THE EVOLUTION OF CRIMINAL RESPONSIBILITY

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Professor Parker investigates the history of the concept of criminal responsibility with particular reference to homicide. The notion of criminal responsibility is traced through Anglo-Saxon and Germanic law and early English law to recent times. The observations and reports of such commentators as Coke, Hale, Hawkins, Foster and East are treated in an historical-analytical fashion. Because of the historical breadth of the article, which encompasses feud and vengeance as well as modern thought on the subject, and because the subject is treated in various socio-political circumstances, a valuable perspective on the concept of criminal responsibility is offered in Professor Parker's presentation.

There have been many changes in the criminal law in the last decade. The debate over law and morals has continued and at the end of the sixties, adult consensual homosexuality was no longer a crime if performed in private.[1] There have been changes in the law relating to abortion,[2] suicide,[3] contraceptive information,[4] and obscenity.[5] There has been a great reduction in the use of capital[6] and corporal[7] punishment and some jurisdictions have totally abandoned the use of these punishments.[8] In addition there have been investigations of the penal system of the Western world which have reported that the use of harsh and retributive penal measures are ineffectual and should be curtailed.[9]

Criminal responsibility has also changed. The whole question was raised and debated *ad nauseam* after the decision in *D.P.P.* v. *Smith*.[10] Ironically, while the criminal rules of accountability were becoming more strictly construed by the House of Lords in the *Smith* case,[11] the courts were taking a more limited view of accountability in tort liability.[12] Some of the theories propounded seemed to suggest that it would be easier to convict a man of constructive murder than to find him financially liable for a tortious act.

The *Smith* decision and the Hart-Devlin debate on law and morals occurred more than ten years ago. In more recent years, there has been something of a reaction. This is due partly to the interest of the behavioural scientists in the questions of crime and correction and partly to the interest of those disciplines in the criminal law itself. Given the fact that the concepts of *mens rea* and *actus reus* are based in part on the Judeo-Christian ethic, one could also add that the changed

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1 Sexual Offences Act, 1967, c.60 (U.K.); Stats. Can. 1968-9, c.38, s.7.
2 Abortion Act, 1967, c.87 (U.K.); Stats. Can. 1968-9, c.38, s.18.
3 Suicide Act (1961), 9 & 10 Eliz. II, c.60 (U.K.).
4 Stats. Can., 1968-9, c.41, s.13.
5 *John Calder (Publications) Ltd.* v. *Powell*, [1965] 1 All E.R. 159, *R.* v. *Brodie*, *R.* v. *Dansky*, *R.* v. *Rubin* [1962] S.C.R. 681, 132 C.C.C. 161, 32 D.L.R. (2d) 507.
6 See *Capital Punishment*, Part II, Developments, 1961-1965, United Nations Economic and Social Affairs, New York, 1968.
7 Great Britain, Home Department, Committee on Corporal Punishment. (Cadogan Report). H.M.S.O. 1938; and comments of Report of the Canadian Committee on Corrections, (Ouimet Report), 1969, at 207-208.
8 The Murder (Abolition of Death Penalty) Act, 1965.
9 Ouimet Report, *supra*, n.7; Quebec, Commission of Enquiry into the Administration of Justice on Criminal and Penal Matters in Quebec (Prévost Report), (1968); Alberta, Executive Council, Report of the Alberta Penology Study, (McGrath Report), (1968).
10 *D.P.P.* v. *Smith* [1961] A.C. 290, [1960] 3 All. E.R. 161.
11 *Cf. R.* v. *Smythe* (1957) 98 C.L.R. 163, and *Parker* v. *The Queen*, (1963) 111 C.L.R. 665. See discussions of this case in Parker, *Verdicts of Manslaughter—An Addendum*, (1963) 3 Alta. L. Rev. 205.
12 *E.g.*, *Wagon Mound* (No. 1) [1961] A.C. 388.

attitude toward the legal concept of responsibility is due, to some extent, to the erosion of Christian values in society. The most respected lay commentator on criminal responsibility has been Barbara Wootton.[13] Baroness Wootton has been the chief proponent of the behavioural approach to criminal responsibility; she discounts the idea of legal guilt and *mens rea* and suggests that the major concern of society should be ensuring that the criminal be "treated" and that questions of proof are not as important as considerations of cure. This attitude has received something less than full approval from lawyers, philosophers, or other behavioural scientists. On the other hand, the flavour of the behavioural approach has been adopted in part by some commentators on the criminal law such as the Ouimet Committee which suggests that the concepts of dangerousness should be accentuated where necessary for the protection of society and that the rigours of the criminal law should be minimized in most other instances.[14]

Despite these campaigns for the abolition of crimes without victims, the curtailment of barbarous punishments and the liberalization of other penal measures, there is little likelihood that basic changes in the structure of criminal law and in the essence of its underlying theory will take place in the near future. This is not entirely the fault of the law; the law is not yet convinced that the behaviourists have a monopoly on wisdom and, consequently, possess foolproof solutions to the problems of crime. The lawyers, therefore, are likely to continue to participate in the morality play[15] of the criminal trial and the labels of "guilty" and "innocent"[16] will continue to be applied.

The following pages will make a historical investigation of the concept of criminal responsibility with particular reference to the law relating to homicide. Murder and kindred offences are not selected because they happen to be the most interesting or sensational of human aberrations. The history of crime and punishment is very intimately related to the killing of another human being, at least in the European-North American tradition. For centuries, there was no clear differentiation between torts and criminal law. In Anglo-Saxon society, a killing was a wrong from which emanated the idea of the blood-feud, the notion of revenge, and, in due course, the ingredients of societal retribution. It is hardly necessary in this study to embark on an archeological expedition to trace the aggressive instinct and incipient violence of *australopithecus africanus*![17] We can start our investigation at a time when man was a little more civilized than that. In particular we shall be examining Anglo-Saxon and Anglo-Norman institutions and their antecedents.

Homicide became important in that period of history when men were beginning to exercise some dominion over a prescribed territory. Threats on the life of a group, or, in due course, on the person of the leader of that group led to the concept of treason which was the ultimate threat to group solidarity—or to its leader. (If it were success-

13 Wootton, *Crime and Criminal Law*, 1966.
14 Ouimet Report, *supra*, n. 7 at 39-90 and 241-272.
15 Morton, *The Function of the Criminal Law in 1962*, at 30. For a more recent example, see Levine *et al* (eds.), *The Tales of Hoffman* (1970).
16 *E.g. Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966).
17 Ardrey, *African Genesis*, at 177 *et seq.*

ful, of course, there is simply a change of leadership). In this investigation we will be discussing the emergence of the concept of the "peace" which we still use today in the phrases "justice of the peace" and "breach of the peace".

We shall also discuss the influence of the Church on the principles of criminal responsibility. The canon law (and, indirectly, the Roman law) provided a strong ingredient to the recipe of criminal responsibility in the form of blameworthiness.

Finally, the crime of homicide has made numerous contributions to the jurisprudence of the criminal law. This has been partly because the crime has attracted most attention from criminal lawyers seeking defences for their clients but also because the judges have allowed defences to develop in worthy cases so that the accused could escape the gallows. Unfortunately, these defences have added more nonsense than sense to the theory of the criminal law although, doubtlessly, greater justice has been done in the individual case. The defences (or partial defences) of provocation and intoxication are typical examples of defences which go far to deny the basic tenets of *mens rea* and to add spurious magic to such concepts as "specific intent" and "negation of intent".

Legal historians are unable to agree on the amount of permanent influence the invasions of Britain have had on English Law. There are many who consider the effect of the Anglo-Saxon laws and institutions was direct and paramount in the development of English Law.[18] Holdsworth,[19] on the other hand, considers that the common law does not rely on the Anglo-Saxon Law as a source but that it has "influenced it from afar". Legal historians are also divided as to how much change was brought about by the Norman Conquest; the best opinion seems to be that William the Conqueror made few immediate changes and only those which did not imperil his kingly position or the conditions of his lords.[20] The Norman legal system was one which was very suitable for superimposition on the English Law because it already had a substantial veneer of Anglo-Saxon (or more specifically Germanic) law.

Anglo-Saxon and Germanic Law

The Anglo-Saxon laws were derived primarily from the laws and customs of the Germanic tribes who invaded Britain and stayed there for centuries (or should one say forever?) leaving a heritage of very modified and improved laws and legal institutions.[21] Many influences were at work on Germanic law. The relevant communities were basically tribal and were very susceptible to changes in their composition due to inter-tribal disturbances and mergers, bringing in their wake changes in laws and customs.

At times, the feud appeared to co-exist[22] with the doctrine of the "peace" although the efficacy of the latter was highly variable. Social

18 Loughlin, *Select Essays in Anglo-American Legal History*, Vol. I at 162 *et seq.* Cherry, *Lectures on the Growth of Criminal Law in Ancient Communities*, at 78 considers English criminal law has progressed continuously with no break since 1066 or soon thereafter.

19 Holdsworth, *History of English Law*, Vol. II, at 2-3; see also Jenks, *Select Essays in Anglo-American Legal History*, Vol. I, at 48.

20 Plucknett, *The Legislation of Edward I*, at 28 suggests that the Anglo-Saxon law continued to have great influence.

21 Cherry, *supra*, n. 18 at 579; *cf.* Jenks, *supra*, n. 19 at 48-49.

22 Loughlin, *supra*, n. 18 at 274.

conditions within the community were clearly reflected in the choice of the feud or of more "civilized" methods in resolving differences and arriving at social equity. Therefore, it is not possible to say that one existed and was then ousted by the other. In a society composed of many ill-defined tribes, there was no universal acceptance of efforts at making and enforcing the "law" at any particular time (and we can only use the term "law" in a very loose sense). No isolated time or incident can be described as the turning point, the climax or nadir of the influence of organized law or disorganized vengeance in a community. In any event, the major ingredients were feud or incursions on and restitution of the "peace".

The most primitive rules of the Germanic tribes derived from the Mosaic law, *lex talionis*, which was purely retaliatory, an eye for an eye, a tooth for a tooth. The right to vengeance belonged only to the party wronged or his kin. Of course the party could be the community at large and this is why the borderline between vengeance and the maintenance of the "peace" is tenous and unreal. To the Germanic tribes, the doctrine of the "peace"—which they termed "frith" or "mund"[23]—meant that when an affront to or a breach of the amity or security of the community, nation, group or individual occurred, the "peace"-breaker was subjected to a reprisal, usually from the group. If the reprisal was on a one-to-one basis, it was an exercise in feud.

At first, revenge was approved of as "no more than adequate or disapproved of as excessive, by rough justice through public opinion".[24] This certainly resulted in very rough justice which tended to degenerate into new retaliations and fresh feuds. Naturally, for the sake of the security of the community, even the most primitive societies had to limit vengeance and repress feuds. Revenge came to be limited to the customary rules of the community with an eventual option of accepting compensation of an agreed amount. This latter concept was too sophisticated to be developed in the days of nomadic tribes but it soon became apparent to a tribe which was anything of an entity with some institutional foundations that if it had wholesale feuds, it could not function efficiently and have all its manpower in a state of preparedness to ward off enemies. Therefore one who broke the peace put himself outside the peace. If the breach was basically a communal one then the peace-breaker might be driven out. If it was more in the nature of a private wrong, then the offending party would be subjected to the rights of revenge of the injured party or his kin. The latter did not necessarily occur because the peace-breaker could be offered the chance to pay compensation, but this was very unlikely if the original offending act had involved "blood and honour".[25]

Yet this adds more sophistication than is warranted and keeps presuming that there is a community in the sense of a censuring body with powers and privileges. This is not precisely accurate. In primitive Germanic law there were various concepts of the "peace". They included "church peace", "moot peace" and "sanctity of the house". These concepts had social importance but at the stage of "folk laws" they had

[23] Chadwick, *Studies in Anglo-Saxon Institutions*, at 116, Jenks, *supra*, n. 19 at 115 ff., Loughlin, *supra*, n. 18 at 270.
[24] Pollock, *Select Essays in Anglo-American Legal History*, Vol. II, at 403.
[25] Loughlin, *supra*, n. 18 at 270.

no legal significance. The community only became concerned when the peace between the parties was not settled reasonably or in a reasonable time. It became a community concern much more quickly if the wrong had a direct effect on the community at large, although this general "peace" did not develop overnight. It must be stressed again that there was no judicial authority in the Germanic "state". The peace was simply the social order. Goebel[26] considers that the malefactor became "peaceless" in a more or less literal sense and that outlawry (which was mentioned earlier) was most unlikely because there was little conception of public order in the sense of a "state" guaranteed by law or that the laws tried to make such a guarantee.

When we progress a little further, we find that rules developed for the feud or revenge-taking and that a homicide accomplished in the course of permitted revenge had to be publicly announced. Otherwise it would be declared a wrongful killing. In petty cases, the right to revenge was eventually forbidden and compensation was substituted. The amounts for most offences became settled and there was a gradation of "offences". As the society became more cohesive, the injured party or his kin could more easily be persuaded to take compensation instead of homicidal revenge. No doubt the process accelerated as the society became larger and more anonymous. The society not only showed cohesiveness but it also showed a need for self-preservation and cooperation. One must remember, however, that there is no sense of punishment as we understand it today—it was generically more of an *ex parte* proceeding. The payments satisfied the community, and the kin.

When communal courts were established, the right to vengeance was controlled by these rough folk courts and the process of compensation became obligatory.[27] In time, vengeance became limited to outlawry imposed by the court of the community.[28] In due course, a talionic killing which preceded the court's judgment had to be justified before that tribunal.

In general, however, the German tribes did not place as much importance on homicide as one would imagine, at least not in terms of legal rules, obligations and "punishment". As is typical of many primitive societies, theft was considered more heinous because of the "inherent intrinsicality" of the possession of chattels.[29] This attitude toward community wrongs and the accentuation of goods over human life can be seen in many primitive communities which have been studied by modern anthropologists.[30] In Germanic society, property offences were expiable by money payment although it was a common and valid practice to kill a thief found *in flagrante delicto*.[31]

Although the primitive community did not take as much account of homicide as wrongs done to chattels, the Germanic tribes showed

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26 Goebel, *Felony and Misdemeanour: A Study in the History of English Criminal Procedure*, at 15.
27 Pike, *History of Crime In England*, Vol. I, at 44-45 is of the opinion that compensation was probably in operation before the Roman occupation.
28 Jeudwine, *Tort, Crime and Police in Medieval Britain*, at 35.
29 *Cf.* the work of Judge Sissons in Sissons, *Judge of the Far North North;* and Mr. Justice M. Kriewaldt, ed. G. Sawyer, *The Application of the Criminal Law to the Aborignes of the Northern Territory of Australia*, (1961) 5 Univ. of W.A. Law Rev. 1.
30 Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia.*
31 For a modern survey of police killings, see Harding, *Police Killings in Australia.*

strong contempt for any secrecy in killing whether it was an original wrong or a killing in vengeance. The feud continued because of the infirmity of human nature and the natural expression of man's anger and the community did not frown upon feuds on that basis. The feuds attracted disapproval for two other reasons. First, they tended to interfere with internal security, which has been referred to above, but there was a more compelling reason. The compensatory procedure was encouraged because this method of mediating disputes helped fill the coffers of the chieftain who exacted his penalty as well as that claimed by the kin.[32]

These two ingredients, of security for the community and fiscal accountability, encouraged the categorisation of secret killings as something which had to be dealt with differently. With the labelling of secret killings we see for the first time an inkling of degrees of responsibility imputable to homicide. The expression *morth* is used in the historical descriptions of the period to describe the "worst" form of homicide. In these circumstance, the wrongdoer would become an outlaw with the corollary, of course, that his goods would be forfeited to the tribe or the chieftain.[33]

At this stage, we should not overemphasize the categories of homicide. As Plucknett says, crime and criminal law (as we know them) were "rapidly becoming a matter of money". The exaction of the *wergeld* or a portion of it for a wrong was a more effective means of social control than any other. There was not a total lack of concern for guilt or gradations of guilt among the seemingly barbaric tribes. One Germanic historian[34] takes the view that as far as it was possible within the inelastic confines of custom to do so, there was some regard for the mental attitude and intentions of the wrongdoer. This was no doubt done, if at all, in the decisions of the group and in the price demanded by the chieftain. When a society is in its infancy, as Von Bar points out, fixed rules are more important than jurisprudence.[35]

Early English Law

The following extracts from the laws of the early English Kings will show that the influence of the Germanic tribal customs and institutions is considerable. The Kentish laws, for instance, consisted of tables of tariffs for wrongs done to the injured parties. The essence of the wrong was compensation for the victim, his kin and the overlord.

It is clear that even from the time of the earliest king of whose laws the are records (*i.e.* Aethelbert), compensation was the remedy to

32 Goebel, *supra*, n. 26 at 7. This was the price paid by the wrongdoer for the interference to the peace of the community.

33 *Id.*, at 8.
"The outlaw is not only excluded from the peace or legal community but may, and should be, killed "bootlessly" (i.e., without any answering penalty), as an enemy of the people by anyone. Outlawry in very ancient times did not have the merely negative content, as we still often hear, that the outlaw is exposed to unexpiable killing but he *must* be dealt with by the whole group as their enemy. Outlawry demands an execution of outlawry. The pursuit of the outlaw is a public duty of all members of the people; he ceases to exist in the Law as kinsman, husband or father. Neither his sib nor his near family can protect him or harbor him. His property is exposed to waste or forfeiture. His house is destroyed by breach or firebrand, the work of his hands annihilated. His possessions are forfeited. i.e. taken over by public authority to which they lapse in so far as the injured party is not satisfied out of them. The English application of this concept will be dealt with on next page.
See also Cherry, *supra* n. 18 at 85-86.

34 Von Bar, *History of Continental Criminal Law*, at 69.

35 *Id.*

be sought.[36] It would be naive and, in fact, erroneous to suggest that the feud had disappeared but the concept of the 'peace' had created a community spirit which stipulated and required the proof of right to kill or a retrospective approval of a killing in the anger of revenge.

The old folk community, as a 'confederacy' bound to peace and mutual protection, was, among the Anglo Saxons, held together by the king.[37] The old folk peace had become a universal concept of the king's peace by which every wrong, a disturbance in the community, was treated, fictionally at least, as an affront to the king's dignity.[38]

There were graduated penalties dependent on the type of wrong inflicted and the social standing of the victim. In the laws of Aethelbert there was a compensation of fifty shillings payable to the king for a slaying on his premises.[39] In the same series of laws there were varying compensations to be paid for the slaying of a freeman, a king's servant or a slave.[40] In the laws of Hlothhere and Eadric,[41] there were similar provisions concerning the slaying of noblemen and freemen and correspondingly variable penalties.[42]

Even at this time, liability does not appear to be absolute. The laws of Withred[43] provided that anyone who slew a man in the act of thieving was not required to pay compensation. Similarly, in the contemporaneous laws of Ine, we find that it was permissible to slay a stranger or a foreigner who failed to indicate his presence or warn of his approach.[44] These laws are, in effect, simply manifestations of a legitimate feud situation which protected the "peace" of the community and once again show the overlap between feud (or revenge) and the idea of the "peace". At this time we are talking of a society clearly delineated by narrow boundaries and plagued by internal treachery and constant threat of external attack. No doubt the exceptions noted above reflect the need to protect that society and, more particularly, the safety of its autocratic leaders.

The remainder of the laws appear to be in arbitrary form or at

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36 Plucknett, *supra*, n. 20 at 8-10.

37 ". . . it is one of the most instructive lessons in the history of English law to trace the growth of the power of the government over the individual; the establishment of courts of justice; the gradual suppression of permanent kings for temporary leaders; and, in the course of time, the assumption by the king of the ideal attributes of absolute perfection, absolute immortality, and legal ubiquity."
Loughlin, *supra*, n. 18 at 282.

"The property of God and the Church is to be paid for with a twelve-fold compensation; a bishop's property with an eleven-fold compensation . . . a deacon's property with a six-fold compensation . . . the peace of the Church with a two-fold compensation . . . .

If the king calls his people to him, and anyone does them injury there, he is to pay a two-fold compensation and 50 shillings to the king . . . .

The breach of the king's protection, 50 shillings . . . .

The breach of a *ceorl's* protection: six shillings . . . .

If anyone kills a man, he is to pay as ordinary wergild 100 shillings . . . .

If hair-pulling occur, 50 *sceattas* [=2½ Kentish shillings] are to be paid as compensation . . . ."

cited by Harding, *A Social History of English Law*, at 13.

38 It must not be thought that this growth of royal jurisdiction developed overnight. It was a gradual process; at first it held sway over the king's person and possessions alone but subsequently it spread to certain crimes ("pleas of the Crown") and eventually the royal jurisdiction extended over the whole kingdom. Carter, *Law: Its Origin, Growth and Function*, at 243, Loughlin, *supra*, n. 18 at 278, Cherry, *supra*, n. 18 at 58, Jenks, *supra*, n. 19 at 109. Roscoe, *The Growth of English Law*, at 5; Pollock, *Select Essays in Anglo-American Legal History*, Vol. I, at 101.

39 Aethelbert 5, as cited in Attenborough, *Laws of the Earliest English Kings*, at 5. Only 12 shillings were paid for a similar deed committed on the premises of a lord (Aethelbert 12.) Similar provision is found in the Laws of Ine id. at 6.

40 See Aethelbert 5, 7, 86 cited *id.*

41 Regnal years: 673-685 and 680-690 A.D. respectively.

42 Holdsworth, Vol. I, *supra*, n. 19 at 3.

43 Circa, 692 A.D.—See Laws of Attenborough *supra*, n. 39, 25, at 19. Ine 16, 21, 35 in *id.* at 41, 43, and 47. See discussion in Loughlin, *supra*, n. 18 at 276.

44 Ine 20.

least they have been preserved in that fashion.[45] In practice, they were probably tempered by some degree of culpability. As the concept of the king's peace developed,[46] there was a corresponding increase in the confidence of the leader and his capacity to exercise discretion. In the laws of Alfred[47] we see the exercise of discretion: [48]

> If anyone fights or draws weapon in King's hall it is for the King to decide whether he shall be put to death or permitted to live.

With the exception of the folk-moots, no law court was in existence and the final arbiter was the King. The above provision is the most surprising because the behaviour described is the type usually considered "bootless" or incapable of compensation by money or goods. Therefore, the king starts, literally, laying down the law. In dispensing mercy along with the law, he is recognizing some crude conception of moral blameworthiness. This royal discretion has some political overtones but, as we shall see presently, it also has been influenced by the Church.

The internal composition or ethos of the European community was changing more frequently and drastically than that of insular Britain. In Britain, or more precisely, southern England as we would describe it today, more stable communities, which were stringently and successfully controlled by strong kings, provide an earlier acceptance of the sovereignty of the organized law. A caveat must be entered, however, against assuming that the people of Anglo-Saxon Britain abruptly abandoned their feuds and private blood-vengeance. At first a compromise existed; composition (based on *bot* and *wergeld*) and feud were both operative but with the king's jurisdiction having some priority. This enabled a gradual acceptance of the law and therefore a stepping-up of legal development and, necessarily, of government.

Outlawry became a less frequent procedure in cases of grave wrongs (of what would now be of a criminal nature), and composition was introduced in its place.

A duty to the community was developing; the miscreant was being delivered to the state for punishment. The miscreant could only be slain by the public at large if he resisted capture.[49] The tendency was towards punishment and away from vengeance.

The Anglo-Saxon law of the time of Alfred did not permit vengeance for bodily injuries or mere threats as in earlier laws. The laws of Alfred, however, allowed immediate vengeance before a judgment in the case of a husband who found a man within closed doors or under a covering with his wife, daughter, sister or mother. This was an exceptional circumstance which has remained so (with some amendments) to the present day.

If A had killed B without cause, it was a prohibited breach of the peace; but if C, B's kinsman, killed A in revenge for B's death it was simply a case of vengeance. Feud took the form of warfare; in the

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45 Maitland and Montagu claim that the setting down of Lex Salica, a written law, was due to the influence of Roman missionaries who taught Aethelbert the art of written laws. Maitland & Montagu, *Sketch of English Legal History*. Also generally see Sayre, *Mens Rea*, (1932) 45 Harv. L. Rev. 974.
46 Harding, *supra*, n. 37 and discussion therein.
47 871-901 A.D. See Loughlin, *supra*, n. 18 at 269.
48 Attenborough, *supra*, n. 39 at 69 and Loughlin, *supra*, n. 18 at 269.
49 Ine 28, s. 1.

instance given, when C and his kinsmen were going abroad to revenge B's death and were resisted by A and his kin, a private feud arose. A feud could arise even on the occasion of the parties appearing at court when the party making the greater show of arms and men would win the day.

> 'While vengeance was an appendage of the law, like private execution in the procedure of debt, feud . . . was outside of the law, and in bold opposition to it, it was the antagonistic element of the individual warring against the interests of society, and which society was naturally and generally without success, striving to control'.[50]

The situation described above was accentuated in the Germanic community because of the temperament of the people as well as the disruptive state of communal life. In Anglo-Saxon Britain attempts to curtail these situations and make for harmonious solutions were more successful. The machinery existed in both communities but did not operate with equal effect.

Composition

The first attempt to curtail feud was by the more general use of compositions. In the illustration given above, if A offered B's *wergeld* (or 'peace money' or *frith*) to C, the state prohibited C from vengeance and in the process protected A. If the *wergeld* were not paid then C could fight A.[51] This obligation to pay was, by authority of the court and state, extended to the kin of the killer.

This attempt to curb feud is well illustrated in Alfred's laws: "Also, we decree that the man who knows his foe to be home sitting shall not fight him before he asks satisfaction".

In theory the party aggrieved could only take revenge when all attempts had been made to seek satisfaction by peaceful means.[52] An avenger who fought before he demanded satisfaction had to pay a penalty to the king.[53]

The aims of Anglo-Saxon law were optimistic on this question of substituting composition for unlawful vengeance and feud. Some writers think that any efforts were abortive. Loughlin remarks:[54]

> 'The government was only as strong as unruly ealdormen permitted; the people were turbulent; and it was reserved to William the Conqueror to strengthen the power of the state and effect the practical suppression of feud.'

The historians of the Anglo-Saxon period fail to show the extent to which the fear of vengeance was a deterrent to wholesale killing. Stephen considers that it was an efficient way of restricting crimes of violence; this seems to be hardly the general opinion or evidenced by the warlike society of the time.

As described earlier, there is a progression from outright feud to vengeance according to customary rules, to composition on a fixed scale.[55]

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50 Loughlin, *supra*, n. 18 at 267.
51 See Ine 74, para 1. Of The Germanic practice which evolved:—"If amends or wergeld was sued for judicially, the offender had to pay to the public authority or the community a certain sum—among certain tribes a quota of the whole compositio, among others a fixed amount, called the peace money (fredus). This was the price for the interference of authority or community in restoring the peace". Goebel, *supra*, n. 26 at 7-8, n. 8.
52 Alfred 42, paragraphs 1, 3 and 4.
53 Aethelred IV, 4.
54 Loughlin, *supra*, n. 18 at 270-271.
55 Cherry, *supra*, n. 18 at 79, Carter, *supra*, n. 38 at 46.

The next step, which took many centuries to achieve universal acceptance but which had its germ in the pre-Conquest period, was the transition from private vengeance to public punishment. The *bot* was compensation made to a person injured by a wrong. The *wer* or *wergeld* was the price set on a slain man which was paid to his relatives. The *wite* was a fine paid to the kin or lord in respect of an offence. Many of the laws were taken up with the formulation of the various amounts to be paid in *bot, wer* and *wite*.[56]

Wer and *bot* belong (and date back) to a period when no form of public punishment was known, when crime was still a matter of private war, when the role of the law maker (if it was possible to designate any such entity at the time) was simply to reconcile the antagonists.[57]

In the *wite* can be seen the first evidence of the future dominion of the ruler and state over the punishment of and compensation for wrongs. It shows that the idea was growing that wrongs were not simply the affair of the injured party and his kin. Such an idea was a condition precedent to the growth in criminal law.[58] This is connected with the growth of 'peace' theory from folk peace, lord's 'peace' to king's 'peace'. King's peace was not a universal concept until after 1066 when there was some form of cohesion among the kingdoms set up by the Saxons.[59]

The number of wrongs which were compensated by money increased. On the other hand the *bot, wer* and *wite* were limited in that they were only applicable to the first commission of some wrongs. Furthermore, some wrongs became unemendable and could only be dealt with by the king. This was due to the king's peace being grossly 'disturbed' and thus the king elected to take the matter into his own hands.[60] It also meant, of course, that the king could assume more control over his subjects if he was strong enough to force them to submit to his criminal jurisdiction.

Royal Jurisdiction and the Influence of the Church

The strongest incentive for the king was the opportunity afforded him to swell his coffers with the payment of compensations. All these factors contributed to the more definite organization of the state and the growth of the criminal law.

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56 Loughlin, *supra*, n. 18 at 273 and 278-280. Also see Plucknett, *supra*, n. 20 at 19 *et seq* and Cherry, *supra*, n. 18 at 83. It has been suggested that the *bot* procedure was due to the influence of Christianity. See Pollock & Maitland, *History of the English Law Before the Time of Edward I*, Vol. II, at 449.

57 The editor of Potter, *Short Outline of English Legal History*, at 145, maintains that the tariffs of fines of the Anglo-Saxon Dooms were concerned rather with the preservation of the community (*i.e.* 'the peace') than with compensation for the person injured though in effect some redress was afforded.

The "peace" doctrine is open to many interpretations. It is a matter of contention as to how much reliance should be placed on this doctrine in explaining the centralisation of criminal procedure and justice, which eventually formed a consolidation of the criminal law.

58 There were no laws in the modern sense which could be enforced. There were no tribunals to declare, interpret or enforce it. Carter claims that:

"The very fact that the compensation was resorted to as the only means of preventing violence and bloodshed is complete proof that no other law than private vengeance or self-help existed" Carter, *supra*, n. 38 at 46.

59 Cherry, footnote 18, *supra*, n. 18 at 89 and 95; Palgrave, *Rise and Progress of the English Commonwealth*, Vol. I, 284-285, Roscoe, *supra*, n. 38 at 5, Loughlin, *supra*, n. 18 at 271 and Carter, *supra*, n. 38 at 243.

60 "The tithing, however, in its relation to the hundred and to the territorial division, which in the end was called a manor, left not a single person in the realm (outlaws excepted) who did not, either directly or indirectly, give some kind of security to the state for his good behaviour. The landed magnate, it is possible, was, to use modern phraseology, only bound in his own recognisances . . . ." This institution was called the 'peace-pledge'. Pike, Vol. I, *supra*, n. 27 at 59-60. This peace money amounted to buying back for oneself a place in the community. If a man refused to pledge himself to pay *wer*, he would be outlawed.

At this stage the demarcation between breaches of private and public morality were still only faintly drawn. It was primarily essential for the king to strive to keep the peace in a potentially anarchical community. Another factor was the influence of the church striving to enforce general morality.[61] Consequently it is impossible to use the modern terms "crime" and "tort" in the society of medieval England which was still struggling toward a 'corporate expression of authority'. Furthermore, so much depended on the personalities of the rulers of Church and State. As one writer stated it:—"All such acts . . . were treated in one category as acts of wrong . . . breaches of good neighbourhood, violations of the social conventions which bound men together".[62] There was a gradual drift towards the majority principle, binding the unwilling minority to a change by the declaration of a new custom. It would seem that there was no difference of procedure or of penalty between acts of obviously "culpable" and unintentional violence and trespass.[63]

Assuming for a moment that such a proposition is correct, a transition came about through the influence of the church, not only in the field of substantive crime, which expanded under the church's discipline, but also in the tests of responsibility and culpability, which had been almost unknown to that time.

The church, through the introduction of the conception of sin into everyday affairs, started the development of a mental element in legal transactions.[64] There was little differentiation, however, in the various forms of wrongdoing; all departures from the moral standards were subjected to the same religious sanctions.

Although the church might preach that it was a sin to kill, the conception of killing as an offence against the community was wholly reliant upon the power and the will of the state to enforce penalties for offences against the community.

This notion of joint culpability in a community such as the tribal one (which in this sense included the societies centred round a manor or noble establishment) was broken down by the moral ideas of the church. The Christian outlook upon moral questions and liability for their infringement was (and is) a highly individualistic one. The church was more ready to look at the actual person who committed the crime and expected him to make amends (and in a later development of course, to be punished).[65] In relation to liability it was a transition from the community view to an individual one.

As Plucknett[66] points out, it was impossible up to the twelfth century to separate crime and tort and the progression of the two types of liabilities; it is equally difficult to trace the transition from feud to composition. Some of the earliest laws (*e.g.* those of Aethelbert) spoke of composition and yet the laws of Edmund and Canute in the mid-tenth and early eleventh centuries dealt primarily with feud. Perhaps this can best be explained in terms of reality as opposed to hope for reality.

[61] Plucknett, *supra*, n. 20 at 3.
[62] Jeudwine, *supra*, n. 28 at 26.
[63] This proposition will be discussed at length below and it will be shown that some doubt has been thrown upon it.
[64] Plucknett, *supra*, n. 20 at 52 *et seq.*
[65] Of course the ecclesiastical law had a wide range of punishments for its delinquent clerks which were not open to the criminal law.
[66] Plucknett, *Concise History of the Common Law*, at 422-423.

The law set down an ideal towards which all members of the tribe or community should strive. Perhaps the success of the subjection of recalcitrant tribesmen depended very largely on the strength and jurisdiction of the ruler. Yet it will be remembered that the laws of Alfred made very stringent provisions for the peaceful settlements of disputes.

This question must rest in an unsatisfactory state until the history of criminal liability and its constituent mental elements are examined in more detail. Custom had prevailed for centuries as the sole factor which was uniform throughout the community, and which had had any force in the regulation of human behaviour.[67] The very qualities of human nature, despite the influence of the church and the power of a strong, unifying leader in lay matters, were of necessity the inhibiting factors in permanent advances in criminal law and criminal policy.

The Norman Influence

Legal historians differ as to the effect of the Norman invasion on English law and legal institutions. One view is that William the Conqueror avowed that he was happy to leave the Anglo-Saxon institutions as he found them. If the proposition is true (which is doubted) that Norman Law did not have much influence[68] on the subsequent law in England, it may be because very little or none of the Norman Law was written, unlike the English Law of the time.[69]

Goebel considers that the influence of Anglo-Saxon institutions has been exaggerated at the expense of Norman sources. He argues that the growth of composition in Germanic law did not offer much foothold for the creation and extension of ideas of public order. This was partly due to the fact that composition was not obligatory and partly because the state, which arranged a settlement *inter partes*, was not inflicting any penalty but simply commandeering some of the proceeds of the compensations. Too often, there was a reversion to feud in defiance of the wishes of the state or community and the law took no notice of the departures from the peace; in fact, it was powerless to do so. On the other hand, nearly everything accomplished by the Frankish[70] rulers towards developing the rule of law and a notion of

67 Seagle, *The History of Law*, at 33-34, has said the problem in primitive law was whether "in the absence of political organisation and specific juridicial institutions certain modes of conduct may be segregated from the amorphous body of customs as at least incipiently legal".

68 Cherry, *supra*, n. 18 at 78, Jenks, *supra*, n. 19 at 49.

69 As early as the time of Aethelbert, King of the Kentings, England has been influenced by the Roman missionaries who taught Aethelbert to keep written laws. See Maitland & Montagu, *supra*, n. 45 at 3.

Earlier reference has been made to the system of peace pledge. The Danes applied the peace pledge with vigour. The main disadvantage of the peace pledge was the temptation to commit perjury because every peace pledge man was willing to testify for any other peace pledge man in his tithing, and thus protected his own pocket from the customary exactions. William the Conqueror instituted the system of Englishry which brought good results in the suppression of outbreaks of violence (and worse) against the Norman invaders. This process necessitated the English proving that the deceased was a fellow countryman and if this was not done, a fine was exacted. See Pollock and Maitland, Vol II, *supra*, n. 56 at 484. Goebel considers that too little notice has been taken of the Norman influence. He considers this is due to the "Victorian cult of Anglo-Saxonism" the "high priests" being Pollock, Maitland and Holdsworth.

70 The Franks in the 5th century became the founders of the French and German kingdoms and had emerged as the greatest power in Europe. In the course of the two subsequent centuries, they lost their dominations over the great area they had previously held. Clovis's sons split the kingdom four ways. The Franks, of which Goebel speaks, are the ones who inhabited what is now France, excluding, *inter alia*, Normandy which nevertheless Goebel maintains was strongly influenced by the Franks.

public order could be accounted for in terms of controlling feud and of filling gaps in the law and procedure to provide for such cases as those where no man was ready to fight.

In Frankish Law, the early stages of the composition procedure was primarily a bargaining process at the will of the litigants; the courts if they can be so called, acted simply as referees.

During the reign of Charlemagne, the judicial officer was first vested with authority to command the maintenance of peace although there is some earlier evidence that he could intervene to arrange a truce. Sanctions, although developing slowly, were not very powerful.

The 'general peace', as the equivalent of legal order, could not have had any great significance when, in the first place, feud could be sustained without any wrong being incurred, and when, even after a judicial proceeding, violence could be resorted to for the same cause of action unless there had been a final binding concord. This concord, which purported to maintain the conclusiveness of judgment, was also meant to serve a broader social purpose of creating a peaceful state. But in a time bordering frequently on anarchy, the device of final concord could not be successful in the gravest situations. Even if a multiplication of these agreements could be imagined, it is hard to conceive that a general 'peace' or order resulted when there was no omnipotent central authority to give cohesion in law enforcement. For the procedure of composition to have general force (without general law enforcement agencies) was not possible because it relied too much on the initiative and compliance of small groups and individuals.

Eventually, of course, the increasing role of the state in composition transactions and the eventual legislation for the control of the feud had the effect of strengthening notions of order as were implicit in the composition process itself. Such concepts could only gain force and importance if state intervention was regulated and standardized.[71]

Most of the actions examined by Goebel concerned land, although there were some relating to violence to the person and personalty. The allegations cited in these actions did not cite *mala fides* for this was a time when mere proof of the wrongful act appeared to be sufficient. Furthermore, there were, in Goebel's estimation, no words alleging a peace breach—in a context where these allegations could be most expected.

In terms of this primitive procedure, the use of afflictive sanctions in the case of offences committed by one free man against another was connected either with feud or with the satisfaction of a bargain to make amends, *i.e.* by composition. In relation to the former, the law continuously tried to restrict this private revenge but sanctioned one situation—the case of 'handhavingness'.[72] In this case, summary justice could be inflicted by the slaying of the wrongdoer. If the malefactor

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[71] Plucknett, *supra*, n. 20 at 79, points out that, in English law, few could pay the money payments and that is why they faded out. The need for the state to prevent further anarchy became more urgent.

[72] "The thief with the mainour; the killer with the bloody knife". *Cf. infangthief* in Anglo-Saxon law.

escaped, he could be pursued, captured and bound but not killed,[73] and was to be brought before the court (when composition was applied).

These provisions represented a transitional stage between the early positions of complete control of the parties over feud and composition, and the subsequent power of the state itself to execute. The transition was not effected though until the idea had progressed to the stage where the state itself was considered as having been injured. This idea was finally reached by three postulates: that the wrong affected the whole community, that the Crown was directly affected[74] or that no-one but public authority was concerned in the wrongful act.

Under the Merovingians,[75] a reversal of this process occurred in territories, under the control of strong lords, which obtained charters of immunity from Crown control.[76]

The death of Charlemagne, a strong ruler, saw the feud persisting and a resurgence of the strong nobles. In the tenth century, the feud took on a new quality. In assessing the situation Goebel says:[77]

> Owing to the regroupment of society into units whose prime purpose was military activity, the feud was no longer a guerilla affair between opposing sides, but rather a form of warfare between military bands.

The feud, therefore, became disassociated from the idea of law enforcement or the pursuit of justice. This quality of "war" was the primary cause of the severance of feud from the alternative of a proceeding for amends.[78] In a period of knightly combat, the fixed scale of emandations was ousted by a new principle of discretionary mulcts. The frequent wars created poverty and the lack of money to pay amends also caused a resort to feud. The King's ban was a natural outcome of this situation. By the ban the Crown had financial priority over everyone else (which included the rights of the injured party or kin) in the assets of the culprit.[79]

The Concept of the King's "Peace" in Norman Law

Goebel disputes the validity of the development in pre-Conquest England of a King's peace;[80] this peace, according to Goebel, has been romanticized by the Anglo-Saxon devotees to signify a personal peace emanating from the Crown, extending over the community and assuming charge of law enforcement and generally becoming guardian of the

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73 This has parallels in the modern law relating to provocation, self-defence and killing of escaping felons. Goebel suggests that this was not based on outlawry but feud and in this instance the privilege of feud *instanter*. The law recognised then as it does today the heat of rage which may afflict a human being. It is also significant that the law at that time insisted on 'no slowing in the tempo of impulse'.

74 *Cf.* Maitland, *Collected Papers*, Vol. I, at 304 and 317, who considers that in English law the notion of the King's peace in criminal procedure was, at least partly, a fiction.

75 7th-11th centuries.

76 This meant, of course, that the Crown lost its 'percentage' from amounts paid under compositions. This right to immunity did not extend to all wrongs and Goebel suggests that the Crown kept control over the offences which it wished to develop and did not lose its exclusive right to Crown procedure.

77 Goebel, *supra*, n. 26 at 194.

78 See *infra*, regarding comparison with appeal.

79 See Pollock and Maitland, Vol. I, *supra*, n. 56 at vi, and Von Bar, *supra*, n. 34 at 73. The royal ban which was imposed for disobedience of a royal command includes most of the police laws of today. It helped to suppress violent feuds. In many cases it imposed a public punishment as well as the composition.

80 Goebel considers that in the Anglo-Saxon dooms the word peace was used generally in an unartful sense of public order or general security. It was nowhere a technical term. He considers it cannot be taken to mean a folk peace; certainly not that 'peace' and order are synonymous. The contrary argument is that there is some evidence that the term meant 'security', but there is more concrete evidence of a king's peace in the form of heavy mulcts for offences in the king's household and for the violation of protection emanating from him.

old folk peace. Instead, Goebel argued that this peace in early Frankish times (and in concurrent English Law) was simply the protection of the king which was extended to specified individuals which protected them from any retaliation by the kin of the deceased.[81] There was also the opposite effect of placing a person outside his protection which allowed anyone to kill such an outlaw without risk of starting a legitimate feud.[82]

Goebel therefore, maintains that there was no 'general peace' and there were simply solitary protections.[83] The Frankish kings' influence on the law nevertheless was considerable. Goebel reconciles the strength and weakness of the Crown's position in that, the[84]

> . . . royal authority was used with the folk-law procedural structure modifying the character of the procedure without disturbing its premises or purpose . . . .

He considers that the real 'peace' concept reached its full development in Normandy in the tenth and eleventh centuries through a marriage of religious and legal concepts. The truce of God was used as a basis for the establishment and development of a Duke's peace. To quote Goebel again:[85]

> (The peace of God) gave the duke's law a characteristic that no other country in France at the time possessed. It was the concept of an order depending upon law, superior to the claims of anyone . . . .

With the background of centralised authority which had been developed in the divisive and potentially anarchic Normandy, William the Conqueror found England admirably suited to this system and an easy task for subjection to his will.[86]

Even ignoring the question of the actual law or legal customs which the conquerors brought with them in 1066, the results of the Norman Conquest were so important that it is hard to believe that a fusion or at least a gloss was not put on the Anglo-Saxon law by the Norman legal institutions. For the first time the phrases 'common law' and 'law and customs of the realm' are found as part of the legal language. The law is now the law of the land, not the law of the Kentings and the law of the West Saxons.

The law became the law of the royal court. Admittedly the new rulers sought to collate the laws of the English and use them but the local laws were quite often too archaic for the purposes of the new State. The Conquest brought about the spread of the justice administered by strong kings,[87] and the establishment of royal justice in the local courts.[88]

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[81] Goebel cites as an example, the case of a woman who has killed the person who tried to rape her.

[82] Goebel does not at this stage of development, give outlawry the wide meaning which is given by the English legal historians and thinks it may only have been exclusion from legal process.

[83] Compare the highly relevant "pleas of the Crown" which had very limited jurisdiction over 'criminal' matters even until the thirteenth century.

[84] Goebel, *supra*, n. 26 at 60.

[85] *Id.*, at 238. See also Pollock and Maitland, Vol. II, *supra*, n. 56 at 52-63.

[86] This could be interpreted as being fatal to any argument that the Norman influence on the established English Law was not very great. This can be countered by a contention that William only found English law so commodious because it had already developed to a great extent along the same lines.

[87] It is surprising to read in Bracton (f.104b) that even in his time he is finding it necessary to urge for the criminal jurisdiction of the king because of crime being a breach of the king's peace.

[88] Jenks, *Law and Politics in the Middle Ages*, at 35-41. See also Plucknett, *supra*, n. 20 at 28 *et seq* and 73 *et seq* and Montagu & Maitland, *supra*, n. 45 at 20 *et seq*. There is a doubt of course whether William I's pledge was kept. Probably truth is as Blackstone says (1 Bl. Comm. 84) in quoting Bacon that 'our laws are mixed as our language and as our language is so much the richer; the laws are the more complete'.

CRIMINAL LIABILITY

Conflicting Theories

Holdsworth[89] maintains that the main principle of the early English law was that a man acted at his peril even when causing accidental death or harm or acting in self-defence.

This statement is probably true on a broad basis of liability considered as it was, in medieval times, with no differentiation between tort and crime. All injuries involved the wrongdoers in "liability", in some form, either as a physical or a pecuniary exaction.

The controversy over the existence of absolute liability is clouded by the ambiguity of the terms used to describe "liability". The laws of the earliest English Kings laid down penalties for the injuries enumerated but these laws changed so that the types of liability varied according to the mode in which the injury was inflicted. The evidence is scant and implications from the meagre data are all that we can use to dissect "liability".

Where a man accidentally caused harm, the injured party or his kin (if the harm had been fatal) was satisfied by payment of compensation of the *bot* or *wergeld*. In cases of a more serious or scandalous nature, the wrongdoer was summarily killed, or pursued and killed in retaliation or retribution or driven from the community. This is not to say that in a case where the circumstantial evidence apparently (but wrongly) pointed to the accused as having acted in a bad manner, that the community did not cause an injustice by making him suffer.

Even Holdsworth[90] allows the situation that where the slain person had only himself to thank for his fate, the 'defendant' would not be liable where his part had been a merely passive one.

A reader of the early laws is likely to be confused by the inconsistencies. The Laws of Alfred contain the following:[91]

> Let the man who slayeth another wilfully perish by death. Let him who slayeth another of necessity or unwillingly or unartfully, as God may have sent him unto his hands, and for whom he has not lain in wait, be worthy of his life, and of lawful 'bot', if he seek an asylum. If, however, anyone presumptuously and wilfully slay his neighbor through guile, pluck thou him from my altar, to the end that he may perish by death.

On the other hand, the much later (but disputed[92]) *Leges Henrici Primi* spoke of men acting at their peril when other parties were

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[89] Holdsworth, Vol. II, *supra*, n. 19 at 40-41. Many writers agree with him but see discussion, *infra*.

[90] Holdsworth, Vol. II, *supra*, n. 19, at 42-43. See also Brown, *The Emergence of the Psychical Test of Guilt in Homicide*, (1960) 1 Tas. U. L. Rev. 231.

[91] Alfred 13, as quoted in Thorpe (ed.), *Ancient Laws*, at 47. It will be remembered that Alfred 42 warned against killing without first demanding justice of a foe and implied a mental element will be taken into account of (if justice was not demanded before killing).

[92] Legal historians are rather cynical of the authenticity of this collection of laws. Admittedly they are full of inconsistencies. They would appear to be a conglomeration of laws of various periods. It is submitted that too much attention has been paid to them. The collection has no pretension of being a scientific compilation and it would be equally time-consuming and valueless to make a list of all the inconsistencies as it would be to attempt a reconciliation. One example may suffice; 75.3 favors absolute liability, 90.8 does not (A, wishing to kill B, kills C instead). A is liable, as he would in any rational system of law *Cf.* Holdsworth, Vol. II, *supra*, n. 19 at 41-42. It is claimed that although *Leges Henrici* reports of absolute liability, the lunatic and the infant escaped liability. The moral element is shown to exist. The absence of any emphasis upon it was probably due to the methods of proof in early law. Not too much emphasis should be placed on it. See also, Sayre, *supra*, n. 45 at 978; Jeudwine, *supra*, n. 28 at 116; Levy-Ullman, *The English Legal Tradition: Its Sources and History*, at 44; and Moreland, *The Law of Homicide*, at 4.

injured."[93] This statement of course does not differentiate tort and crime.

Many commentators, particularly those concerned with the pre-Conquest period, stress the influence of the Mosaic Law. This may have been the case in the laws of the earliest of the kings but it does not seem to apply to the Laws of Alfred[94] as is often argued.[95] The English Law followed the Mosaic law in the outlawing of a killer but whether this long continued after the feud was regulated or money payments were substituted is disputable. The only solution to the killer's problem was to take refuge (as in Mosaic Law) until the avengers' blood had time to cool. There is one factor against this line of argument. For many centuries, the person who killed in defence of himself or his family, had to seek the king's pardon and was considered culpable until he had done so. This may have been due to the king's desire to retain control over his realm and his suspicions of any disturbance to his 'peace'. This is undoubtedly true of William the Conqueror's procedure by which a town was amerced for any killing and by the necessity of presentment of Englishry.

These stringent rules of liability may have been caused by the difficulty of proving intention (or its absence) under archaic procedure. In a society where the social and political climate was somewhat unstable, the summary and certain nature of law enforcement may not be surprising.[96]

Winfield[97] is contemptuous of any notion of absolute liability. He considers that maxims such as 'a man acts at his peril' are meaningless

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[93] Pollock and Maitland, Vol. I, *supra*, n. 56 at 31.

[94] But compare the quotation from Alfred 13, *supra*, n. 91, with Exodus, Ch. xxi, verse 14.

[95] *Supra*. See also the laws of Aethelred and Canute. See Brown, *supra*, n. 90 at 231, note 2.

[96] Wigmore, *Responsibility for Tortious Acts: Its History*, (1894) 7 Harv. L. Rev. 315 at 317. In a searching historical survey of responsibility, Wigmore speaks of the early community in Britain as relying upon absolute liability. He attributes this to the superstitions of pollution of blood and the need for the propitiation of deities when a member had been slain. He also said:—

"In the light of these it is easy to understand that the notion of Responsibility for Harmful Results was determined largely by instincts of superstition, and that our ancestors were satisfied with finding a visible source for the harm and following out their ideas of justice upon it."

Also see Moreland, *supra*, n. 92 at 2. Attaint was probably a later form of the same early notion.

Leges Henrici Primi, I. 90, II, provided:—

"*Legis cum esta, qui inscienter peccat scienter emendet, et qui brecht ungewealdes* (unintentionally) *bete gewealdes. (e.g.) si alicujus equus, ab oblique stimulatus vel subeaudatus, quam libet percuciat.*" See somment, Pollock and Maitland, *supra*, n. 56 at 456. Wilful murder is unemendable. Wigmore, *id.*, at 322, also described a second stage:

"As times change, and superstition begins to fade, the notion of misadventure . . . is hazily evolved, and the facts . . . are regarded as ground for an appeal to the king or the lord on the offender's behalf. The strict law is thus regarded as requiring punishment; but no vengeance can be wreaked upon him, no blood-feud started by the members of the victim's family."

See Bracton 140b. 141b. The Statute of Gloucester (6 Edw. I c.9) makes provision for a person who killed in self-defence or by misadventure to be held liable but the king could, at his pleasure, pardon the killer.

Select Pleas of Crown (S.S.) I, Nos. 114, 188.

Select Pleas of Crown (S.S.) I, Nos. 145, Bracton ff. 120b, 144b.

Bracton Note Bk. iii, 229, No. 1216 (1236-1237).

And a third stage, *id.*, at 324:

". . . the malfeasor by misadventure must at least pay a fine, though released from the penalty of death, and later on, when the blood feud had disappeared and a fixed payment was the regular form of civil liability, he may pay a portion of the ordinary amount."

Leg. Hen. I, 90, "In these and like cases, where a man intends one thing and another eventuates, *i.e.* when the result, not the intention, is charged as blameable, let the judge fix a small fine, and fee, inasmuch as it really occurred by accident."

". . . at a somewhat later stage, up to the middle of the thirteenth century, as the notion of complete exculpation (in a criminal process) grows, the malfeasor must, immediately after the occurrence, give notice of it, and swear an extra-processual exculpatory oath as to its occurring by accident or in self-defence; otherwise he loses the benefit of the plea . . .".

Wigmore, *Id.*, at 324-325. Select Pleas of Crown (S.S.) Nos. 81, 132, 156, 203.

[97] Winfield, *The Myth of Absolute Liability*, (1926) 42 L.Q.R. 37.

or at least dangerously misleading.[98] Analysts, such as Wigmore[99] may well be projecting modern concepts on to the wording of statutes and proclamations which are at least eight hundred years old. Wigmore contends that:[100]

> . . . The very fact that it [early Medieval English Law] could, and did, draw the distinction between 'liable' and 'not liable' shows that it must have considered at least sub-consciously the state of a man's mind when he acted, or did not act, in a given set of circumstances.

In an apt and probably accurate simile, Winfield supports his argument by suggesting that rulers made laws as wild beasts eat—"hurriedly, when and how they can, careless of what the food is so long as it fills them for the moment, in peril of losing it or their own lives to any stronger animal".[101] He also examines the laws of Alfred which allowed a man to fight in defence of himself, his lord or blood relation without paying compensation[102] and suggests that killings by accident or misadventure were discounted.[103]

Winfield doubts the "act at your peril" meaning which has been suggested for *Leges Henrici Primi* and suggests that the most that can be said is "the less you were in fault, the less must you pay."[104]

Winfield holds that these early laws show that there were many instances in which a man did not act at his peril; that in theory, there was a tendency to hold a man liable for some, but not all, accidental harm. In practice this harsh rule was made workable by judicial discretion as to penalties which brought about, in a practical way at least, a rough differentiation between intention, inadvertence and inevitable accident.[105]

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98 See also comment of Plucknett *supra*, n. 66 at 404.

99 See *supra*, n. 96.

100 Winfield, *supra*, n. 97 at 37.

101 *Id.*, at 38. There seemed to be a general right of self-defence against all but one's Lord. Alfred 85, 83.1.

102 Alfred C.42, *S.S.* 4, 5, 6, 7. There was a reaction later due to the influence of the Church. See *infra*.

103 *Leges Hen.* 88, 4. Winfield also criticizes the contrast expressed in the doubtful *Leges Henrici* which states '*legis enim est: qui inscienter peccat, scinter emendet*' and '*reum non facit nisi mens rea.*'
Leges Henrici 5, 286. See comment of Pollock and Maitland, Vol. II, *supra*, n. 56 at 473. Sayre claims that this latter Latin quotation was used only in connection with perjury which was due to the influence of canon law and was 'borrowed' from St. Augustine. Sayre, *supra*, n. 45 at 975.

104 *Leges Henrici* 90, 11c and 11d. The same idea is found in Cnut II, 68, 3 (as incorporated from Aethelred VI, 52, 1) which states that if anyone does a thing *imprudenter* it is not the same thing, as if he does it *prudenter*. The latter is worth quoting at length. It reads thus: (Aethelred, VI, 52, 1).
"And always the greater the man's position in this present life or the higher the privileges of his rank the more fully shall he make amends for his sons, and the more dearly shall he pay for all misdeeds; for the strong and the weak are not able, nor can they bear a like burden; any more than the sick can be treated like the sound. And therefore, in forming a judgment, careful discrimination must be made between age and youth, wealth and poverty, health and sickness, and the various ranks of life, both in the amends imposed by ecclesiastical authority and in the penalties inflicted in secular law.
And if it happens that a man commits a misdeed involuntarily or unintentionally, the case is different from that of one who offends of his own free will voluntarily and intentionally; and likewise, he who is an involuntary agent in his misdeeds, should always be entitled to clemency and better terms, owing to the fact that he acted as an involuntary agent."
As Plucknett, *supra*, n. 66 at 419, comments: the passage is probably a little "homiletic" in tone but nevertheless describes the general attitude. Pollock & Maitland, Vol. I, *supra*, n. 56.

105 Winfield is highly critical of Holdsworth, Pollock and Maitland who held tenaciously to what he calls the 'myth of absolute liability'. He is also critical of Wigmore. Winfield, in fact, should have no quarrel with Wigmore. The latter is in agreement with Winfield; he simply starts his analysis at an earlier stage of 'legal' development. Winfield deprecates by implication at least, the possibility that man was ever subject to absolute liability as a consequence of harmful acts and yet largely discusses the Anglo-Saxon period and later. Winfield chooses to ignore primitive law preceding the Anglo-Saxon laws. Wigmore's postulates are the superstitions of primitive man who feared and pandered to his potentially wrathful gods. Admittedly Wigmore does rely on the suspect *Leges Henrici Primi* as illustra-

The uncertainty on the question of absolute liability is accentuated by the lack of division between criminal and tort liability as it exists today. It is logical that one could expect criminal liability (if it had existed separately from other forms of liability) to be based on the social policy to punish injury committed with an intent to do harm. It is one thing to say that the primitive community perceived a difference between liability and no liability at all; it is entirely different to infer that the primitive community classified the criminal intent of a wrongdoer in terms of blameworthiness or lack of it.

The blood feud, out of which the idea of crime developed, rested upon the notion of vengeance. An interesting hypothesis has been suggested:[106] if criminal law originated from the blood feud-vengeance relationship, then it would be natural for the criminal law to concern itself with those injuries which were highly provocative, and the most highly provocative injuries were those which were intentional. Vengeance sought a blameworthy victim and blameworthiness rested upon fault or evil design.

On the other hand, this theory is not in accord with the facts and social climate as far as one can judge from the meagre materials available. The early forms of law and trial were very crude, and vengeance was taken with very little thought for the blameworthiness of the offender. There was not time or thought for nice considerations of intent.[107]

The truth of the matter must lie somewhere between these extremes, but lack of books of record[108] makes it difficult to reach a definite conclusion.

The old laws[109] provided for absolute liability on the offender, who was handed over to the next of kin. This in essence, has remained the law with the exception of inevitable accident or complete negligence by the victim, but, of course, in the field of tort not crime.[110] Many of the crimes committed in this period were the same type of crimes as those committed today which, by their very nature, require a guilty intent for their commission.

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tive of the first stage but this is in relation to laws which are much more advanced than the notions of blood-pollution and taboos which require the manifestation of absolute liability. Wigmore, *supra*, n. 96 at 316. Wigmore, along with Holdsworth and others, examines the theory of absolute liability as theory whereas Winfield makes wide assumptions and uses a pragmatic approach.

The transitional period between the most primitive of legal systems described by Wigmore and the Anglo-Saxon examples given by Winfield was a period when the community imposed stringent laws to safeguard a small group of people who needed strong regulatory measures to make life in the community peaceful. Perhaps exceptions began to creep in when the tribal chief decided that it was inexpedient to kill a much-needed warrior who had caused death in a manner which was not particularly serious. Of course, outlawry or alternative punishment, other than death, does not rob the law of the period of its absolute liability. Pollock and Maitland, Vol. II, *supra*, n. 56 at 468-469, are undoubtedly of the opinion that Law started with rigid principles which charged a man with all the evil he has done and then mitigations of this rule are accepted. The 'offender' must be able to swear that nothing was done whereby the dead man was 'farther from life and nearer to death.'

106 Sayre, *supra*, n. 45 at 975.

107 O. W. Holmes, *The Common Law*, at 50, points out the underlying object of the criminal law must be to enforce external conformity to rule, to prevent injurious action quite apart from the intent, of the actor. (In early development it was founded on vengeance. Consider the rationale of trial by battle). We may surmise however, that there was a fatalistic attitude to life in earlier times which made man accept misfortune (in the shape of heavy liability for harm that they did not mean to do) with more resignation than now.'

108 'Law in books' was a rarity in the four centuries before Glanville and even so the written law was so much less in contact with the law in action than it is now. Plucknett, *supra*, n. 66 at 419.

109 Such as a West Gothic one cited by Sayre, *supra*, n. 45 at 977.

110 Potter, *supra*, n. 57 at 356, 359 and 373-375, claims that it was the growth of *mens rea* in felony which caused the gap between crime and tort which appears later.

A strict system, under which feud and blood revenge existed as the sole or, at least, the main means of law enforcement and money payments for settlement of disputes, could only last so long as the community was small and homogenous.[111] As the society became more complicated and unwieldy because of its size, and less isolated from strangers who had no proprietary or communal interest, this peculiar form of social unity decreased and disappeared. Money payments and feud for crimes and offences against the established order became mischievous, being sources of income for those in power, and an intolerable burden for some segments of the community,[112]—usually those most affected. This change—not so much in penalties but in the disposition of the penalties —was largely due to the influence of the church.[113]

Church and State

In the ninth and tenth centuries, but more particularly after the Norman Conquest,[114] we see three great influences on the law:— Canon law, the closely related Roman Law,[115] and the increasing importance of the king's jurisdiction over crime.[116] There is a transformation in the official treatment of those acts we call crimes. This is well described by Jeudwine:[117]

> the Western World suddenly ceased to regard murder, arson, rape and theft as regrettable torts which should be compensated by payment to the family—such and other serious offences came to be regarded not only as sins for which penance was required by the Church, but as crimes against society at large to be prosecuted by the community through its chief; the ever recurring blood feud was gradually discredited in men's minds; the transfer of the receipt of payment from the kinsfolk to the king disinclined men to favour violence.

The Church enforced rights of trial in ecclesiastical courts for its clerks' wrongdoings.[118] It also gained opportunities for enforcing not merely in the confessional, but by a "public and coercive procedure", their doctrine of the various shades of homicidal guilt and it had the old Roman texts from which to draw analogies and hitherto unknown legal rules. A further factor assisting the Church in its broader ap-

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111 This unity was particularly evident when all community members had an interest in the soil.

112 As to this change in emphasis, see Jeudwine, *supra*, n. 28, at 38, and Maitland, *Collected Papers*, Vol. I, at 304 and 317.

113 *Cf.* the interpretation of Hammond who considers it is simply a matter of the State becoming strong and preserving the roots of a society against the disruptive influence of anti-social criminal acts. Hammond, *The Criminal Code*, 1825-1849, at 159.

114 The Normans were more strongly influenced by the ecclesiastical law than the more primitive and insular British tribes.

115 It is, in part, the ancestor of ecclesiastical law.

116 From Goebel's description of Frankish Law (*supra*) as developed and added to their own, the Normans were probably more developed in the field of criminal law than England at the time of the Conquest. Pollock and Maitland, Vol. I, *supra*, n. 56 at 51. The early Merovingians (under the influence of Christian ideals) treated crime as violations of the Kingly authority. Von Bar, *supra*, n. 34 at 71. Pollock and Maitland, Vol. I, *supra*, n. 56 at 478, describe the canon law with its implications as 'floating on the surface of and scarcely mingling with the coarser English law in the early years of development."

117 Jeudwine, *supra*, n. 28 at 84. Liability to the Kingfolk was replaced by the Frankpledge. Jeudwine, *id.*, at 91. Two English legal historians claim that the Norman ecclesiastical restraints did not have a very direct influence in England. Pollock and Maitland, Vol. I, *supra*, n. 56 at 52-53. (But perhaps it can be said that they had a very great indirect one).

118 In the twelfth century, the Church's jurisidiction over criminal law was questioned by the law authorities. This was one bone of contention between Beckett and the King. The Constitution of Clarendon settled the problems on a basis of compromise; that clerks should first answer to the King's Court, and then be remitted to trial by the bishop. The benefit of clergy was introduced in 1170. Eventually it led to many abuses but was not abolished until 7 & 8 Geo. IV c. 28 (1827).

proach to criminal law was the more diversified system of punishments which it could inflict.[119]

The Church's influence accentuated the blameworthiness of wrongdoing by emphasizing the sense of sin. This concept established an objective criterion.[120] This influence had a drastic effect on the punishments inflicted; the moral theologian considered that imprisonment would bring the prisoner, through contemplation on his wrongdoing, to repentance. Ironically, the criterion for punishment was meant to be primarily subjective although the example set by the miscreant's repentance would no doubt be meant to have a general deterrent effect.[121]

Of course the criminal law was not ready for this sophistication (and may never be). In the twelfth century, the law was still concerned with the problem of what type of wrong had been committed. The need for a firmer system for dealings with wrongs had to be evolved before any thought could be given to the problem of degrees of liability (and therefore of punishment).

The influence of the church was remarkable in its by-products rather than in its direct authority over legal matters. ". . . it helped forward the development of the state, it sanctified the royal office, it taught men that the king was the representative of law and order, the maintainer of justice and equity".[122]

This transition did not take place suddenly and completely but it was a process by which royal authority over crime was in an unassailable position by the end of the twelfth century.[123]

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[119] This is another reason why the more primitive society had a rigid standard of liability; it was due to a lack of flexibility in its punishments. In Norman law, it has been maintained that little is heard of money payments for wrongs committed. Pollock and Maitland, Vol. I, *supra*, n. 56 at 53.

[120] Von Bar, *supra*, n. 34 at 92 expresses this well—in terms equally applicable today: ". . . [O]nly by adherence to an objective or outward standard can a steady development of criminal law be obtained. By taking the external standard, it is possible to reach gradually a juster valuation of inward or personal guilt. If we are to hope to detect inward guilt by human agencies, we must resort exclusively to external manifestations. Apart from the fact that, under a system of criminal law based on that theory, inward guilt of malice and passion, of ambition and greed, are sure to receive their just desserts, there is, at any rate, no other means available to attain the end desired. Exclusive regard for the moral element leads endlessly nowhere.

[121] *See also* Moreland, *supra*, n. 92 at 5 and 7, Plucknett, *supra*, n. 66 at 305; Sayre, *supra*, n. 45 at 975, 980, 982 and 1016; Cherry, *supra*, n. 18 at 89.

"The point is not that morality first began to make its appearance in the law, but that an increasing and new conscious emphasis upon morality necessitated a new insistence upon psychical elements in determining criminality . . . perhaps it is more correct to say that the newer concept of criminal liability involved not so much a transition of thought, as a shift of emphasis and change in the angle of approach, which resulted in the recognition of new legal doctrines and attitudes." Sayre, *id.*, at 989. Compare the remarks of Plucknett, *id.*, at 465, who explains this evolution more simply. He considers the changed notions as an abandonment of the idea of fixed tariffs being regarded as a true measure of human responsibility and which is only partly due to the direct influence of the Church. "Looking merely at the history of the formal rules, we thus gain the impression of an absolute liability which is in the course of reduction to more rational limits; if, on the other hand, we take into account the discretionary tampering of strict laws with mercy, which the sources frequently allude to, the change seems to be of form rather than of substance." *Legis Henrici Primi*, when speaking of perjury mention '*reum non facet nisi mens rea*.' See later the unrealistic influence of the Church on Bracton.

[122] Holdsworth, Vol. II, *supra*, n. 19 at 40.

[123] The influence of the Church and its canon law is inextricably connected with the influence of Roman law, (although one source has argued that Roman law had no influence on English law before 1066). Montagu & Maitland, *supra*, n. 45, at 21. *But see* the comment of Sohm, *Institutes of Roman Law*, at xxxii. Of course, its influence on Anglo-Saxon law after the invasion of the Teutonic tribes from Germany is problematical. It was introduced to Germany much later than the Teutonic invasion (see Sohm generally). Its direct infusion into English law was at the time of the Renaissance. Its indirect effects were placed well before then in the period which is at present under discussion (pre-twelfth century).

Also see the disagreements on the influence of Roman Law described in Cherry, *supra*, n. 18 at 56-58. Traces of the Roman Law, as inherited from the Roman Conquest, are very rare and of no importance.

See Stubbs, *Constitutional History of England*, Vol. I at 206 and 494. One influence, though not on the law, as law, is the emulation of Roman Law practice by Aethelbert (616 A.D.) in recording his laws.

The influence of Roman Law was 'atmospheric' rather than in a substantive

Royal Jurisdiction

This is not the place to examine all the causes of royal supremacy after the twelfth century. The Norman's system of feudal tenure, the imposition of land taxes, the establishment of a law court of professional judges, the missions of the itinerant justices and the duties of sheriffs are factors in this achievement.

The King's peace was maintained by the conception of the "felony"[124] —with resulting forfeitures. The "pleas of the Crown", similar to the Norman King's ban, started to give royal justice a monopoly over serious offences. The Assizes of Clarendon and Northampton in 1176 provided indictment and presentment in place of "appeals" by private persons. The final demise of composition was accelerated because the King's prior exactions had eaten into the profits of private litigation.

The 'Modern' History of Homicide

The term, *murdrum,* a Latinized form of *morth,* first occurred in the Laws of Edward the Confessor (which are purported to have been collected in the time of William the Conqueror).[125] *Murdrum* denoted a secret unemendable killing—the worst form. This conception of *murdrum,* particularly as it developed under the Normans,[126] was a remarkable instance of the transition from the view that homicide was a wrong to the survivors to the view that it was an offence against the state.[127]

Although there were a few references made to homicide being treated on different bases depending on the mental element and juris-

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form. The reception of Roman Law in England (which was of an admittedly limited character) was like its reception in Germany: not an act of legislation, but a long process of custom. *See* Hunter, *Roman Law,* at 111-112. As Hunter points out, *id.,* at 111 the criminal law "shows marks of contact with Roman Law, but the Church and canon law had a greater influence on its development."

The opportunities for its catalytic effect were many and included the strong and influential Oxford School of Civil Law, the recognition of Roman Law in the clerical courts whose jurisdiction extended over civil matters and the pervasive influence of the clergy who acted as judges in the higher civil courts. Roman Law gave a fillip to the Common Law which had the defects of inflexibility and incongruity with the social environment. Similarly the monarchy in England lent a different flavour to English law with crime being treated as an 'injury' to the State. Cherry, *supra,* n. 18 at 56 *et seq.*

Its influence declined after the reign of Edward I who passed legislation which superceded it (but which was also indebted to it for some of the provisions). The appointment of lay judges and the British predilection for judicial compromise and freedom from absolute rules hastened the decline of Roman law influence. Yet the twelfth century saw the resuscitation of Roman Law in the English Law. Notions of *dolus* and *culpa* were taken up with fresh interest and some attempts were made to graft them on the English Law. See comments regarding Bracton, *infra.*

124 The origin of this term is rather clouded in history; Pollock and Maitland, Vol. II, *supra,* n. 56 at 463; Holdsworth, Vol. II, *supra,* n. 19 at 302-303.

125 Stephen, *History of Criminal Law of England,* Vol. III, at 25; and Maitland, *Pleas of the Crown for County of Gloucester,* at xxix.

126 The technical meaning of *murdrum* had changed; it was still a killing in secret but of a Norman for which a fine was exacted. The crime of forsteal was of similar type—a killing by lying in wait or ambush—which became a plea of the Crown before 1066.

127 This transition was aided, particularly in the case of a secret killing, by the ancient process of blood feud which usually assumed that the facts were notorious or at least easily verifiable, and the law had no adequate means of dealing with such cases. See Pollock, Vol. II, *supra,* n. 24 at 404, and Holdsworth, Vol III, *supra,* n. 19 at 24. Of course it is always easy to find some historical precedents to refute the novelty or ingenuity of present development—in this instance, the post-1200 innovations. The laws of Aethelbert, for instance, described *bot* and *wite* for homicides which varied with the circumstances of the killing and the status of the victim. The Laws of Alfred (particularly Alfred 13 as quoted in Thorpe, Vol I, *supra,* n. 91 at 47,) showed some regard for the mental element and drew a rough distinction between intentional and unintentional killing. The same laws (Alfred 25 as at Thorpe, *id.,* at 49) made provision for a killer to be excused if he killed in defence of his property at night. Whether these were, in practice more than a token denunciation of homicide on religious grounds, or whether they were actually executed as law is now of course impossible to say, but it is obvious that the enactments themselves were very meagre. See Stephen, Vol. III, *supra,* n. 125 at 25. The Laws of Aethelstan also make provision for more stringent treatment for "secret" ("*morth*") crimes. Canute's Laws (Cnut 57)—provided for 'public' disposition of the slayer; this, with the exception of Alfred's Laws, was the only case in which homicide was treated as a crime in a modern sense of the word although at this stage the kin are still given the opportunity for revenge.

diction, the first laws which had any resemblance to, or included a modern definition of, homicide are those contained in the *Leges Henrici Primi*,[128] which describe homicides by poison, witchcraft, wounding or other *maleficium* as being inexpiable.[129]

Although the Normans were administratively innovative, the development of criminal law theory after 1066 was slow. The only clues available to us are from commentators such as Glanville.

The first of Glanville's two divisions was *murdrum* or secret killing, the accusation or appeal of which is only admitted on the prosecution of the blood relations of the victim. The other part of Glanville's law relating to homicide was that of simple homicide; an appellor had to be allied to the deceased by blood, homage or dominion, and had to be able to give testimony relating to the death from his own experience.[130] There is certainly no talk of a mental element.

The next commentator was Bracton who wrote his treatise about two hundred years after the Conquest. Bracton was influenced by the Roman Law and Canon Law.[131] This had the contributory effect, *inter alia*, of introducing into our criminal law, in substantive form, the mental element in crime.[132]

Bracton distinguished homicide according to the cause and manner of the killing. First, homicide *ex justitia, e.g.* by lawful sentence of the court or in killing an outlaw.[133] Secondly, he described homicide *ex necessitate* or *se defendendo*,[134] in which case the homicide was justifiable if the necessity was inevitable as in the defence of one's own person or in killing a housebreaker or trespasser.[135] Thirdly, homicide *ex casu* or *infortunium* was considered an *excusable* killing if it occurred through misadventure. He considered whether the act was

128 As quoted in Thorpe, Vol. I *supra*, n. 91 at 576-582. Note the earlier reference to the doubtful origins of this body of laws. *See also* Pollock and Maitland, Vol. II, *supra*, n. 56 at 456.

129 Stephen, Vol. III, *supra*, n. 125 at 27, considers this to be doubtful as other passages in these puzzling laws referred to "*bot*" and "*wer*". Stephen thinks that it probably meant that they were *prima facie* inexpiable.

130 *Duo autem sunt genera homicidi. Murdrum, quod nullo vidente, nullo sciente clam perperatur, praeter solum interfectorem et ejus complices—Est et aliud Homicidium, quod constat in generali vocabulo, et dicitur, simplex Homicidium.* Glanville, Lib. xiv, c.3

Stephen's comment is that if the definition of "*murdrum*" were omitted, ". . . the passage constitutes a remarkable anticipation of the later division of the crime into murder and manslaughter."

Stephens, Vol. III, *supra*, n. 125 at 28; *cf.* Holdsworth, Vol. II, *supra*, n. 19 at 303. Also see Reeves, *History of the English Law from the Saxons to the End of the Reign of Henry VII*, Vol. I, at 237-238 and 418; Beames, *A Translation of Glanville*, at 354; Pollock and Maitland, Vol. II, *supra*, n. 56 at 483-484; Pike, Vol. II, *supra*, n. 27 at 469.

131 Bracton was particularly indebted to Bernard of Pavia who died in 1213. Maitland and Maine join issue as to the extent of Bracton's plagiarism.

132 Bracton ff. 120b, 121, 136b. "*Crimen (homicidii) non contrahitur, nisi voluntas nocendi intercedat, et voluntas et propositium distinguunt maleficium, et furtum animo non committitur sine affectu furandi.* See Pollock and Maitland, Vol. II, *supra*, n. 5 at 479.

"Moral distinctions will supply a rough test which will help us to draw a wavering line between . . . crimes of varying degrees of gravity." Holdsworth, Vol. II, *supra*, n. 19 at 204. It is also significant that Bracton considered the definition of crimes in connection with the procedure for their punishment. Holdworth, id., at 214. But the law of Bracton's day was not really ready to receive distinctions between the various kinds of homicide which certain influences pressed on him (and particularly the canonist influences) because, unlike ecclesiastical law, there was not choice of punishment. See Maitland, *Select Pleas of the Crown (S.S.)*, at 235.

133 Bracton, f. 120.

134 *Id.*, and Maitland, *supra*, n. 132 at paragraphs 114 and 234.

The law as described by Bracton was very strict as to the inevitability of the necessity requiring 'lack of any meditation or hatred, in fear and grief or mind, in delivering himself and his property, when he could not otherwise escape.' See Bracton (Twiss ed.) 277. See also 4 Bl. Comm. 178 (who quoted Bracton f. 155). Homicide was justifiable where committed for the prevention of any forcible or atrocious crime *e.g.* attempt at robbery or murder of another or burglary. See Sayre, *supra*, n. 45 at 986; Wigmore, *supra*, n. 96 at 322-328 and Moreland, *supra*, n. 92 at 6.

135 This was included as a consequence of a case of 1256, quoted in Pollock and Maitland, Vol. II, *supra*, n. 56 at 477-478.

itself lawful and proper; for if it were unlawful (and not excusable through any excuses) it was held to be murder or voluntary homicide.[136]

This third classification, homicide by misadventure, arose, for instance, where a person threw a stone at an animal or was felling a tree and another person who was passing by was accidentally killed by the stone or tree. The legality of the initial act was examined for if it was not lawful the law considered the wrongdoer guilty of murder (or voluntary homicide). The circumstances were also considered to decide whether due caution had been used. If the act were lawful and the usual bounds of accepted behaviour were not exceeded, culpable homicide was not imputed to the actor. This kind of homicide, which is now designated under the crime of manslaughter,[137] was called *chance medley*[138]—when the killing of man occurred *se defendendo,* in self-defence in a medley, *i.e.* a scuffle, affray or sudden quarrel.[139] All homicide, neither justifiable nor excusable, was in Bracton's time felonious.

Stephen's evaluation of Bracton's treatise seems accurate:[140]

> It lays down, though not very correctly or systematically, some of the leading distinctions connected with the subject, but it is singular that, turning as it does so very largely upon moral considerations, its principal distinction—that between involuntary homicide and murder—should have no relation to morality; that it should take no notice of the different grades of evil intention which may accompany voluntary homicide; and that it should omit altogether the question of provocation.

It classified under the same head, homicide by a sword and homicide by a blow of a fist, homicide by a person provoked in the highest degree and homicide by a robber.[141]

The Developing Classifications of Homicide

Statutory Development

'Homicide' and 'manslaughter' were the general terms under which every type of slaying was comprehended. Those slayings which happened by pure accident or inevitable necessity were not regarded as criminal.[142] The limits of liability were wide with little or no formal legal rules; to a great extent 'guilt' depended on the whim of the king.[143] But when the necessity was not inevitable or the accident was not entirely blameless, the slayer was, according to Bracton, responsible.[144] There were many homicides which were not of the worst type (*i.e.* 'murder') but were also neither justifiable nor cases of misadventure or self-defence and were capital offences.

The Statute of Gloucester not only gave formal recognition to the royal jurisidiction but expanded it. It also set forth those killings

136 This is as far as the divisions of homicide went at this stage.

137 The law did not draw the line between Murder or Manslaughter as it is known today. See *Thomas* v. *Wykes,* Ann. Monest. iv, 233-235.

138 Furthermore, misinterpretation of this definition of 'chance medley' led to confusion and controversy as will be shown at a later stage.

139 This will be referred to later. Bracton f. 121. Note it was still felonious homicide if simply done 'all of a sudden' without any mitigating circumstances.

140 Stephens, Vol. III, *supra,* n. 125 at 33.

141 In Bracton's time, 'murder' meant a secret killing with a fine on the township. The fine was not paid when the killing was by misadventure. Bracton, f. 135.

142 This does not mean they were entirely free of liability, *e.g.* as from appeal.

143 Pollock and Maitland, Vol. II, *supra,* n. 56 at 584. See also Britton I, 113.

144 Stephen, Vol III, *supra,* n. 125 at 35. There is no mention of how degrees of necessity were arrived at.

which would be pardoned by the King.[145] It laid down that: [146]

> The king commands that no writ shall be granted out of the chancery of the the death of a man to enquire whether a man killed another by misadventure or in self-defence, or in other manner by felony, but if such person is in prison and before the justices in eyre or justices of goal delivery, puts himself on the country for good or evil, and if it is found by the country that he did it in self-defence or by misadventure then, on the record of the justices, the king shall pardon him if he will.

This statute provided for the abolition of the writ *de odio et atia* which was issued in order that a jury might say whether a person accused of homicide was accused duly or maliciously. The most common issuing of the writ was in cases of misadventure or self-defence. Such cases were no longer "bailable" and a jury did not proclaim a verdict but pronounced to the effect that the accused could be pardoned by the king if he so pleased.[147]

By a statute of Edward I,[148] foresters and parkers were given the right to kill trespassers found on the preserves under their charge if the miscreants refused to give themselves up and if the park officials did not act maliciously.[149]

The practice of Englishry was finally abolished in 1340.[150] The result was to cut away the ground of distinction taken by Bracton between voluntary homicide in general and 'murder' which gradually came to mean the worst specie of homicide and distinguished it from killing in self-defence, accidental and justifiable homicide.[151]

At this time, statutes were being passed which were expanding the scope of the criminal law. The statute 25 Edward III st. 5 c.2 differentiated treason from felony.[152]

The Development of Malice Aforethought

When the subject's regard for law was not great and the disregard was evidenced by numerous cases of self-help, the unquestioning obedience to a rigid law was very necessary for the preservation of the community structure and the lives of its members. At this stage of development it was impossible to make exceptions and the law appeared

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145 (1278) 6 Edw. I, c. 9. Prior to this, the only killings which were justifiable were those in execution of lawful order of court and in killing an outlaw or a manifest thief. See Holdsworth, Vol. II, *supra*, n. 19 at 303. All other killings were strictly wrongful though not necessarily felonious.

146 The only prior legislation relevant to homicide was the Statute of Marlbridge (1267) 52 Hen. 3, c. 25 which referred to distinctions between *per infortunium* and culpable felony. See comments in Stephen, Vol. III, *supra*, n. 125 at 36-37.

147 Stephen, Vol. III, *supra*, n. 125 at 37. This showed that some degree of guilt was still attached to killing by misadventure or by self defence.

148 21 Edward I, St. 2. Pardons were not granted by the King as a matter of course until 1310. Even then, Stephen, Vol. III, *supra*, n. 125 at 38, suggests that the king would probably do so only upon terms as to fines and forfeitures which would depend on the degree of blame attached to the nature of the necessity or the amount of carelessness he had shown. *See* Stephen's example, *id.*, at 38-39, in which chattels were forfeited but the report intimates that the defendant could expect to buy a pardon. This was brought about, as is shown by these statutes, by a gradual realisation of the importance of the mental element in the criminal law. It must be remembered that many of Bracton's premises anticipated the substantive law as propounded by later statutes. In 1328 a statute (2 Edw. III, C.2) was passed curtailing the number and categories of homicide which could be pardoned as abuses had developed. In 1390 a statute (13 Rich. II St. 2 c.1) was passed allowing the Chancery to issue pardons of course if the killing was by misadventure or in necessary self defence. Of course in time the judges did not ask the jury to find a special verdict of misadventure or self-defence but simply acquitted the accused.

149 Fitz-Herbert, *Corone*, at 284 *et seq* gives examples.

150 13 Edward III, st. 1 c.4; Holdsworth, Vol. II, *supra*, n. 19 at 375 and 259-260. Reeves, Vol. II, *supra*, n. 130 at 416, 417, and Pollock and Maitland, Vol. II, *supra*, n. 56 at 486.

151 Holdsworth, Vol. II, *supra*, n. 19 at 375.

152 Several more felonies were added by statute in this period. *E.g.* 38 Edw. III st. 1. c. 6 and 5 Henry IV, c. 5.

to be harsh. Only when obedience to the law became the rule was it possible to make exceptions.[153]

Bracton's exposition on the law must have been, to a certain extent, theoretical rather than practical.[154] Beginning with the legislation of Edward I, however, we find that the differentiation of criminal liability is indeed practised. The law examined intent and not merely the act; at the same time the law was not being blindly obedient to the canon law theory of moral guilt which tended to disregard the factual and human background.

There are numerous examples[155] of cases where the accused had pleaded self-defence; the jury would so find, if the facts would support it, and, in addition, that the killing was "not by felony or of malice aforethought;" and that in the circumstances of the killing he could not otherwise escape from death.[156]

The use of the expression 'malice aforethought' was a natural consequence of the forms of special findings in such cases and the result was the emergence of the modern meaning of murder with its own mental requirements. This was made necessary by the Statute of Gloucester (1278) which abolished the writ *de odio et atia* and required juries to decide whether homicide was by felony or by misadventure.[157]

At times, it has been very difficult to separate civil and criminal liability. The basic distinction came about when the judges insisted that the appeal of a person wronged should allege a crime, and in particular, a felony.[158]

As Harding says:[159]

> The words of a medieval chief justice, "the thought of man shall not be tried, for the devil himself knoweth not the thought of man", contain . . . a kernel of uncomfortable truth for a law still struggling to appreciate "the psychical element in guilt and innocence".

This struggle and this ineptitude in the early stages of criminal law means that the search for the source of malice aforethought is likely to be fruitless or more accurately is likely to produce spasmodic instances of the concept's existence. Scholars, nevertheless, have tried to clarify the situation. Stephen considers that it developed as a substitute for the writ *de odio et atia*. Maitland considers that when fines[160] were abolished in 1340, *murdrum* did not regain its old meaning of

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153 I am indebted for many insights to the well-researched article by Brown, *supra*, n. 90.

154 Brown, *id.*, points out, for instance, that Bracton introduced the concept that the "will to injure was a necessary pre-requisite for the commission of the offence.". He adds with some justification that, "This insistence on the presence of moral guilt in crime was not capable of immediate appreciation by the English criminal lawyer who was still preoccupied with the question: "Has some definite offence been committed?".

155 Fitzherbert, *supra*, n. 149, at 284-287.

156 *Id.*, at 285. *See* further examples in Reeves, Vol. II, *supra*, n. 140 at 416-417 and Stephen, Vol. III, *supra*, n. 125 at 41.

157 *See* Harding, *supra*, n. 37 at 62-64 where the author gives a very clear description of the mechanics of the appeal and the gradual separation of civil and criminal liability.

158 Harding, *supra*, n. 37 at 63 says:
> "By the thirteenth century, felonies had become more or less commensurate with the "bootless" crimes of Canute and the deeds which the presenting juries of the Assize of Clarendon had to list ". . . the imprecise moral attitude in the word felony perhaps helped to develop a concept of criminal liability. Felony implied a certain venom, malice, premeditation, in the felon."

159 Harding, *supra*, n. 37 at 64.

160 Note, however, that the Statute of Marlbridge (1267) 52 Henry III, c.25 abolished the murder fine if the killing was by misadventure.

secret killing but described a killing by 'malice prepense'.[101]

Maitland was probably accurate in saying that "malice prepense" was not new to the law when it appeared in statutory form in 1531.[102] As early as the fourteenth century, the term was contracted with acts done on a sudden anger.[103] Under the *Leges Henrici Primi*,[104] the King was entitled to a fine if the person killing had lain in wait on the King's highway,[105] and had assaulted his enemy and was taken in the very act. The basic criterion was the secrecy or concealment because if the killer had lain in wait but had not taken advantage of the ambush but had called his enemy to fight and in a straight fight death ensued, no fine was payable. The important element of this 'forsteal', as it was called, was the secrecy and premeditation.

Maitland considered this old concept of 'forsteal' was the direct ancestor of malice aforethought.

He quotes a statute of 1389 which provided that:[106]

> A pardon which in terms is but a pardon for homicide is to be unavailing in case the clain man has been murdered or slain, "*for again, assault* or *malice* prepense."

Maitland has pointed out that the 'waiting prepensed' situation was a plea of the Crown. The system of compositions became unwieldy because of the multiplication of claims by various lords and overlords. It not only became unwieldy but so expensive that few men could afford this process of private exculpation. The King's jurisdiction did not intervene with the entire consent of the lords whose coffers were suffering, and the King's peace was created, partly as a fiction, to legitimate the jurisidiction.[107]

Maitland considered it was an easy developmental step from the *premeditatus assultus* of forsteal to the concept of *praecogitata malitia*. This replaced the old criteria of *premeditata* (meaning waylaying)

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101 Maitland, *Collected Papers*, Vol. I, at 328; Cook, *A Comment on Malice Aforethought*, (1924) 33 Yale L. J. 529, agrees with this. Maitland, *supra*, n. 161 at 308 quoted a case where the compurgators had to swear that the wrongdoer "*quod non ex praecogitata malitia factum fuerat quod praedictum est, sed ex motu iracundiae nimis accensae.*" As stated above, malice prepense was also found in the Statute of Gloucester to distinguish homicide which would result in a hanging from one which was excusable and would be pardoned. *See* Perkins, *Re-examination of Malice Aforethought*, (1934) 43 Yale L. J. 537 at 544-545. For the position as to pardon before this Statute see the cases cited in *1 S.S. Select Pleas of the Crown*, (1877) No. 70 when pardons depended on the King's grace. Note that a statute of 1389, 13 Rich. II, s.2 c.1 had laid down that no pardon was available if the deed had been done "of prepensed malice".

102 23 Henry VIII, c.1 which made murder of 'malice prepense' unclergyable. Note that until this time there was no clear distinction betwen murder and manslaughter. See Maitland, *supra*, n. 161 at 304-305 and Perkins, *supra*, n. 161 at 544.

103 Perkins, *supra*, n. 161 at 545; Pollock and Maitland, Vol. II, *supra*, n. 56 at 485, footnote 5.

104 *Leges Henrici*, 80, ss. 2, 4.

105 The underlying notion being that the highway part of the King's domain and his subjects travelling thereon were entitled to enjoy his 'peace'. Maitland, *supra*, n. 161 at 326. It is not difficult to imagine how this was extended to other situations and other crimes.

106 13 Rich II st. 2 c.1.
The Laws of William the Conqueror had provided for penalties for "prepensed awaiting" as the *Leges Henrici Primi* had done for premeditation and ambush.
The *premeditatus* assault was an old form. The Mosaic law was imported into this concept (with the assistance of the canon law). "But if a man come presumptuously upon his neighbor, to slay him with guile, thou should take him from mine altar, that he may die." Exodus, Ch. xxi, v.15. This robbed the killer of sanctuary and assisted in drawing a line between two kinds of culpable homicide, waylaying, *insidiae* (from the Latin text of the passage from Exodus) and *guet-apens* being the distinctive marks of 'wrongs' of the worst kind.

107 Maitland, *supra*, n. 161 at 313, 317-318 and 328. "Probably the old system (of composition) would sooner or later have been found intolerable and have broken down of its own weight. But the strange thing, the great peculiarity of our criminal law, is that it was not supplanted by myriad local customs, but by one royal and common law." *Id.*, at 313.

with a purely mental element ascertainable without restricting it to the old forsteal situation.[168]

A different interpretation is given by the American writer Cook.[169] He agrees that the expressions *agrait purpense* or *guet-apens* (prepensed awaiting) and *assultus premeditatus* mentioned by Maitland and the writ *de odio et atia* (upon which Stephen relied) were related. On the other hand, Cook finds it difficult to relate these concepts to malice aforethought which became so essential to the crime of murder. He concedes that the mention of *purpense* would go a long way in support of Maitland's contention. His argument is that more weight is attached to the lying-in-wait provision in the extracts than a true pre-meditation. On Maitland's own admission the French expression denotes primarily a lying-in-wait situation. In these circumstances it is difficult to resist Cook's argument.

Cook makes the further point that the concept of *assultus premeditatus* occurs frequently in robbery and mayhem and that there are no cases of homicide alone which include the words. Therefore he decides that one must look elsewhere for the origin of malice aforethought. Cook does not consider that the specific origins of malice aforethought are as recent as Maitland would have us believe.

In the days when liability was so nearly absolute that the courts pronounced the same verdict against a person who killed by misadventure or in self-defence as against the most heinous killer, the only form of alleviation was by royal pardon. Cook maintains that before the king granted a pardon he ensured that a killer was free from moral guilt. To achieve this he enlisted the aid of juries who reached a verdict on the facts, and that in these deliberations "malice aforethought" is first mentioned.[170]

By the early thirteenth century pardons were using the term in the sense we know it today.

On this point Cook states: [171]

> Many such pardons are granted, with the result that the meaning and connotation of malice became familiar. So we are not surprised when in 1270, after a brawl in which a person is wounded, we see the offending party made to swear, with fifty compurgators that the affair had been the result of sudden anger and not of malice aforethought.

Cook quotes many cases of the fourteenth century where the term was used in relation to cases of self-defence. Those cases occurred many years before malice aforethought was applied to the old forsteal situ-

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168 Maitland, *supra*, n. 161 at 322. Compare with the classic definition of express malice given by Blackstone (4 Bl. Comm. 199):
"Express malice is when one, with a sedate deliberate mind and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as laying in wait, antecedent menaces, former grudges and concerted schemes to do him some bodily harm."
Blackstone is using waylaying simply as an example of the malice involved; of course it must be noted that malice is still tied primarily to a meaning of premeditation.

169 Cook, *supra*, n. 161.

170 *Id.*, at 533.
It was strange that the juries should be reaching decisions involving malice aforethought when the courts were still ignoring it. Cook offers no explanation of this phenomenon; the only possible explanation which can be suggested is that the question of moral guilt was put before the jury by the King's chancellor or deputies who were ecclesiastics. This is not entirely convincing as a majority of the judges were also in holy orders.

171 *Id.*, at 535. *Cf.* 535, footnote 35. Maitland refers to this at 308. It should be noted that the crime was simply one of wounding. In 1306 there was an example relating to slander. This detracts from Cook's criticism that the expression *assaultus premeditatus* applied equally to offences other than homicide.

ation and also before cases where malice aforethought was coupled in some cases with ambush, the latter being treated as a separate act in itself.

By the fifteenth century it had become the custom to indict a man as having committed the offence with malice aforethought. In any event, Cook[172] claims there were various statutes of this period which limited and finally abolished benefit of clergy and which emphasized the element of malice aforethought.[173]

Despite its inconsistencies, Cook's argument seems more likely to be the correct one. As stated earlier, there are a few difficulties; it is not easy to relate the notion of malice in slander and other non-fatal crimes to the mental element in murder. This difficulty is a relatively minor one compared with the linguistic (and other) ambiguities in Maitland's analysis.

On the other hand, it may be a little difficult to believe that the King and the juries should be assessing a killing in terms of a mental element when the courts had remained oblivious or had ignored the development. Perhaps this can be explained in terms of rigidity of the court's attitude and the inelastic interpretation given to the common law as compared with the application of these 'equitable' principles. We must remember, however, that the persons who came to the King asking for pardons were reliant on the King's grace to relieve them from a financial obligation to the kin or the King himself. In any event, the King or his representative would be very solicitous in examining this application for pardon to ensure that the applicant was not using the "defences" of accident or self-defence as shams or shields for wrongdoing and particularly for revenge. Of course there is the more practical question that the King would be losing revenue if a person charged was freed entirely from pecuniary or physical liability.[174]

Development from the Fourteenth to the Sixteenth Centuries

During this period, the developments were elaborations on the principles laid down in the reign of Edward I. Many anachronisms remained[175] and the law of homicide was slow to change. Although the courts were taking into account the peculiar circumstances of particular cases, the law of homicide remained harsh.[176] For instance, a homicide

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172 *Id.*, at 536.

173 *See* (1496) 12 Hen. VII, c. 7; (1512) 4 Hen. VIII, c. 2; (1531) 23 Hen. VIII, c. 1, ss. 3, 4; (1547) 1 Edw. VI c.12, s.10. In this regard compare Cook's opening remarks, *id.*, at 529, that malice was not an essential part of murder until "comparatively recent" origin. *Buckler's Case* (1552) 1 Dyer 69.

174 Although the special findings of the juries enabled a person who had killed in self-defence to be exonerated, forfeiture of goods remained a consequence of such a verdict. *See* 21 Edward III, Stephen, Vol. III, *supra*, n. 125 at 37. Stephen considers that the mistaken construction placed on the Statute of Marlbridge had the practical result of attaching forfeiture of goods to a verdict of *se defendendo*. The mistake being that 'murder' was not construed as it should have been as *murdrum*—a fine on the township, but as the more modern development of murder as the most heinous form of homicide. Forfeiture was not finally abolished until accomplished by the statute, 9 Geo. IV, c. 31, s. 10.

175 *E.g.* appeals of felony, benefit of clergy and deodands. On the other hand note the ameliorative measures which sought to preserve of the person and his property.
E.g. Y.B. 9 Edward IV Mich. pl. 10 per Litt, and Y.B. 35 Hen. VI, Mich. pl. 3 per Priscot C.J.. Further examples: 22 Hen. VI, Mich. pl. 12; 35 Hen. VI, Mich. pl. 3.

176 *E.g.* North Assize Rolls 85; 26 Ass. pl. 26 and 32; Y.B. 21 Hen. VII, Mich. pl. 50; 43 Ass. pl. 31; Y.B. 2 Hen. IV, Mich. pl. 40; Fitz. *Ab Corone* pl. 284, 286; *Bracton's Note Book*, case 1216; *Select Pleas of Crown (S.S.)* pl. 70.

in self-defence, in repelling a felon or by misadventure still resulted in forfeiture of goods and the need for a pardon.[177]

Up to this time, as noticed above, although there had been a legal definition of murder, as distinguished from other types of homicide, it was a distinction which involved very little differentiation from other homicides unless they were justifiable, *se defendendo* or by misadventure. Homicide was felonious and therefore capital,[178] whether it did or did not amount to murder, but it was possible to claim benefit of clergy.[179] The only distinction between murder and what would now be termed manslaughter was that murder by waylaying, malice prepense *etc.* was not within the terms of any general pardon. There were controversies as to the meaning of malice aforethought. There were even arguments as to whether such a test should be applied at all.[180]

Stephen describes[181] how the judges of the fifteenth and sixteenth centures had a loose criterion of 'malice', that they called the mental element in killing which they applied when they considered it proper that the perpetrator should hang.

Homicide and Malice Aforethought after the Sixteenth Century

Homicide was now divided into two branches; murder, being unlawful killing with malice aforethought (and without benefit of clergy) and, secondly, homicide in general, being unlawful killing without malice aforethought (with benefit of clergy). The remaining history consists of a search for a more precise definition of malice aforethought.[182]

There were very few commentators between the time of Bracton and that of Coke. At the end of the sixteenth century, however, the criminal law became the subject of treatises, such as Staundforde's "Pleas of the Crown" which was plagiarized from Bracton. He recognized only two kinds of voluntary homicide, with malice prepense, and upon a sudden quarrel. Staundforde considered that, in cases of avoidable necessity and in all cases of killing in self-defence other than those protected by 24 Henry VIII c.5 (as to the killing of robbers and burglars), if the act was necessary to save the life of the slayer, he was entitled to a pardon but his goods were forfeited. The same held true in killings by misadventure.

177 21 Hen. VIII, c. 5 (1532) recited in the preamble that it had been doubtful whether a person who killed anyone who attempted to rob or murder him in his own house, or on or near the highway, was to forfeit his goods and enacted that for the future no forfeiture should be incurred in any such case but that the persons so killing should be entitled to a simple acquittal.

This statutory provision showed that, up to this time, forfeiture was the usual penalty for the unfortunate person who killed in self-defence. Stephen, Vol. III, *supra*, n. 125 at 40 and Foster, *Crown Law*, at 287 considers that this method of forfeiture in self-defence was the last remnant of the old system of *bot* and *wite*.

It would seem from the above that at last the granting of a pardon was a matter of course. The vigilant attention of Parliament was soon to be attracted to the alleged abuse in the granting of pardons.

178 The main difficulty being that those charged with that homicide were only susceptible to three possible forms of treatments, *viz.*, execution, acquittal or pardon.

179 As to gradual exclusion of murder from benefit of clergy and restriction of this privilege, *see*: 13 Hen. VII, 4 Hen. VIII, 23 Henry VIII, 1 Edward VI, and note the gradual inclusion of definite words describing and incorporating the mental element.

180 146 Brian C. J. in Y. B. 7 Edw. IV, f. 2, pl. 2. quoted in Brown *supra*, n. 90 at 237. But see (1467) Y.B. 6, Ed w. IV, 4 Mich. pl. 18. and Y.B. 12, Edw. IV, pl. 28, Y.B. 13, Edw. IV, pl. 5.

181 Quoted in Royal Commission on Capital Punishment 1866: Minutes of Evidence, Q. 2110.

As Brown states, *supra*, n. 90 at 237-238, from the extension of malice to those who "deserved hanging or some other form of fatal torture" the concept of implied malice was developed.

182 An example is a statute of 1530, 22 Hen. VIII c. 2, where the offence of poisoning was made high treason and offenders were excluded from benefit of clergy. Another statute, 1 Edw. VI, c.12, c.3, repealed the earlier statute and provided that all wilful killings by poisoning should be adjudged "wilful murder of malice prepensed".

The reign of James I saw the passing of significant legislation, the Statute of Stabbing,[183] the preamble of which states:

> . . . to the end that stabbing and killing men on the sudden, done and committed by many inhuman and wicked persons in the time of their rage, drunkenness, hidden pleasure, or other passions of which may be restrained.

The body of the Act provides that:[184]

> Every person . . . which . . . shall stab or thrust any person or persons that hath not their own weapon drawn, or that hath not then first stricken the party, which shall so stab or thrust so as the person so stabbed or thrust—shall thereof die within the space of six months then next following although it cannot be proved that the same was done of malice aforethought . . . shall be excluded from the benefit of clergy and suffer death as in the case of wilful murder.

This legislation, instead of clarifying the law, made it more incomprehensible; it assumed that no extenuating circumstances except drawing a weapon or actual stabbing could be sufficient 'provocation'[185] to reduce killing by stabbing from murder to manslaughter. It produced such harsh results that the judges refused to apply it.[186]

At last, in 1666, the judges agreed that the Statute was merely declaratory of the common law and an attempt to counteract juries which had tended to see the mitigation of provocation in unlikely cases. (Perhaps this is not surprising when one considers the potential punishments whcih could be inflicted.)

In any event, the meaning supposedly given to malice aforethought by the Statute of Stabbing was superseded by the writings of Coke and other commentators of the seventeenth century. One of these was Lambard who divided voluntary homicide into punishable and non-punishable. The latter included killings committed in the course of justice and 'justifiable' deaths. Punishable homicides were classified as those committed with malice prepense (murder, petit treason and *felo de se*) and those without (chance medley and self-defence).[187]

Lambard was the first person to attempt to give a modern meaning to malice aforethought.[188] His treatment of the concept showed it was gradually adopting its more sophisticated, and unsatisfactory, meaning.

There is, unfortunately, the first official recognition of the unhappy implied malice:

> . . . if one (suddenly and without outward show or present quarrel or offence) draw his weapon and therewith kill another that standeth by him, the law judgeth it to have proceeded of former malice, meditated within his own mind.[189]

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183 2 James I, c. 8, (1604). *See* comments of Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed., Vol. III, at 746-747.

184 The meaning of 'malice aforethought' or 'malice prepense' was construed in its popular meaning.

185 It must be noted that this term is being used in this context in a non-legal sense (or at least not in the sense which is ascribed to it today).

186 *See* examples in Foster, *supra*, n. 177 at 299 and 301. I Hawk, P.C. 7, *per* Blackstone (4 Bl. Comm. 193): "For in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt: (unless it is poison and shows clear deliberation)." The case of a man stabbing an adulterer was eventually held not to be within the Act but it was not until much later that such a killing was manslaughter and not murder.

187 Lambard's table of homicide did not include involuntary killing which resulted in forfeiture if the act was unlawful and might be felony (murder or manslaughter).

188 Stephen, Vol. III, *supra*, n. 125 at 50.

189 Stephen's comment, *id.*, at 50-51, is that this statement was incorrect because it took no notice of the sudden killing in which there really was no antecedent malice, as, for instance, killing upon a slight provocation or in "mere wantonness". Stephen asks why should such a man be in any different position than one who had a motive which was obvious. The difficulty might have been resolved if consideration had been given to the fact that motive must in the nature of things precede the act caused by it, and the Statute of Stabbing had said nothing about the duration of the premeditation.

Attempts have been made to define malice aforethought. They seem to have failed and, instead, we have gathered a collection of special circumstances. The law had not become more scientific;[190] instead, it had reflected the social conditions of the time and the attitudes toward punishment.

We can, at least, say that malice is starting to take on a modern meaning so that the literal interpretation of premeditation is too narrow.[191]

Coke

Much of the uncertainty surrounding malice aforethought is attributable to the very influential Coke. He described[192] it in these terms:[193]

> . . . malice prepense is when one compasseth to kill, wound, or beat another, and doth it *fedato animo*. This is said in law to be malice aforethought prepensed—*malitia praecognita*.

And he gives an illustration of its meaning:[194]

> It must be malice continuing until the mortal wound or the like be given. Albeit there had been malice between two, and after they are pacified and made friends, and after this upon a new occasion fall out, and the one killeth the other, this is Homicide, but no murder, because the former malice continued not.

Coke also gave[195] a negative definition that "some manslaughters be voluntary and not of malice aforethought upon some sudden falling out", *delinquens per iram provocatus puniri debet mitius*.[196]

Coke commented that there was no difference between murder and manslaughter, but that one was upon malice forethought and the other upon a sudden occasion and therefore was called chance medley. He gave a further illustration:[197]

> If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go into the field, and there in fight the one killeth the other; here is no malice prepensed, for the fetching of the weapon and going into the field, is but a continuance of the sudden falling out, and the *blood was never cooled*. But if they appoint to fight the next day, that is malice prepensed.

This definition of 'malice' given by Coke gives an 'unnatural' meaning to the word. The natural meaning of the word refers not to intention, but to the motives of the person killing.

Coke's first case of implied malice[198] was one of killing without any provocation. It is strange that Coke should call this implied malice

190 *See* Shapiro, *Law and Science in Seventeenth Century England*, (1969) 21 Stan. L. Rev. 727 for an analysis of law and science in this period.

191 Many terms were used in a confused way. Manslaughter tended to have a literal rather than a technical meaning. Chance medley was similarly confused; some commentators using it as a killing upon a sudden quarrel, others as provocation or self-defence. It had probably meant one or other of these at different times. From the seventeenth century onwards, the confusion continued; this was partly due to lack of a clear conception of its history and a misinterpretation of its terms and contexts.

Finally it should be noted that the use of an examination of the categories of murder as set down in the books is open to some doubt. First, it is highly likely that theory varied from practice. Secondly, related to the first point, there was an inadequate range of punishments to deal with 'categories' of homicide which were less than those attracting liability for homicide; consequently injustices were done.

192 Co. Inst. III, at 51.

193 This points the way, in a negative fashion, to the theory that provocation negatives malice; this is clear from Coke's later remarks, regarding murder being voluntary killing without any provocation.

194 Co. Inst. III, at 51. This will be referred to later in the direct context of provocation and the test of the cooling time.

195 *Id.*

196 *Id.*, at 55.

197 *Id.*, at 51.

198 *Id.*, at 52. On the manner of the deed, Coke, thinking particularly of poisoning, quotes "*Mackallaye's case*" (*sic.*) Lib. 9 fol. 67b.

because such a situation obviously referred to a case of killing intentionally (without provocation) which was a clear case of express malice for where a man killed another accidentally without provocation, there was no malice express or implied.

Other cases of implied malice cited by Coke were:

(i) "in respect of the person slain"[199] *e.g.* magistrate, constable or watchman killed in the course of duty.

(ii) "in respect of person killing"[200] *e.g.* if A assaults B to rob him and in resisting, A killeth D this is murder by malice implied.

Coke also stated:[201]

> Some (killings) be voluntary, and yet being done upon an inevitable cause, are no felony.
> As if A be assaulted by B, and they fight together and before any mortal blow given A giveth back until he unto cometh a hedge, wall, or other strait, beyond which he cannot pass, and then in his own defence and for safeguard of *his own life* killeth the other: this is voluntary, and yet no felony [because it was done] *se defendendo.*

A further example was given:[202]

> If A assault B so *fiercely and violently,* and in *such a place,* and in *such a manner,* as if B should give back, he would be in danger of his life, he may in this case defend himself; and if in *that* defence he killeth A, it is *se defendendo.*

All Coke had to say as to chance medley was:[203]

> Homicide is called chance medley or chance melee for that is done by chance (without premeditation) upon a sudden brawl, shuffling or contention.

Coke previously defined malice in an "unnatural" sense and yet, in the above illustration, he reverts to the word's "natural" meaning. Surely it is just as possible to be in a state *sedato animo* in executing an intention suddenly conceived as in executing an intention of long standing. Stephen made a pertinent comment on Coke's formulation of malice:[204]

> If Coke had contented himself with saying that malice meant an intention to inflict bodily injury not justified or excused or mitigated by law, and that prepensed meant only that the intention must be formed before the injury was inflicted, he would have said very nearly what he did actually say, without employing any fiction whatever; and if he had added that the word likewise included reckless indifference as to whether bodily injury was caused or not, he would have made his statement complete . . . .

More Specific Classifications of Homicide and Concurrent Confusion

The confusion seemed to be minimized by the time of Henry VII. Homicide was categorized as murder (premeditated homicide) and felonious homicide (homicide intended, though not previously designed

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199 Co. Inst. III, at 52.

200 *Id.*

201 *Id.*, at 55-56. The Statute of Gloucester saved his life but he still suffered forfeiture.

202 *Id.*, at 56.

203 This is obviously the source of the confusion between chance medley and accident (*infra*).

204 Stephen, Vol. III, *supra*, n. 125 at 55-56. Also note that, up to this point, the law of homicide made no differentiation based on the type of violence (*e.g.* knife or fist) used which would be a criterion for the type of homicide committed. Similarly, there was no positive rule on the meaning of provocation. *See* comment in Stephen, id., at 55 and Reeves, Vol. II, *supra*, n. 130 at 416. It will be noted that the term 'provocation' was used by Coke and even earlier writers but in a loose sense with no exact meaning. Such meaning seems to imply mitigation but is hopelessly entangled with self-defence and chance medley.
The only firm rule was the adultery rule which was recognized in the earliest tribal laws (and Roman law). See *infra*. Coke negatively mentions provocation in a case of sudden killing by describing the absence of provocation as raising a presumption of malice prepense. *Cf.* the modern case of *Mancini* v. *D.P.P.* [1942] A.C.1.

or premeditated). Every intentional act of homicide was considered felonious unless justifiable or excusable.[205]

Even in the reign of Elizabeth I, the distinction between murder and manslaughter still caused some confusion in consequence of which there seems to have been a lack of uniformity among the judges, some thinking that they were distinct offences and others having treated them as two names for the same offence.[206] The fact that the literal meaning had been ascribed to manslaughter was a main cause of the trouble. One writer[207] contends that because of the common everyday usage applied to 'manslaughter', the term chance medley was invented to supply and describe the relevant circumstances.[208]

But in the latter part of the reign of Elizabeth I, the term manslaughter had begun to attract the overall meaning which it bears today.[209] A commentator[210] shows the confusion which existed in referring to 'manslaughter' as being covered by the following examples.

> First—it might be manslaughter as is allowed by law *viz.*, upon a certain necessity or in the execution of justice, in defence of one's house, goods or person. Secondly, it might be manslaughter upon premeditated malice commonly called murder.

He then described two other kinds of voluntary homicide without *preceding* malice, the first of which is that crime "commonly called manslaughter", more correctly "homicide by chance medley" which signified "a killing when people were meddled or committed together by mere chance upon some un-looked-for occasion without any former malice." The second is killing *se defendendo;* not such a one as is justified as those mentioned above under homicide allowed by law; nor again such as is attended with circumstances of heat and sudden affray as that before mentioned.[211] His final classification is manslaughter by misadventure.

We have seen that this distinction between murder and manslaughter, based on premeditated malice (roughly meaning ill-will) and a sudden falling out, was inaccurate. There were many cases where a sudden falling out could import malice aforethought where intention was manifest and no mitigation applicable.[212] The doctrine of implied malice was only a further complication.

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205 The use of this distinction is shown by an example in the reign of Henry VIII:
> A prisoner was found guilty of manslaughter but not guilty of murder and sentenced to be hanged. The reason given was that "manslaughter is comprehended in murder." 'From this we should be led to conclude that the precise meaning of murder, as distinguished from other killing, was not yet defined, nor indeed did there seem to be any direction by which a line could be drawn, until the statute 23 Henry VIII had taken away clergy from murder with malice prepense; the form of which expression seems to intimate that there might be a murder (*sic*) without malice prepense.' See Reeves, Vol. III, *supra*, n. 130 at 411.

206 *See* examples quoted by Reeves, *id.*, at 794 and 795, and particularly *Wroth* v. *Wigges*, Cro. Eliz. 276, in which the jury found prisoner not guilty of murder and declined to bring in a verdict of guilty of manslaughter as such question was not within their charge.

207 Reeves, *id.*, at 794.

208 In this regard Brown, *supra*, n. 90 at 239 would appear to have created a misconception in classing chance medley as excusable. On the other hand it should be remembered that when chance medley was the only alternative to murder (*See* Staunforde *supra*) there was no alternative punishment and the person killing under chance medley simply suffered forfeiture—as did those who killed in a situation which was classified as justifiable homicide.

209 Walsh sets this development at a little earlier stage, *viz.* in time of Coke. "Other kinds of homicide (*i.e.* those except murder) came to be called chance medley and by Coke's time, the term 'manslaughter' had come into use in its modern sense."

210 Lamb. Iren, 218.

211 *Id.*, at 230. This broad (and inaccurate) classification of course still implies a secret quality being attached to murder.

212 At the time when Coke, and others, were writing their commentaries, a "sudden falling out" was much more likely—due to the habitual carrying of weapons, the mores of demanding satisfaction and the lack of law enforcement as we know it

We must remember of course that we have little case law we can examine and the rules stated by Coke (and, later, by Hale, Foster, and Hawkins) were based on occurrences in the course and the commentators' perceptions of them. Chance medley may have been inaccurate, as was the definition of malice and manslaughter, but it did provide a mitigation. This provides an attractive rationale and suggests that the judges were humane in applying a criminal equity. Yet, it must be remembered that the punishments for the lesser forms of homicide were severe. Even an acquittal or a pardon resulted in forfeiture. In terms of legal theory, we do have categories but the commentators' formulations of these rules had little significance if the punishments and forfeitures were in fact applied.

Perhaps the more practical and sophisticated rules of Hale, Chief Justice of England, may give more enlightenment, certainty and reason to the law.

Hale's Pleas of the Crown

Hale divided the killings into three main groups.[213] First, there was the homicide which was purely voluntary, *i.e.* murder or manslaughter. His second classification was that of the involuntary homicide such as killing *per infortunium.* Thirdly, Hale spoke of mixed homicides, partly voluntary and partly involuntary which included killing *se defendendo* (and which involved forfeiture of goods), killing in defence of a man's house or person, against an assault in *via regia,* and in advancement or execution of justice.[214]

Hale also stated:[215]

> Murder and manslaughter differ not in kind or nature of the offence, but only in the degree, the former being a killing of a man of malice prepense, the latter upon a sudden provocation and falling out.

This seems to be stated categorically and involves limited categories at that, but he went on to say that it was possible for a jury to find a man accuse of murder and could yet be convicted of manslaughter if such were found.

Hale differentiated between murder and manslaughter:[216]

(i) in the degree and quality of the offence; for murder is accompanied with malice aforethought, either express or presumed but bare homicide is upon a sudden provocation or falling out.

(ii) . . . and in murder there may be accessories before and after because ordinarily it is an act of deliberation and not merely of sudden passion.

(iii) The indictment for murder essentially requires these words—*'felonice ex malitia fua praecognita interfecit et murdravit'* but the indictment of *simple* homicide is only *'felonice interfecit'.*

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today. *See also* Holdsworth, Vol. III, *supra,* n. 19 at 303. Stephen's comment, Vol. III, *supra,* n. 125 at 59, is worthy of note:

> "The old law on this subject is adjusted at every point to a state of things in which men habitually carried deadly weapons and used them on very slight occasions. In substance, it was to this effect: If two men quarrel and one attacks the other with a deadly weapon, it is the duty of the person so attacked to fly as far as it is physically possible for him to do so, whether he is in the right or in the wrong. If his enemy follows him up and tries to kill him, and if solely in order to avoid instant death he defends himself and kills his enemy, he is not to forfeit life and land like a felon, but he is to forfeit his goods and to purchase a pardon and to be imprisoned till trial, no doubt because the presumption was that both parties were to blame in a quarrel. If the person attacked does not run away but resists, and in the fight either is killed, the offence is manslaughter."

213 1 Hale P. C. 472.

214 As Stephen points out, Vol. III, *supra,* n. 125 at 61, the use of the word 'voluntary' in the first category is confusing; if it means 'intentional' it would include the killings described in the third category. Similarly, it could hardly mean 'voluntary' ('of the will') in its strict or 'natural' sense because this would include all homicides.

215 1 Hale P.C. 499 and 450.

216 1 Hale P.C. 450.

Hale's comments on malice aforethought seem to coincide with Coke's. His initial classification of malice[217] is identical with that of Coke. He described malice as a 'deliberate intention of doing *any* unlawful bodily harm'. This intention was judged from external circumstances.

As to provocation, Hale gave this illustration:[218]

> If there is a dispute (*e.g.* a long standing law suit) between A and B—this is not sufficient evidence of malice prepense—even if they meet and upon sudden provocation—but if they meet and fall out and one kills the other, this may amount to malice.

Hale considered that there was no provocation if there had been lying-in-wait or a predisposition to do bodily harm. He used the same illustration as Coke:[219]

> . . . that if A and B have quarrelled and have been reconciled and then upon another occasion fall out, it is not murder unless the reconciliation was a sham and the hurt done was upon the score of old malice—then it is considered to be murder.

And then a more realistic example was given:[220]

> If there be *malice* by A against B and vice versa, and they meet and upon the *account of that malice* A strikes B and B thereupon kills A (*otherwise* than on his own necessary *defence*) it is murder in B, but if they meet accidentally and A assaults B first and B *merely* in his own defence, without any other malicious design kills A, this is *not* murder in B for it was not done upon account of the former malice but a new and sudden emergency for the safeguard of B's life; but if A and B meet deliberately in compact it is murder.

Hale was doubtful of the law where:[221]

> B genuinely declined to fight with A (in circumstances otherwise similar to the above) and ran away as far as he could, offered to yield and yet A refusing the decline of it, had attempted his death and B, after all this, kills A in his own defence.

He seemed to be of the hesitant opinion that it would excuse him of murder so long as the running away was not a pretence.[222]

He gave a further example:[223]

> If A challenges B to fight and B refuses, but lets A know he will not be beaten, but will defend himself and B kills A on A assaulting him, it is *se defendendo* unless B could escape and did not.

Hale did show more clearly and fully than Coke the question of provocation in homicide.

Another example given by Hale was very similar to one given by Coke:[224]

> If A and B fell out suddenly and run and get their weapons and go into a field and fight and A kills B, this is not murder but homicide, for it is continuance of the sudden falling out and the blood was never cooled.[224]

He made a distinction however (which has developed into a concrete rule in relation to provocation),[225] in cases where the killing

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217 1 Hale P.C. 451.
218 *Id.*
219 1 Hale P.C. 452.
220 *Id.*
221 *Id.*
222 *Id.*, *Taverner's Case.* A challenged C to fight and C declined and A called him a coward. But if one kills the other in an arranged fight—it is murder. 1 Rolle Rep. 295.
223 1 Hale P.C. 453.
224 4 Bl. Comm. 181, agreed and described it as one continued act of passion.
225 Co. P.C. p. 51, *Ferrer's Case.* Cro. Car. 371. *Morgan's Case.* Cro. Eliz. 101. *See also Royley's Case* 12 Co. Rep. 87, Cro. Jac. 296. *Holloway's Case* Jones, W. 198. Kelyng 127. Hale discussed *Holloway's Case* (Kelyng 64 and 65, 1 Hale P.C. 454): If the master designeth an immoderate or unreasonable correction, either regarding the measure or manner or instrument, thereof, and the servant die thereof, I see not how this can be excused from murder: if done with deliberation and design, nor from manslaughter if done herein consideration must be had of the manner of the provocation, the danger of the instrument, which the master useth and the age or condition of the servant that is stricken. Hale suggested that the same rule applied to schoolmasters. See Hale, 1 Hale P.C. 455, which also described provocation as that which would take off the presumption of malice in killing.

took place on another day or after such a length of time that it was presumed that they had time for *deliberation* in which case it was murder.

Hale enumerated the situations which would give rise to provocation. For instance where "A jostles B to take the wall of him, or whips out of the track the horse on which A is riding".[226] This was, in Hale's opinion, provocation in A.[227] Secondly, insulting language of itself was not provocation but if A gave indecent language to B and B thereupon struck A, but not mortally and then A struck B and then B struck A, that was "but again manslaughter for the second stroke made a *new* provocation."[228]

Hale makes some incomprehensible distinctions. Where a sheriff's bailiff tries to execute a process on a warrant which is faulty, in its drafting or on jurisidictional grounds,[229] and the person upon whom the bailiff attempts to service the process kills the bailiff,[230] it is adjudged manslaughter and not murder. Yet, in a case where the type of process is erroneous, such a killing is not reducible to manslaughter.[231] Thirdly, if A demands a debt of B and serves him with a writ, there is no provocation.[232]

The last case Hale mentioned is of A and B quarrelling:[233]

> A tells B to pluck a pin out of A's sleeve which B doth accordingly, and then A strikes B, whereof he dies; it is no provocation because A consented and it appeared to be a deliberate artifice in A to take occasion to kill B.

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226 1 Hale P.C. 455-457.

227 *See Lambe's Case*, (1641-1642) 17 Chas. 1.
"If A be passing the street and B meeting him (there being convenient distance between A and the wall) takes the wall of A and thereupon A kills him, this is murder. But if B had jostled A, this jostling had been a provocation. (1 Hale P.C. 455) and so it would be; if A riding on the road, B had whipt the horse of A out of the track and then A had alighted, and killed B it had been manslaughter." *Lanure's Case* (1644).

228 In *Lord Morley's Case*, 6 St. Tr. 769, it was agreed that if A gives fighting words to B and thereupon B immediately kills him, this is murder in B and that such words are not in law, such a provocation as will extenuate the offence into manslaughter. Hale makes a comment regarding Statute of Stabbing to the effect that it was partly passed to stop the practice of juries who were apt upon any verbal provocation to find the fact to be manslaughter. There is then an indecipherable reference to 'that' case (it is not known if he means *Morley*) held that the words of menace of bodily harm would come within the reason of such a provocation as would make the offence to be but manslaughter. (1 Hale, P.C. 456.) Hale continued the discussion of provocation by words: "And many, who were of opinion, that bare words of fighting, disdain or contumely, would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were of this opinion, that if A gives indecent language to B and B thereupon strikes A, but not mortally, and then A strikes B again, and then B kills A, that this is but manslaughter for the second stroke made a new provocation and . . . It was decided this was but a sudden falling out and the second blow makes the affray" (1 Hale P.C. 456) See also *Williams*, 1 Hale P.C. 469. He also cites a case in which:
"A was sitting drinking in an alehouse; B, a woman, called him 'a son of a whore.' A took up a broomstaff and at a distance throws it at her which hit her and killed her. The question of law was put to all the judges at Serjeants' Inn who ruled that bare words or at least words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter."
Admitting that provocation by words would not extenuate in cases where striking had been with such an instrument as necessarily would have caused death, (with sword or pistol), judges were divided in present case and the king was advised to pardon the defendant which was done. (1 Hale, P.C. 456-457.)
A final instance quoted by Hale, in this category is the case where there is chiding between husband and wife and the husband strikes his wife thereupon with a pestle, so that she dies presently, it is murder, and the chiding will not be such provocation as to mitigate. 1 Hale, P.C. 457, 43 Cro. Eliz. f. 120a. Kel. 64. *Cf.* sections 36 to 42 of Canadian Criminal Code, S.C. 1953-54, c. 51.

229 *Pew's Case*, Cro. Car. 183; *Semayne*, 5 Co. Rep. 91a, 5 Co. 91 b, Cro. Car. 537, W. Jones 429; *Fisher's Case*, M. 17 Jac. Br. *See also Mackley's Case*, 9, Co. Rep. 68. *Young's Case*, 4. Co. Rep. 40a.

230 *Buckner's Case*, Kel. J. 136 (quoted in 1 Hale P.C. 4780).

231 *Mackalley's Case*, 9 Co. Rep. 65b, Co. 66a, Co. 66b.

232 The same is true if A makes a face at B or A takes the wall of B without jostling. 1 Hale P.C. 455. *Brain's Case*, Cro. Eliz. 779; Kel. 131.

233 1 Hale P.C. 456.

Hale did not mention in any detail the anomalous adultery cases but he referred to the decision in *Manning*.[234]

> If A commit adultery with B the wife of C who comes up and takes them in the very act and with a *staff* kills the adulterer upon the place.

Hale described this as a case of "manslaughter and neither murder or under the privilege of *se defendendo*. He went on, "but if A had been taken by C in the very attempt of a rape upon the wife and she crying out, her husband had come and killed A in the act of ravishment, it would be within *se defendendo* because it was a felony."[235]

Blackstone paid greater attention to provocation than had the earlier writers. He took a very modern view that mitigation for provocation was due to the law's regard for human frailty.[236] He considered that the law took the legitimate view that a hasty and deliberate act should not be put on the same footing as the more guilty deliberate act. He did not quite reflect modern law in some of his illustrations; for instance he described the pulling of a man's nose as being "great provocation". Yet he stated that no words or gestures were sufficient provocation.[237]

Provocation was not considered by him as excusable *se defendendo* because there is no absolute necessity for doing it to preserve life, but neither was it murder for there was no previous malice, but the law considered such a killing attracted sufficient guilt to be punished as manslaughter.

He described manslaughter on a sudden provocation as differing from homicide *se defendendo* in that in the latter case there was an apparent necessity, for self preservation, to kill the aggressor, in the former there was no necessity at all being only a sudden act of revenge.[238]

If a person was 'unlawfully' and unjustifiably 'provoked' by gestures and killed but he only meant to beat with intent to chastise, and not to kill, it was only manslaughter—although it was not a proper provocation.

He described *Holloway's Case*, ("although a case of provocation") as murder with malice because the behaviour of the prisoner "could not proceed but from a bad breast."[239]

The tracing of provocation as a defence, or mitigation, shows that it made an important contribution to the overall history of homicide. On the one hand, it tended to "purify" malice aforethought by taking provoked killings outside the scope of malice. A reversal of policy occurred too. If a killing was committed without apparent provocation, a presumption of concealed motive arose. This led, in due course, to the highly criticized rule in *Mancini*[240] that provocation must negative

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234 1 Hale P.C. 86. In the report in T. Raym. at 212 it was stated: "Manning had his clergy at the Bar and was burned in the hand; and the Court directed the executioner to burn him gently, because there could not be greater provocation than this."

235 1 Hale P.C. 457. Blackstone went further, 4 Bl. Comm. 181 and 191, and described homicide as justified when committed in defence of the chastity of one's self or relations. He also delicately referred to a crime of a still more detestable nature which may be equally resisted by the death of the unnatural aggressor which he had no doubt would be justified.

236 4 Bl. Comm. 191.

237 *Id.*, at 200.

238 *Id.* But, one presumes not revenge implying malice.

239 *Id.*

240 *Mancini* v. *D.P.P.* [1942] A.C. 1.

intention (which, of course, is a very different concept from the old malice).

Under the head of implied malice Hale also discussed various cases[241] involving the execution by a legal officer of a valid legal process; this was considered no provocation to the person against whom the process was executed if he knew that the victim was an officer in the execution of his duty. If the officer exceeded his duty or if the offender was not made aware of the officer's office or duty, this could, in some cases, reduce the killing to manslaughter.[242]

After the time of Hale, cases became fully reported, which led to more uniformity in the law and greater use of the principle of *stare decisis*.[243] This contributed to a broader and more sensible view of malice aforethought, that the normal character of homicide must be judged principally by the extent to which the circumstances of the case showed brutal ferocity and inability to control natural anger excited by a serious cause.

Hawkins and Later Commentators

Hawkins[244] initially classified homicide as either felonious or non-felonious. The latter consisted of justifiable and excusable homicide.

Justifiable homicide was described as arising from some unavoidable necessity to which the person who killed another had to be reduced without any manner of fault in himself.[245] Justifiable homicide was either of a public or private nature. The former consisted of a killing in execution or advancement of justice. The latter was a justifiable defence against a wilful wrong done or attempted against a man's person, house or goods;[246] the provision for defence of the person was extended to defence of near next of kin, as was the right to defend property extended to servants or lodgers of the owner of that property.[247]

Hawkins described excusable homicide as either homicide *per infortunium* or *se defendendo*. The first was the simple case of misadventure or accident.[248]

In this category of self-defence is found[249] the situation, as distinct from the preservation of property or body, of one who, having no other possible means of preserving his life from another who combated with him on a sudden quarrel or of defending his person from one who attempted to beat him (especially if such attempt was made in his own house), killed that person by whom he was reduced to such an inevitable necessity. Such person was excused only if he was forced to

241 1 Hale P.C. 456-465.
242 The second question of interest in this context was whether a striking with such an instrument as this would not be likely to kill, but which did cause death would involve the killer in guilt for murder; the judges were not unanimous (probably under influence of Coke's stringent felony-murder rule) but the court advised the king to pardon the defendant which was done. See also *Lord Morley's case*, *supra*, n. 128.
243 Stephen, Vol. III, *supra*, n. 125 at 7.
244 First appeared in 1716; the present discussions are based on the 8th edition (1824).
245 1 Hawk. P.C. 79. Such lack of fault according to Hawkins had to be complete with 'no malice coloured under pretence of necessity' for such would amount to murder. Justifiable homicide allowed the person killing to be freed without arraignment and without the necessity to purchase a pardon.
246 1 Hawk. P.C. 82, sec. 21. He was speaking here of the individual who was entirely blameless in a transaction involving defence of his person, property etc.
247 *Id.*
248 *E.g.* One man killing another in fighting at barriers or tilting at the King's command.
249 1 Hawk. P.C. 87. c. xi, sec. 13.

act upon unavoidable necessity and had retreated as far as he was able.[250] Hawkins defined these as non-felonious killings because, in his view, they were not committed with a felonious intent.

Hawkins described felonious homicide as being of two types, that with malice and that without. Homicide without malice was called:[251]

> Manslaughter or sometimes chance medley by which we understand such killing as happens either on a sudden quarrel or in the commission of an unlawful act, without any deliberate intention of doing any killing at all.

Stress was laid on the fact that it had to be a sudden quarrel and that there was no appreciable time allowable for the tempers of the parties to cool. If time elapsed and tempers cooled, a renewal of the quarrel did not attract the rule of a non-malicious killing.[252] Even in a sudden quarrel, bare words or gestures would not excuse if retaliation was made with a deadly weapon before the provoker was able to defend himself and if the person so easily provoked killed, then it was murder,[253] as it would be manifest that such action could only be taken "upon a malice prepense".

Hawkins described a man finding another in bed with his wife or being pulled by the nose or of being wrongfully arrested or in defence of his house against wrongful entry as cases in which a man was patently guilty of only the lesser crime of manslaughter at the most.[254] If the passion cooled, then the law would imply in the killing a motive of revenge rather than a blind ungovernable outburst resulting in death for the provoker.

Hawkins' definitions of excusable and justifiable homicide almost correspond with the modern categories—subject to some changes in nomenclature. Under manslaughter, a term only imperfectly understood by Hawkins, was collected all the killings where the perpetrator did not "deserve" capital punishment. For instance, Hawkins spoke of chance medley, the original "manslaughter", as equivalent to or identical with the lesser crime of manslaughter or provocation.

Foster

Foster's[255] classification was a more modern one. In a chapter entitled *"Homicide Founded on Necessity"*, he described self-defence as falling under the head of homicide in necessity and being of two kinds. First, there was the variety of homicide *se defendendo* which was perfectly innocent and which he labelled as justifiable self-defence. The second kind was in some measure blameable and "barely excusable".[256] This latter was termed culpable self-defence but which, "through the benignity of the law", was considered excusable. With some justification, Foster noted that "the want of attending to his distinction hath . . . thrown some darkness and confusion upon this part of the law".[257]

250 *Id.* Retreat could not be a mere pretence so that he could be better fitted to take revenge in killing. An officer in the execution of a duty and a person feloniously assaluted on the highway were not obliged to retreat before retaliating. 1 Hawk P.C. 87, s. 16.
251 1 Hawk P.C. 89, Ch. xii. s.1.
252 1 Hawk P.C. 96, Ch. xii, s.23.
253 1 Hawk P.C. 97, s. 27.
254 1 Hawk P.C. 98, s. 36.
255 *Crown Law* (including, *inter alia*, Discourse on Homicide) first published in 1762; this edition being of 1809 (4th ed.).
256 *Id.*, at 273.
257 *Id.*

In the case of justifiable self-defence, force could be repelled by force in defence of person or property against who:[258]

> . . . manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon another. In these cases he is not obliged to retreat but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable.

Foster described 'culpable self-defence' as such:

> . . . upon the authority of the Statute 24 Hen. VIII c. 5., to distinguish it from the other by the name of homicide *se defendendo* upon chance medley.

In Foster's opinion the term 'chance medley'[259] had been wrongly applied in the past to accidental death, whereas the ancient legal notion of homicide by chance medley involved death ensuing from a combat upon a sudden quarrel. If, on such a sudden quarrel, a person retreated as far as he could with safety before the mortal blow was given and then by dint of mere necessity killed his adversary for the preservation of his own life, it was excusable self-defence. Foster found it very difficult to draw the line between this case and one in which the combat continued (without a retreat) up to the time the mortal blow was given and the person killing was not at that time in imminent danger of death. In the latter case, although the killing was also in the heat of passion, it was manslaughter.[260]

Foster pointed out that it was commonly believed that for the killing to come within the rule of excusable self-defence the first blow must have been given by the eventual victim against the person who relied on self-defence. But, he continued:[261]

> . . . as in the case of manslaughter upon sudden provocations, where the parties fight on equal terms, all malice apart, (it) will make no difference, if either party quitteth the combat and retreateth before a mortal wound be given . . .

but:[262]

> . . . if the first assault be upon malice, which must be collected from the circumstances, and the assailant, to give himself some colour for putting in execution the wicked purposes of his heart, retreateth and then turneth and killeth, this will be murder.

Therefore, the retreat was immaterial where there was original malice and for the killing to be justified or excused there must be inevitable necessity.

Hawkins and Hale lack the divisions of homicide which Foster creates, particularly on the question of manslaughter. He treated the legal concept of manslaughter as an anomaly, as an expression of the benignity of the common law in imputing an infirmity in human nature where death ensued from a sudden affray and in the heat of blood upon provocation.[263]

East[264] also defined manslaughter as an unlawful act but as one which was committed with the absence of malice, express or implied ('which is the very essence of murder').[265] The act was imputed to the infirmity of human nature and the correction ordained for it is propor-

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258 *Id.* As with Hawkins, this justification was extended to a member of the aggrieved's family, his servant or even a lodger.
259 *Id.*, at 275. See also *Id.*, at 276, n. 1, for derivation of the phrase.
260 Manslaughter was probably being used in its modern sense.
261 Foster, *supra*, n. 177 at 277.
262 *Id.*, at 277-278.
263 *Id.*, at 290.
264 *East's Pleas of the Crown*, 1803.
265 1 East P.C. 218.

tionately lenient.[206] To East, homicide was only justifiable, when such justification arose from: [207]

> . . . an imperious duty prescribed by the law, or be owing to some unavoidable necessity induced by the act of the party killed, without any fault in the party killing.

East echoes Foster in describing excusable homicide as arising where the party killing was not altogether free from blame, but the necessity created arose partly by the fault of the party killing. The categories and illustrations given in relation to homicide *ex necessitate*,[208] justifiable and excusable, followed the same patterns as those of Foster.

With Foster, provocation had emerged as a separate category. 'Chance medley' was described as an instance of excusable homicide obviously a very close resemblance, from Foster's evaluation, to what is now known as 'excessive' self-defence;[209] in the latter the person killing did not obey the rules pertaining to self-defence—primarily the one as to retreat.

The tracing of criminal responsibility ends with East. Since then we have an expansion of common law reporting but the principles are not much clearer. Statutes have been passed but frequently the legislative language has been no clearer than the common law. In Canada, the courts have tended to use the common law decisions of England in spite of a Code.

Perhaps the distinctions between degrees of homicide will never be as important again because criminal punishments are less severe and, in particular, the threat of capital punishment, which caused so many anomalies in criminal law theory, has lost its potency.

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206 *Id.*
207 *Id.*, at 219.
208 *Id.*, at 220-221.
209 *See* Parker, *A Plea of Self-Defence Resulting in Manslaughter*, (1963) 3 Alta. L. Rev. 16 and cases cited therein.