. J. that "a butcher who did in fact sell meat unfit for human food should be able to get compensation. . . ." (*id.* at 481).

Two other English cases which apparently support the rigorous doctrine of strict liability deserve notice. In *Regina v. Bishop* (1880) 5 Q. B. 259, the defendant was convicted of receiving into her home two or more lunatics, the house not being a licensed hospital. The jury found that the defendant acted honestly and on reasonable grounds, but the judges affirmed the conviction, holding that

result from any fault, are rare—almost invariably the strict liability formula is pronounced in situations which would not have occurred without, at least, negligence. In these rare situations “strict liability” apparently means precisely the same as in torts. But even this concession is a dubious one for if one or two anomalous decisions are ignored, and one considers the judicial language in the above carefully considered case,⁷³ the opinions amount almost to instructions to trial courts to acquit where lack of knowledge is not culpable.

Nonetheless the misgivings that must be stimulated by such a possible use of penal sanctions are considerable, and they have given rise to studied defenses of the present practices. Efforts to distinguish the public welfare offences from “true” crimes on the ground that in the former, “regulation of the public order” is more important than “singling out wrongdoers for the purpose of punishment or correction,” and on the ground that imprisonment is not prescribed⁷⁴ are not persuasive. Nor do “formal” distinctions carry much greater weight.

But it is possible to hazard certain tentative generalizations regarding the public welfare offences.⁷⁵ Firstly, many of the enactments apply not to the general public but only to certain traders, particularly suppliers of food or drugs and vendors of alcoholic beverages. Others, which have more general application as to potential offenders, are restricted to very few activities—the operation of automobiles, safety of

the statutory terms “lunatic . . . and persons of unsound mind” included hysterical patients. The defendant had advertised for patients suffering from “hysteria” etc. Accordingly the facts included knowledge and, indeed, deliberate conduct in violation of the statute. The case is more nearly relevant to *ignorantia legis* than to action “at peril.”

In *Rex v. Larssonneur*, 24 Cr. App. 74, 149 L.T.R. 542 (C.C.A. 1933), the defendant, ordered deported from England, went to Ireland and was brought back by Irish officers who turned her over to the English police. She was convicted of being an alien found in England, to whom permission to land had been refused. The jury’s verdict found her guilty “through circumstances beyond her own control.” One can only say of the decision that it reaches the ultimate peak of arbitrary injustice, and the sentence of three days’ imprisonment provides no extenuation. One can read between the lines some of the motivating conditions—the defendant was a Frenchwoman, first permitted to land in England on condition that she would not engage in any employment. Later she was deported, went to Ireland, and was returned as stated above. Perhaps the nature of the employment which constituted violation of the conditions of the first entry helped the righteous judges to their stern decision.

There are a number of American cases, also, of conviction regardless of reasonable care, *e.g.*, for illegal transportation of slaves. *State v. Balbo & Susq. Steam Co.* 13 Md. 181 (1858); *Cf. Com. v. Mixer*, 207 Mass. 141, 93 N. E. 249 (1910) (defendant, a driver for a carrier, transported an unmarked barrel of liquor); *People v. Werner* 174 N. Y. 132, 66 N. E. 667 (1903) (sale of liquor to a minor). But, again, by far the greatest part of the American decisions are cases where ordinary care would have effected compliance with the statutes.

73. In the *Hobbs Case*, *cit.* note 70.

74. Sayre *op. cit. supra* note 63, at 72.

75. The following remarks may be illustrated by reference to Sayre’s tabulations, *id.* at 73, 84-88.

highways, and various health measures. Nextly, these regulations and the conditions of conforming to them presuppose regular inspection, licensing, and other administrative supervision. This is not suggested as a condition of proper enforcement of these statutes, but rather to indicate the nature of the relevant behavior, *i.e.*, it is not merely "affirmative"; it also represents a continuous pattern of activity—the violations being, normally, specific instances of a general course of sub-standard conduct. Thirdly, the public welfare enactments are relatively new. They represent adaptations to an intricate economy, an impersonal market, and modern invention. Although regulation of quality and workmanship dates at least from the guilds, violations under conditions of trade within primary groups are still more readily recognizable as immoral. Thus, fourthly, the modern public welfare offences are not strongly supported by the mores. Their occurrence does not arouse the resentment under modern conditions that characterizes the affective attitudes directed at the perpetrators of traditional crimes. Hence, though Ross' eloquent denunciation of food adulterers as deliberate large scale murderers⁷⁶ is logical, it carries little popular conviction because sustaining mores are largely lacking. The escape of such offenders from onerous consequences attests the impotence of rational ethics unsupported by emotional attitudes.⁷⁷

These criteria may be significant for scientific study; they are not presented to justify the elimination of *mens rea* from these offences. The usual defense is hardly more than a concession that the results represent the lesser of the evil choices available. As Baron Parke put it in an early case, "the public inconvenience would be much greater if in every case the officers were obliged to prove knowledge."⁷⁸ Protection to the public from diseased or adulterated food, the indiscriminate sale of liquor and the like are deemed to transcend occasional injustices, and the stigma is softened by avoiding the derogatory terminology of the criminal law. This suggests that if the penalties were confined to negligent misconduct, conviction might be defensible, not as punishment, but as instruction, and as a stimulus to the creation of relevant sustaining mores. But, even on the premise that strict liability is warranted in such cases, it is impossible to justify it when the defendant has acted not only innocently, but also carefully. The only support is the supposition that it is always possible to act still more cautiously and the further dogma, impossible of rational proof, that

76. ROSS, *SIN AND SOCIETY* (1907).

77. Sutherland raises very important problems in his *White Collar Criminality* (1940) 5 *AMER. SOC. REV.* 1.

78. *Regina v. Woodrow* 15 M. and W. 404 (Ex. 1846).

we can never be certain that due care was employed or even that the conduct was innocent. But such arguments of expediency are bald confessions of the gross inadequacy of existing legal institutions. Such penalization of persons who are both innocent and careful smacks of an indiscriminate terrorism that is foreign to the common law. The entire problem should be re-examined with a view to providing adequate instrumentalities for determination of knowledge and due care. It does not follow that the public welfare offences should be immediately included in penal codes, nor that a distinctive terminology should not be employed for some time to come to set them apart from generally recognized crimes. Existing decisions and codes express intuitive judgments of the desirability of avoiding large gaps between law and public opinion.⁷⁹ The public welfare offenses suggest a possible development not unlike the creation of many minor offences by the Court of Star Chamber, which have since become integrated in the mores. The like support by the public may be expected for these newer harms as public opinion becomes enlightened, and indeed that objective raises serious doubts regarding the indefinite classification of public welfare regulations outside the criminal codes, unaccompanied by sustained efforts to provide the institutions required for determination of the cases on their merits.

But the issues of public and legislative policy⁸⁰ must not be confused with the requirements of legal science. Here the demands are for stripping the decorative vocabulary from the realities and generalizing accordingly. The factors noted above—the incidence of the regulations on restricted business groups or on special activities, the normal need for a standard course of conduct to insure compliance, suggesting detailed administrative control, the novelty of such regulation in a complex impersonal economy, and the absence of supporting public attitudes—these combine and interact upon one another. They increase insight into current analyses and judicial decisions, but they do not fulfill the requirements of a scientific theory. The characteristics noted are matters of emphasis rather than essentials that distinguish the public welfare offences from other crimes.⁸¹

The public welfare offences are not the only ones that are im-

79. "It is everywhere understood that regulative statutes, although supported by penalties, stand outside of the criminal law of the codes." FREUND, *LEGISLATIVE REGULATION* (1932) 34.

80. See Gausewitz, *Criminal Law—Reclassification of Certain Offenses as Civil instead of Criminal*, 12 WIS. L. REV. 365-7.

81. The third edition of Beale's *CASES ON CRIMINAL LAW* (1915) included a section on Public Torts under the general heading "The Offences." The facts included vary considerably—*e.g.*, not repairing a public road, blasphemy, acts contra bonos mores, vagabondage—and it is difficult to detect significant common characteristics that justify the title of this section.

portant in relation to elimination of *mens rea*. Besides *ignorantia juris*, negligence and the rules on mistake and provocation, discussed above,⁸² there are several other important type-situations, usually treated as *mala prohibita*, which must be noted in this regard. They are fact-situations which constitute violations of laws that carry severe penalties. *R. v. Prince*⁸³ represents one type of these exceptional situations. It will be recalled that the defendant, reasonably mistaking the age of a girl actually below that of consent, was held guilty of seduction. Brett's masterly dissent, which seems to have been approved by Stephen,⁸⁴ could not prevail against the ingrained morality that the defendant did an act "wrong in itself," although Bramwell conceded that if a woman of fifty were involved, the "seduction" would not be "wrong." Of like gendre are adultery cases and decisions on bigamy that have rigorously limited the *R. v. Tolson* doctrine. In all these situations it is obvious that sexual morality has over-ridden established principles of the criminal law. Decisions directed by sex mores are notoriously irrational. Without asserting that these decisions are indefensible on some ground, it is certain that the validity of these exceptions to the fundamental requirement of *mens rea* cannot be assumed. Related to the above situations, and questionable on analogous grounds, are decisions holding that prohibitions on the sale of narcotics do not require *mens rea*.⁸⁵ Reliance on decisions in food adulteration cases, as precedents, implements the contention of informed observers that laws on the distribution of narcotics and the imposition of substantial prison sentences in such cases reveal a still-primitive grasp of an important social problem—and not any justification of the strict liability imposed.

The above analysis of strict liability in torts and in criminal law suggests certain general conclusions. In addition to the great and approved range of strict liability in torts as contrasted with the limited and challenged application of the doctrine in the criminal law, there are other reasons than those noted above, to distinguish the nature of the liability in the two fields. Apart from such vestiges as trespass to real estate and others noted above, strict liability in torts should imply insurance. Only a superficial comparison identifies such modern strict liability, *e.g.*, in industrial cases, with primitive rules of action at peril. The contemporary rules embody rational ethical judgments on the entire situation—and the paramount consideration in the modern condi-

82. Hall, *Interrelations of Criminal Law and Torts: I*, (1943) 43 COLUMBIA L. REV. 753.

83. (1875) L. R. 2 C. C. R. 154.

84. *Regina v. Tolson* 23 Q. B. D. 190 (1889).

85. *United States v. Balint* 258 U. S. 250 (1922). Cf. *Greenfield, Malum Prohibitum* (1921) 7 A. B. A. J. 493.

tions is that the losses are widely distributed. But a contract to insure against a penalty imposed for violation of a public welfare offense would be invalid. So, too, a tort judgment can be enforced against the defendant's heirs, but this would hardly seem possible as regards penalties. These penalties are small and they are prescribed; in torts, the damages assessed on strict liability are sometimes very substantial and they are unliquidated until fixed by the triers of the facts. Regardless of judicial euphemism, the imposition of a penalty casts a stigma on those convicted; no such dishonor is attached to tort judgments based on strict liability. The above differentiae support the general thesis that moral culpability should remain the essence of criminal liability, and that existing legal classifications should be reorganized on that basis. They invite a reexamination of doctrines that have been complacently put forth in recent years as sound exceptions to the basic principles of criminal law. They suggest that the relevant problems may call for special theories and a new terminology, but that they are not solved by simply inventing the category, "public tort." For even in this area of lesser harms, there are important distinctions between torts and crimes.

CONCLUSION: THE RANGE OF FUTURE STUDY

The principal notions analyzed above, "harm," "culpability," "effects," "individual damage" and "social harm," together with related concepts, can be incorporated into a series of more or less systematized propositions. These generalizations would not be merely formal ones; they would refer to a set of major values, to the concrete incidence of these in social phenomena, and to relevant rules of torts and criminal law. This body of knowledge, though not systematic in a rigorous sense, should be superior to what is provided by the presently unrelated doctrines. The data which ultimately challenge investigation comprise infinitely varied phases of human conduct which, so far as it is influenced by rules that incorporate the above basic ideas, represents an indissoluble integration of suggestive ideals with the actualities of observable phenomena. The interrelated knowledge of torts and criminal law not only amplifies the existing separate disciplines by increasing insight into present meanings; it also provides a more adequate instrumentality for analysis of such conduct in the context of important social problems.

This can be indicated briefly, *e.g.*, by reference to various problems that center on fraud. The prevailing mode of isolated analysis encounters fraud in numerous fields, but we lack inclusive studies of broad problems that, taken from life, defy the atomization which their arbitrary dissection into separate unrelated categories renders inevitable. Such studies

would not only contribute towards a legal sociology, they would sharpen present understanding of the various categories themselves and amplify our understanding of their functions. For example, a simplified version of the questions raised by fraud involves the criminal law at one extreme, the Federal Trade Commission at the other, and tort law viewed as occupying an intermediate ground. A statement of the bare facts technically material to the various rules of law obliterates empirical nuances that are important in the actual operation of the legal controls. Thus many of the cases heard before the Federal Trade Commission include a misrepresentation of fact, scienter, reliance and damage. In theory they fall within the confines of each of the three above legal divisions. This suggests that arbitrary influences or class domination determine the actual manipulation of controls—else why should a businessman be met merely by an order to “cease and desist” where, on the same facts classified as “material” with reference to more onerous sanctions, another individual, especially if indigent, would be imprisoned for a substantial term? But a scrutiny of the facts reveals decisive variations of an order different from the “legally material.” The overriding influence of the mores which evaluate false commercial advertising and food adulteration quite differently from attempts to poison and confidence games has been noted. The differences thus reflected are certainly not wholly irrational, and, in any event, so long as it is generally conceded that there should not be great gaps between public attitudes and legal controls, though the latter need not always merely reflect the former, such disproportionateness will persist. The actual configurations of fact also influence the selection of sanctions in other directions. Financial status varies considerably even in the revolutionary states. There is little point in suing an irresponsible even for assault—the penal law is the obvious recourse. But if the assailant is a man of means, substantial damages not only satisfy but are obtainable without risk of the presumption of innocence. Libel, especially by a corporation, almost as obviously calls for civil action. If the multiplicity of sanctions is viewed functionally in light of the facts and the probabilities of actual satisfaction, many of the formal inconsistencies fall into a rational frame or become of minor importance. In addition to mores and the prospects of actual satisfaction, the facts of fraud may be differentiated from other points of view. A person who has purchased a package of cigarettes in reliance on false advertising is not only disinterested, it would be burdensome to take legal proceedings; but multiplied by millions, the damage is very substantial. Again, quite apart from reliance and damage, competitors have interests, and indeed the decent conduct of trade should, itself, be protected—and these require suitable agencies of investigation

and enforcement. Whether the "person" who commits the wrong is a minor or a corporation may have consequences that are significant both legally and empirically.

Finally, the fact-situations are frequently distinguishable in terms of legal criteria, and though this alone does not account for the varied treatment, it is an important supplementary factor. Thus scienter is not required before the Federal Trade Commission, and this is approximated in the departures from the older tort doctrine in a number of jurisdictions, especially in intimate vendor-vendee relationships. But as to damage, the Federal Trade Commission and the criminal law are in accord. Of course, it is the former that deals much more frequently with fraud that has not damaged, and not only because it functions to prevent future harm, but also because protection of the consumers' interests requires that they be supplied with what they wanted—even though the substitute is actually better for them; in addition, the competitor's interest requires anticipatory relief. So, too, whereas actual reliance has rather definite denotations in torts and criminal law, and is there required, it is a matter of minor concern before the Federal Trade Commission—reasonable probability of such reliance, broadly construed, is sufficient. Negligence on the part of the victim is irrelevant generally, but intentionally wrongful participation by him, though significant in torts, affects neither the penal law nor the Federal Trade Commission, which must be guided by more general policies. As expected, there is a progressively wider interpretation of the nature of the misrepresentation as one proceeds from crime to tort to "unfair or deceptive acts or practices"—the last including, *e.g.*, lotteries and unfair discounts. Procedure, taken in the broadest sense, varies considerably in the respective agencies noted, the purposes of the proceedings, the nature of the wrong and of the sanctions supplying the directing considerations. The variations in fact, doctrine and purpose, indicated above, suggest a preliminary approach to analysis of important socio-legal problems which involve comparisons of the operation and efficacy of different agencies of control.

This essay has been devoted primarily to analysis of the nature of various typical harms that form a large part of the subject-matter of such problems. But it is apparent that the sanctions require equal study. The prevailing mode of thought has concentrated almost exclusively but only formally on the sanction. Without careful analysis it has indulged in the traditional assumption that punishment differs from reparation, and in the circularity that the nature of the sanction determines that of the harm, *i.e.*, whether it is a crime. The purpose of the emphasis on the nature of the harms has been to disengage the logical im-

passee and to develop the elementary principle that the nature of the harm should bear a rational relation to the sanction. Once this perspective obtains, it is possible and necessary to focus on the sanctions, themselves. The starting point is recognition that sanctions resemble harms not only formally, but also in substance. Just as do the legally proscribed harms, they, too, comprise behavior-circumstances that, to normal minds, are "evils," invasions of interests, etc. The two sets of "invasions" generally parallel each other but certain important differences exist. The proscribed harms vary much more than do the sanctions, *e.g.*, they include negligent and reckless conduct whereas sanctions are deliberate. The harms comprise direct invasions on reputation and other interests that are only indirectly impaired by the sanctions. The harms are, of course, generally disapproved whereas the sanctions are widely supported. They represent the approved channeling of the ultimate force of the community on the offender—hence the obvious invalidity of opposing law and force.

It is when we proceed from these common attributes of harms and sanctions to the task of classifying the latter that the major complexities appear. The traditional and principal classification of sanctions has been "penal" and "civil"—the latter being a catch-all to include everything "non-penal." This classification is valid to the extent that "penal" denotes a distinctive sanction, but its utility, even on that assumption, is impaired by the indiscriminate confusion of all other sanctions. The extent of the problem may be indicated even from a very limited listing of specific sanctions. In the traditional criminal law, alone, penalties have varied so considerably as to defy summary treatment. They are a tribute to man's ingenuity and sadistic impulses, and they range from simple admonitions and petty fines to capital punishment. In past ages they were sometimes imposed on families and on entire communities; they reflect the influence of economic conditions and class interests as well as that of moral ideas. Accordingly, a helpful limitation on the task of classification is a more or less arbitrary restriction to existing sanctions, without regard to their origins.

An initial catalogue of sanctions, compiled to guide formulation of the scope of inquiry, might begin with declaratory and investitive judgments at one extreme, and capital punishment at the other. The difficulties would be raised by various intermediate sanctions, particularly by the so-called civil penalties, fines, punishment for contempt, sanctions applied for violation of injunctions, and those discussed above—punitive damages and penal actions. Revocation of license to engage in various activities, cease and desist orders, and such sentences as compulsory attendance at a violator's school, visit to a hospital, copying of rules,

enforcement of a very low speed limit, which have recently been imposed for traffic violations, raise other pertinent questions. Such matters as self-help and self-defense would need to be considered, and the totality of legal sanctions must be distinguished from the vast congeries of social sanctions. The first probability that emerges even from such a partial enumeration as the above is that a much nicer classification than the traditional one is required together with appropriate terms that avoid the barren catch-all, "non-penal." Some such classifications have been suggested and others can readily be imagined, but it will not be easy to invent one that is both detailed and also representative of actual differences in the data.

It is clear, nextly, that some theory, however tentatively held, is essential to any analysis of sanctions, and the plain direction for the initial inquiry concerns the hypothesis that penal sanctions are distinctive. The fact that "penal law" is the only branch of law that has been widely designated by reference to the sanction reflects the general belief that punishment is distinctive. But the professional literature includes arguments that payment of a money judgment is a type of "punishment," which reveals the major difficulty even in a limited inquiry, namely, that inhering in the ambiguity of the basic term. Partly by necessity, but also because of its considerable persuasiveness, the required theory had best begin with a testing of the traditional doctrine. Summarized briefly, it is that punishment is founded on the axiom that man is a moral being, and ultimately on the thesis that ethical judgments are intelligible and defensible. The essence of punishment is the deliberate infliction of suffering on the person of the offender because of a past moral wrong; by contrast, reparation does not imply suffering. Punishment is, therefore, in all modern systems confined to the offender. It is not accompanied by anger; on the contrary, except for the capital penalty, it indicates an appreciation of the offender's moral potentialities and an avowal of his possible reformation. The chief end of the civil sanctions, reparation, does not require that the harm involve moral culpability; nor is payment by the offender essential, any funds allocated to satisfaction of the judgment suffice. By contrast, the criminal must submit himself to the punishment; it cannot be transferred—though the fine challenges at this point. So, too, punishment is inflicted solely by public officials whereas compensation may be arranged by the parties, since the latter is not exclusively in the public interest.

These generalizations are important as preliminary hypotheses, but their validity and utility can be tested only by analysis of their relations to the actual specific sanctions that are employed in profuse variation

in modern legal systems. The premises of such testing are that the sanction must bear a rational relationship to harm and that sanction and harm, if correctly ascertained, contribute to each other's significance. Indeed it is almost axiomatic that we cannot understand the one until we know its connections with the other. The degree of possible rational differentiation of harms in terms of their relative severity fixes the limits for corresponding variation in sanctions. Sanctions must also bear a rational relation to other sanctions. These premises are suggested by evaluations implicit in any balanced legal system. But sanctions also function in the attainment of objectives set by non-legal criteria. Feasibility and appropriateness to facilitate attainment of these ends suggest standards for determination and appraisal of sanctions that supplement those posed by the above internal criteria. In the light of the paucity of existing knowledge on the broad social problems which intimately concern both torts and criminal law, the foregoing represents a very brief survey of a vast terrain which challenges the full resources of contemporary understanding and research. Insight into the elementary principles that form the links between torts and criminal law provides the essential condition for further study.