

THE ESSENCE OF MENS REA

by

W. BERTELSMANN



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## THE ESSENCE OF MENS REA

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by

WERNER BERTELSMANN, Dr. jur. (Göttingen)



SOVENGA



University of the North  
P.O. Sovenga (via Pietersburg)  
0727  
Republic of South Africa

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## Summary

The inquiry aims at the development of a substantive concept of *mens rea* in criminal law. No common denominator of all degrees of culpability has emerged either from the psychological or from the psychological-normative, let alone from the purely normative concept of *mens rea*. "Vorwerfbarkeit" (blameworthiness) can only indicate the limits of *mens rea*, not its substance. One obstacle to the perception of the substance is the apparent break between intent and negligence which, though important in positive law, has often been over-emphasized in legal dogmatics. In South African law, where negligence is supposed to be "objective" and, therefore, not even a form of *mens rea*, that break is particularly striking.

In reality intent and negligence shade off into each other. This becomes evident by considering *inter alia*: *culpa dolo determinata*; the question whether *dolus eventualis* is sufficient *mens rea* for attempts; the degrees of culpability in English common law; and the fact that in South Africa it has been possible for conscious negligence to be absorbed, virtually unnoticed, by *dolus eventualis*. Every degree of *mens rea* is, in fact, closely related to the preceding one and to the following. Their common denominator, the essence of *mens rea*, must be deduced from the essence of criminal conduct.

However, there cannot be one substantive concept of crime that applies to all criminal offences. Because of qualitative differences three classes of crimes must be distinguished: *mala in se*, *mala prohibita* and violations of a moral code which are prohibited, but not injurious to legal interests.

Crimes *mala in se* are essentially invasions of protected legal interests or values ("harm"). The substantive element of *mens rea* in these crimes is, therefore, disregard for the protected interests. For instance, no conviction of any type of homicide should be obtained unless the defendant acted with a blameworthy disregard for human life, at least in the form of negligence. In *mala prohibita*, on the other hand, the basic element of *mens rea* is blameworthy disregard of the statute.

It follows that ignorance of the legal prohibition should be held to exclude intent in *mala prohibita*, but not in *mala in se*.

To distinguish *mala prohibita* from *mala in se* is more difficult in *abstracto* than in *concreto*; if a doubt remains, the benefit can be given to the defendant.

Special rules are suggested in respect of violations of a moral code which do not affect any legal interest.

## Opsomming

Die ondersoek gaan oor die ontwikkeling van 'n materiële skuldbegrip in die strafreg. Nog die sielkundige, nog die sielkundig – normatiewe en allermans die suiwer normatiewe skuldbegrip lewer so 'n gemeenskaplike noemer van alle skuldgrade op. “Verwytbaarheid” dui net die grense van skuld aan, nie die inhoud nie. Die waarneming van die inhoud word bemoeilik deur die skynbare breuk tussen opset en nalatigheid wat in die positiewe reg belangrik is, maar waaraan daar in die dogmatiek soms heeltemal te veel betekenis geheg word. In die Suid-Afrikaanse strafreg met sy beweerde “objektiewe” nalatigheid wat dan nie eers 'n vorm van skuld sou wees nie, is daardie breuk besonder opvallend.

In werklikheid gaan opset en nalatigheid in mekaar oor, soos aange-ton word aan die hand van *culpa dolo determinata*, die vraag of *dolus eventualis* aan die skuldvereiste van poging voldoen, die skuldgrade van die Engelse reg en die feit dat in Suid-Afrika bewuste nalatigheid onopgemerk in opset met moontlikheidsbewussyn kon opgaan.

Feit is dat elke graad van skuld na verwant is aan die voorafgaande graad en die volgende. Hulle gemeenskaplike noemer, die materiële gehalte van strafregtelike skuld, moet van die materiële gehalte van misdaad afgelei word.

Dit is egter nie moontlik om vir alle misdade een materiële omskrywing te vind nie. Drie wesensverskillende soorte misdade moet onderskei word: *mala in se*, *mala prohibita*, en strafbare oortredings van 'n sedekode wat geen regsgoed skend nie.

Die wese van misdade *mala in se* is aantasting van regsgoedere (“harm”). By hulle lê daarom die materiële skuld in die verwytbare geringskatting of verontagsaming van die regsgoed wat aangetas word. Gevolglik behoort daar bv geen skuldigbevinding aan moord of strafbare manslag te wees nie tensy die beskuldigde van 'n geringskatting van die regsgoed lewe, ten minste in die vorm van nalatigheid, verwy kan word. By *mala prohibita* is die inhoud van skuld daarenteen die verwytbare minagting van wettoregtelike gebooie of verbiedinge.

Ten opsigte van wederregtelikheidsbewussyn en dwaling beteken dit onder meer dat onkunde van die verbod opset wel by *mala prohibita* maar nie by *mala in se* uitsluit nie.

Die afbakening van *mala prohibita* teenoor *mala in se* lewer in *abstracto* meer moeilikhede op as *in concreto*, en waar daar nog 'n twyfel bly, kan die voordeel daarvan aan die beskuldigde gegee word.

Spesiale beginsels word aan die hand gedoen t a v morele oortredings wat geen regsgoed aantast nie.

## Zusammenfassung

Einen allen Schuldstufen gemeinsamen materialen Gehalt der Strafrechtsschuld lässt weder der psychologische, noch der psychologisch-normative, noch etwa der rein normative Schuldbegriff erkennen. “Vorwerfbarkeit” bezeichnet nur die Grenzen des Schuldbereichs. Über den Inhalt täuscht die im positiven Recht wichtige und in der Lehre zum Teil überbetonte Zäsur zwischen *dolus* und *culpa* hinweg (besonders im südafrikanischen Recht mit seiner angeblich “objektiven” Fahrlässigkeit). In Wirklichkeit gehen Vorsatz und Fahrlässigkeit ineinander über. Das zeigt sich u.a. in der *culpa dolo determinata*, in der Fragwürdigkeit des *dolus eventualis* bei versuchten Verbrechen, in den Schuldstufen des englischen Strafrechts und in der Tatsache, dass im südafrikanischen Recht *luxuria* unbemerkt im *dolus eventualis* aufgehen konnte. Jede Schuldstufe ist der vorhergehenden und der folgenden nahe verwandt. Ihr gemeinsamer Nenner, der materiale Gehalt der Schuld, ist dem materialen Gehalt des Verbrechens zu entnehmen.

Dabei sind drei wesensungleiche Gattungen von Straftaten zu unterscheiden: *mala in se* (echtes Kriminalunrecht), *mala prohibita* (auch schwerwiegende) und strafbare, aber kein Rechtsgut verletzende Verstöße gegen Sittennormen.

*Mala in se* gefährden oder verletzen Rechtsgüter (“harm”). Bei ihnen liegt die materiale Schuld in vorwerfbarer Missachtung oder Geringschätzung des angegriffenen Rechtsgutes. Deshalb sollte z.B. wegen eines Tötungsdeliktes nur dann bestraft werden können, wenn dem Täter Missachtung menschlichen Lebens wenigstens in der Form der Fahrlässigkeit vorzuwerfen ist.

Wesentlicher Schuldinhalt bei *mala prohibita* ist vorwerfbare Missachtung des Gesetzesbefehls (ebenfalls mindestens Fahrlässigkeit).

Für die Irrtumslehre ergibt sich daraus u.a., dass Unkenntnis des Verbotes die Vorsatzschuld bei *mala prohibita* ausschliesst und bei *mala in se* unberührt lässt.

Die Abgrenzung von *mala prohibita* gegenüber *mala in se* ist abstrakt nach Tatbeständen nicht restlos durchführbar, eher im Einzelfall; notfalls ist nach dem Grundsatz in *dubio pro reo* zu verfahren.

Für Sittenverstöße, die kein Rechtsgut beeinträchtigen, werden besondere Regeln vorgeschlagen.



## THE ESSENCE OF MENS REA

Mr. Vice-Chancellor, members of the Council, colleagues, ladies and gentlemen:

Since an inaugural lecture may properly serve the purpose of conveying a personal credo concerning the basic approach to some branch of science or learning, I have chosen as the topic of this lecture the views I have basically held for many years on one of the fundamental concepts in criminal law: the concept of *mens rea* – culpability, fault, the guilty mind, *skuld*, *Schuld* – which is, or should be recognised as, a necessary element of every crime.

Even if it were possible for, say, two lawyers to learn by heart everything that judges and academic writers have ever said about *mens rea* in criminal law, they could still disagree wholly on what it is, and even more on what the term ought to imply. Yet this is not a purely “theoretical” question: for the accused in a criminal trial it can mean the difference between liberty and jail, or even between life and death.

Three little examples to which I shall return towards the end of this lecture may illustrate the significance of the *mens rea* concept:

- I. Mbombela, an uneducated youth of 18, has been called to a hut where children thought they had seen a “tikoloshe”, i.e. an evil spirit which can cause death. With a hatchet Mbombela strikes at what he, too, believes to be the “tikoloshe”. Actually he kills his nephew who had fallen asleep in the hut.<sup>1)</sup> Is Mbombela guilty of murder? Of culpable homicide? Of any crime?
- II. After a decree of judicial separation has been granted, Robby erroneously believes his first marriage to have been dissolved, and he marries another woman. Is he guilty of bigamy?
- III. A man called Tshwape slaughters a goat on a farm in the Kuruman district, with the permission and aid of the farmer from whom he bought it. According to a government notice published in the Gazette under the Marketing Act it is unlawful for him to do so in that particular area without a permit.<sup>2)</sup> Tshwape has never heard about that prohibition. Should he be punished?

In each of these examples the outward conduct of the accused fits the legal definition of some criminal offence. But are the acts committed with a guilty mind? Do the actors deserve punishment?

The general principle, accepted by jurists throughout the world, is “*nulla poena sine culpa*”, no punishment without culpability, “*actus non facit reum nisi mens sit rea*”, the act does not make a man guilty unless he has a guilty mind. Basically this maxim was already part of the late Roman law. Today it is recognised to a great extent in many countries, including England, the USA and South Africa, while in other legal systems (mainly the Romano-Germanic ones) it actually applies to the whole body of criminal law.<sup>3)</sup> Yet, as Jürgen Baumann puts it, “*Schuld* has always been and still is today the most unclarified and contentious phenomenon” in this branch of legal science.<sup>4)</sup>

There is not even agreement on the basic issue of the relation between criminal and moral guilt. In the opinion of some great jurists all legal *mens rea* is moral culpability.<sup>5)</sup> Most authors, however, hold otherwise or, at least, emphasise that legal norms must not be confused with moral or ethical norms,<sup>6)</sup> and I agree with them. Whatever the concept of crime may have been in the Middle Ages, definitions such as a “morally wrong act” or “conduct intolerable to the community on account of its ethical turpitude”<sup>7)</sup> are off the mark today. Too many criminal cases in the modern state involve no more than acts of negligence or contraventions of purely regulatory legislation, and certain acts which are morally indifferent or even praiseworthy constitute serious crimes in many countries.<sup>8)</sup> Besides, the concept of *mens rea* has a definite function in criminal law, namely that of limiting criminal liability in fairness to the legally blameless, and in accordance with the principle of legality. For this function a moral concept of guilt is too broad on the one hand and too narrow on the other.

The concept of *mens rea* as developed in the Romano-Germanic legal systems on the basis of the *Constitutio Criminalis Carolina* (1532), but mainly in the 19th century,<sup>9)</sup> was a “psychological” one: it consisted in a mental nexus between the actor and his unlawful act. At times it was actually believed that *mens rea* could be exhaustively identified with either *dolus* or *culpa*. However, in the 20th century several shortcomings of the purely psychological concept became apparent. It was found to lack what really matters – that which constitutes the difference between intention in the psychological sense (“natural” intention) and *dolus malus*. Further it did not seem to fit where a mental nexus between the actor and the consequences of his



act was conspicuously absent, i.e. in cases of unconscious negligence, and it left no room for excuses (grounds excluding *mens rea*). A normative element was therefore added to the psychological one, and this element or quality of *mens rea* has been called "Vorwerfbarkeit", "verwyfbaarheid"<sup>10</sup>). (The nearest equivalent in English appears to be "blameworthiness".) "Vorwerfbarkeit" requires "Zumutbarkeit rechtmässigen Verhaltens", that is, there is no blame if in the particular circumstances the actor could not fairly be expected to act lawfully.<sup>11</sup>)

The result is a more complex concept of *mens rea* which presupposes or contains criminal responsibility (*Schuldfähigkeit*) and includes as elements either intent or negligence, a value judgement, and the absence of excuses. In a nutshell *mens rea* is now defined as the blameworthy relation between the actor and his act.<sup>12</sup>) A different view is held by those writers who embrace the *finale Handlungslehre*. By transplanting intent from the area of culpability to that of the *actus reus*, they have abandoned the psychological element altogether and arrived at a purely normative concept of *mens rea*: "Vorwerfbarkeit" (including actual or potential awareness of unlawfulness) only.<sup>13</sup>) In the process they have, as Jescheck points out, achieved the "categorical separation" of negligent from intentional conduct.<sup>14</sup>)

The usefulness of the concepts of "Vorwerfbarkeit" and "Zumutbarkeit" should certainly not be underestimated. By demarcating the sphere of *mens rea* from the areas covered by lack of criminal responsibility and grounds excluding *mens rea*, they provide a frame – but the picture inside remains hazy.<sup>15</sup>) Does it consist of as many *mentes reae* as there are offences, or can some common substance, a common denominator be discovered?<sup>16</sup>)

If there is such a substance, the trend of dogmatics during the past 150 years has not been conducive to its perception. In the light of the psychological concept which still largely influences legal thinking, intent and negligence, though located in the same area, did not seem to have much in common. Intent meant cognition and volition, while unconscious negligence meant absence of both. That gulf has never quite been bridged, and the *finale Handlungslehre* seeks to make it even wider.

In South African criminal law there is, or is supposed to be, an additional difference between intent and negligence which appears rather odd to Continental lawyers. While the test is subjective for *dolus*, it is said to be objective for *culpa*: negligence depends on how a fictitious "reasonable man" would have acted in the position of the defendant. If that test were strictly applied, without regard to any

subjective factors, it would have no bearing on the actual mental state of the accused and on his personal blameworthiness; indeed, "negligence" would have nothing to do with *mens rea*.<sup>17</sup>)

Although, as we have seen, the law often seems to partition off intent and negligence like substances that cannot be mixed, quite a different picture emerges when they are assessed ontologically, i.e. when we look at what actually happens: in reality they shade off and merge into each other.

Consider for instance those frequent cases of what used to be called *culpa dolo determinata*:<sup>18</sup>) one act constituting two offences, the first committed with intent and the second through negligence. Barry, exasperated by Freddy's teasing and desirous of hurting him, strikes a blow with a blunt instrument, aiming at Freddy's nose but actually hitting his temple. Freddy is grievously injured and dies a few hours later. Whatever the specific offences committed by Barry may be called in various legal systems, this is essentially a case of intentional assault coupled with negligent homicide. Psychologically Barry acts in one state of mind, but juridically he has two *mentes reae*. Can anything be more closely interwoven than intent and negligence are in such cases?

Consider further the question of *mens rea* in respect of the homicide in the following series of externally identical situations, categorised according to the degrees of *mens rea* in Romano-Germanic legal systems:

A man called Ali plants a time-bomb, set to explode at midnight, in the embassy building of a country whose Middle East policy has annoyed him. The blast kills a counsellor of the embassy who is working in his office.

**Variant I:** Ali did not and could not foresee that a person would be in the building at midnight: No *mens rea* in respect of causing the death of a human being.<sup>19</sup>)

#### *Culpa*

**Variant II:** Ali could have foreseen, but simply did not think of the possibility of death resulting from the explosion: Unconscious negligence (*negligentia*).<sup>19</sup>)

**Variant III:** Ali did foresee the possibility of causing death, but trusted it would not happen: Conscious negligence (*luxuria*).<sup>20</sup>)

#### *Dolus*

**Variant IV:** The same as III, but now Ali reconciled himself to the possibility of fatal consequences. Eventual ("legal", "constructive") intention (*dolus eventualis*).<sup>21</sup>)

**Variant V:** Ali aimed at damaging property only, but realised that a person would be killed by the explosion. He foresaw death as an undesirable, but unavoidable consequence of his action: Direct intention (*dolus directus*), which can be divided into (a) first degree *dolus directus* in respect of the building, (b) second degree *dolus directus* (sometimes referred to as *dolus indirectus*)<sup>22</sup>) in respect of killing a human being.



On account of general principles including, especially, the principle of legality, the *mens rea* requirement for every crime should be clearly defined or, at least, be determinable. This, above all, makes it necessary to distinguish between several forms or gradations of culpability. In the Romano-Germanic legal systems by far the most important dividing-line is that between *dolus* and *culpa*. It demarcates culpable homicide from murder, or *fahrlässige Tötung* from *Totschlag* and *Mord*. Moreover it indicates the threshold of criminal liability for a great many offences as, for instance, in South Africa for all common law crimes except culpable homicide.<sup>23)</sup>

But that does not mean that there is a hiatus between *culpa* and *dolus*. On the contrary, as Ali with the time-bomb has shown, the dividing-line is as thin as the Tropic of Capricorn. Negligence ends precisely where intention begins.<sup>24)</sup>

Further there seems to be no cogent reason why the lines between the various forms of *mens rea* should have to be fixed exactly where Continental legal systems draw them. No matter how the categories are defined, it will always be possible to argue that in certain respects they are out of focus. Take, for instance, the question of whether *dolus eventualis* is really a form of intention. Those jurists in South Africa who call it "not actual" but "legal" or "constructive" intention,<sup>25)</sup> obviously feel serious doubts about it.<sup>26)</sup>

Such doubts will be strengthened by considering those crimes which hinge on intention, i.e. attempted offences. It is usually held that the *dolus* required for a punishable attempt includes *dolus eventualis*,<sup>27)</sup> but a careful study of the decided cases would, I believe, reveal the fact that this rule is applied only in certain situations. Most other attempts committed with eventual intention, even if they can be proved, are never prosecuted. Suppose the time-bomb had been placed with *dolus eventualis* in respect of causing death, but there was no person in the embassy building and nobody got hurt, would Ali be charged with attempted murder?<sup>28)</sup> The answer might suggest that *dolus eventualis* does fall short of intention even as the law understands it. Does that mean that Romano-Germanic legal science has fixed the threshold of intention at too low a level? Surprisingly, some great scholars would place it even lower! A strong case for considering *luxuria* a form of intention has in the course of the centuries repeatedly been put forward, most recently by Arthur Kaufmann.<sup>29)</sup>

Still weightier is the fact that in the English common law there are other grades of criminal culpability, and actually that dividing-line which is of such paramount importance in Romano-Germanic law and legal science is ignored. Two forms of *mens rea* are recognised: intent (corresponding, more or less, to first and second degree *dolus direc-*

*tus*)<sup>30)</sup> and recklessness. As a rule, these are not held to cover inadvertent negligence, which has no relation to a state of mind, being determined by an objective standard. Mere inadvertence, it is claimed, does not suffice for common-law criminal liability (although it may take the place of *mens rea* in statutory offences).<sup>31)</sup>

Though in English law abstract generalisations must often be taken *cum grano salis*, it is quite safe to say that "recklessness" covers at least<sup>32)</sup> *luxuria* and *dolus eventualis* lumped together.<sup>33)34)</sup>

At the same time, we notice in England, too, uncertainty and significant disagreement regarding this particular field of *mens rea*: while one school favours the treatment of recklessness as a kind of negligence, another would consider it rather as a form of intention.<sup>35)</sup> Something else is, however, equally significant and not controversial at all: recklessness in English law never amounts to sufficient *mens rea* for a criminal attempt.<sup>36)</sup>

Of course, once the positive law has at some point drawn a dividing-line, the two forms of *mens rea* thus separated can no longer "overlap": every individual case will ultimately belong either above the line or below it. But our observations must have made it clear that no such line for the distinction of mental attitudes is immovably predetermined by the "Natur der Sache".<sup>37)</sup> Ontologically several characteristics of *mens rea*, relating to cognition and volition, do overlap, and will extend either side of the line, wherever we fix it. So, for instance, (using the Romano-Germanic divisions) we find that absence of deliberate design to bring about the unlawful consequences reaches from "*dolus indirectus*" right down to zero, and consciousness of possible harm from *luxuria* right up to *dolus directus*. *Dolus eventualis* contains an element of negligence, and *luxuria*<sup>38)</sup> an element of intent (the actor wilfully creates a dangerous situation). The truth is that every grade of *mens rea* is closely related both to the preceding and to the following one. All categories signify rather quantitative than qualitative differences. They all indicate various degrees<sup>39)</sup> of something substantive: the essence of *mens rea*.

That basic element we are trying to determine, the real object of personal blame,<sup>40)</sup> must lie behind all the psychological aspects of criminal fault. We cannot expect to find it in ethics, in private law notions, or in the peculiarities of any particular legal system. The essence of criminal *mens rea* can only be derived from the essence of criminal conduct. In order to define it materially, a material concept of crime must be taken as the point of departure.

This makes it necessary to consider three classes of criminal conduct:<sup>41)</sup>



- (1) Crimes *mala in se*, which are "wrong in themselves";<sup>42)</sup>
- (2) Crimes *mala prohibita*, which are "wrong only because prohibited by legislation";<sup>42)</sup>
- (3) Violations of a moral code which are not injurious to legal interests, but prohibited by law.

The ancient distinction between *mala in se* (or *mala per se*) and *mala prohibita* appears, it is true, to have been discredited by devious definitions<sup>43)</sup> and by the undeserving purposes for which the courts have used it.<sup>44)</sup> No wonder some writers feel it ought to be discarded as being "unscientific and fallacious".<sup>45)</sup> But if newly assessed in the light of modern legal thought, the old classification will, I think, prove indispensable for a proper understanding of the very nature of criminal law and its functions.

At first sight, the traditional, brief definition of *malum prohibitum* seems to the point and unambiguous enough, but the term *malum in se*, "inherently wrong", lends itself to widely divergent interpretations. What is a wrong? The answers given to that question cannot possibly be surveyed in this context.

A widely accepted view and, to my mind, the most acceptable one is that an act cannot constitute a criminal wrong in the material sense unless it threatens or inflicts harm to a protected legal interest or value.<sup>46)</sup> It must be *Gefährdung oder Verletzung von Rechtsgütern*.<sup>47)</sup> While I do not agree that "moral turpitude" can be used as a reliable juridical criterion, it is certainly true that most *mala in se* also contain an element of moral wrong. All those acts which cause harm to individuals or to the public are, after all, violations of that fundamental ethical and legal commandment *alterum non laedere*.<sup>48)</sup> They are directed against life, health and bodily security of human beings, their personal liberty and dignity, property rights, the constitutional order and safety of the State, the integrity of the administration of justice, and many other values, regardless of whether the unlawful conduct is defined by common law, in a comprehensive criminal code, or by some other statute.

Including the basic subjective element we may say: these acts are manifestations of mental attitudes characterized by lack of consideration or respect for the legally protected interests of others.<sup>49)</sup> Consequently, the substantive element common to the *mentes reae* of the wrongdoers in this field is: disregard for the legal interests which the law seeks to protect and which the misdeed threatens or injures. The term "disregard" is intended to include all degrees of lack of respect for, or regard to, the object of protection, from inadvertence and

carelessness (if serious enough to warrant penal sanction) up to callous contempt or deliberate aggression in cases of *dolus directus*.

So, for instance, the essence of the mental attitude for which we blame those who kill is disregard for human life. This applies not only to murderers, but also to those who cause death by negligent conduct.<sup>50)</sup> Of course, every legal system can lay down additional subjective elements of various types of homicide. But wherever the *mens rea* principle is recognised, no conviction of any kind of homicide should be obtained unless there was some degree of disregard for human life on the part of the defendant.

This concept is, I think, what we were looking for. It is substantive in nature and yet sufficiently general to be found in all grades of *mens rea*. It is directly derived from and closely related to the essence of the crime. Together with the external unlawful conduct, it constitutes the real ground of punishment, the *ratio puniendi*.<sup>51)</sup> For this reason it may be expected to prove functional for the purposes of criminal justice, which means that it ought to help to make the *mens rea* principle more effective, confining the imposition of punishment to those who deserve it – and deserve it on legal grounds only.

From the vantage point thus gained, it is now easy to see that young Mbombela, who meant to save people from a "tikoloshe", should have been acquitted. However unreasonable his conduct may appear to a learned judge, there was no trace of disregard for human life in it.<sup>52)</sup> (Actually, in 1933 Mbombela was found guilty, but under today's sounder rules relating to intent and mistake of fact there ought to be an acquittal.)<sup>53)</sup>

Another example of a *malum in se* in our legal system is bigamy. When Robby married, erroneously believing that his first marriage had been dissolved, he also committed an act which objectively affected a legal interest, namely the institution of monogamy. Since his belief was honest (otherwise it would not have been a belief), there was in his mind no conscious disregard of that legal interest, and where bigamy requires intent in the full sense, he should be found not guilty.

However, depending on the national law that is applied, the result may be different if the mistake was due to negligence, i.e. if Robby was not careful enough to avoid a bigamous marriage. A country's courts or legislature could lay down that in such a case negligence, or the intentional act coupled with negligence as to its lawfulness *in concreto*,



should be sufficient *mens rea*. Without abandoning the *mens rea* principle, criminal liability could thus be extended as long as it requires some degree of disregard for the protected legal interest or value. (Generally speaking this is certainly not desirable. "The principle should be that we have the minimum criminal law necessary.")<sup>54)</sup>

A "mistake of law", as in Robby's case, which can be an excuse, must not be confused with ignorance of the legal norm that makes a *malum in se* punishable. Where a defendant claims he did not know that assaulting or killing a human being, raping, stealing, or having two wives was prohibited, the maxim that "ignorance of the law is no excuse" is rightly applied if in *mala in se* the essence of *mens rea* is disregard not primarily for the law, but for the protected interests.<sup>55)</sup>

The situation is quite different in the case of Tshwape who slaughtered his goat without a permit, an act clearly falling under the second group of offences, *mala prohibita*. As far as substantial legal interests or social values are concerned, his conduct may have been neither dangerous nor harmful. Many *mala prohibita* have a tendency to cause harm *in abstracto*, but may be perfectly harmless *in concreto*. At any rate, the essence of such a contravention is non-compliance with, or disobedience to statutory enactments.<sup>56)</sup> The *mens rea* principle should also apply to this class of offences (as it does in many countries). However, here the essence of *mens rea* is disregard not of a protected interest, but of a statutory prohibition.<sup>57)</sup>

This variation of *mens rea*, too, covers negligence as well as intention.

*Dolus*, as conscious disobedience, must include knowledge of the prohibition, order or rule which is not complied with.<sup>58)</sup> Parents would hardly punish a boy for going out if the message that he must stay at home never reached him.<sup>59)</sup> Thus, where intent is an element of *malum prohibitum*, the actor should only be convicted if he was at least aware of the possibility that his act might be prohibited, and if he reconciled himself to that possibility (*dolus eventualis*). Otherwise his ignorance of the law should excuse him. That dubious maxim that "everyone is presumed to know the law" becomes preposterous when applied not only to *mala in se*, but also to the whole body of our legislation creating public welfare offences and regulatory contraventions.<sup>60)</sup>

It has always been a highly contentious question whether the knowledge that a legal norm makes a certain act criminal is or is not a necessary element of criminal intent. From our point of view the answer is now clear: basically it must be no in respect of *mala in se*, and yes in respect of *mala prohibita*.<sup>61)</sup>

However, there are good reasons why many *mala prohibita* should not require more than negligence to establish *mens rea*. Frequently this will best conform to the legislative purpose, and where the alternative would be "strict responsibility", i.e. punishment without guilt, negligence as a *mens rea* requirement is much to be preferred and should be substituted.<sup>62)</sup>

Negligence amounting to disregard of statutory prohibitions or injunctions can take many forms. For example, I can simply forget<sup>63)</sup> to renew the third party insurance for my motor vehicle, or to submit my income tax return; longing for my cigar, I can overlook a notice that smoking is not permitted in the railway compartment in which I am travelling; in unlawfully taking money out of the country I can act negligently by failing to find out about the regulations, or about the amount of money in my wallet; and so on.

The point is that where *mens rea* in *malum prohibitum* depends on what the actor knew, or what he should have known and could have known, the existence of the prohibition can, and ought to be treated like any other element of the offence. To that extent the distinction between mistake of fact and mistake of law becomes irrelevant, and the presumption that everyone knows the law should be rejected as unfair, unfounded and untenable. On the other hand, where the crime is *malum in se* it should make no difference whether or not the actor knew about the norm prohibiting his conduct, and to presume his knowledge of that law is quite unnecessary. So, whatever the nature of the offence, there is no room for the presumption.

These considerations ought to be helpful in dealing also with more difficult questions of mistake, such as erroneous belief in facts which would justify an otherwise unlawful act, or in a ground of justification which the law does not recognise, or mistake as to the scope of a recognised ground of justification. If in such a case the crime charged is, say, *malum in se* and we are satisfied that the accused did not act with blameworthy disregard for the legal interest concerned, the outcome to be aimed at is reasonably clear – even though, depending on the national law under which the case is tried, we may have to overcome some hurdles before we reach it.

One question will inevitably be asked: Is there a criterion or test by which it can be determined with certainty whether a particular offence must be regarded as *malum in se* or *malum prohibitum*? The answer is no.<sup>64)</sup> The boundaries are fluid, some offences qualify for both classes, and a crime *malum prohibitum* can without amendment to its definition in course of time develop into *malum in se*. For instance, hunting animals of a certain species becomes *malum*



*prohibitum* when statutory protection is first instituted, and *malum in se* when the survival of the species is generally accepted as a legal interest of the public. Indeed, the same offence may constitute *malum in se* for some persons and *malum prohibitum* for others. Sometimes classification will, therefore, not be possible *in abstracto*, but may well be so *in concreto*. In the remaining cases where a court finds itself really unable to decide whether for a particular defendant some specific offence falls under the first class or under the second, recourse may always be had to the rule *in dubio pro reo*: there can be no harm in giving the accused the benefit of the doubt and basing the verdict on that assumption which is to him the more favourable.

Offences belonging to the third class, i.e. violations of a moral code which do no harm to legal interests, were in the past sometimes considered *mala in se*, and sometimes *mala prohibita*.<sup>65</sup>) More recently, powerful tendencies to strip them of their criminal character have been successful in many countries, and where they are still punishable, their special nature makes it necessary to place them in a category of their own. In respect of these kinds of conduct I will at present only express an opinion, without motivating it. I would be inclined to treat them like *mala in se* only if the individual actor is a member of a group the large majority of which accepts the moral code concerned and insists on enforcing it. In the case of "outsiders" (other sections of the population, visiting foreigners, etc.) the principles relating to *mala prohibita* should be applied.

The proposed substantive concept of *mens rea* would exclude criminal liability in a number of cases in which under present South African law the defendants will be told that ignorance of the law is no excuse. As a result I anticipate objections inspired by the usual fear that law and order would collapse if any derogations were permitted from the old maxim "*ignorantia iuris neminem excusat*"<sup>66</sup>). However, such fears have proved unfounded even in countries which have gone much further in requiring awareness of unlawfulness as an element of criminal culpability. Those who believe that the interests of society or of the State require deviations from the principle of *mens rea* are almost invariably mistaken.

Before summing up, I wish to add only that while concentrating on the picture we should not forget the frame. Limitations of criminal liability resulting from youth, insanity, intoxication and other circumstances must be taken into account, which can conveniently be done by retaining the term blameworthy (*verwytbaar, vorwerfbaar*). The definition should therefore read as follows:

The material element of *mens rea* is

- (a) in crimes *mala in se*: blameworthy disregard of legal interests protected by criminal law; and
- (b) in *mala prohibita*: blameworthy disregard of the statute which is contravened.

I submit that this concept of culpability is as fair to the individual as it is to society and the State. It reflects, I think, the basic elements of all the mental attitudes that really matter in criminal law. What the administration of criminal justice may be expected to do is no more and no less than to suppress prohibited conduct in which these mental attitudes manifest themselves. On the other hand the individual ought to be safe from prosecution and punishment as long as he respects the legal interests of others, or where such interests are not at stake, the commands of the legislator.

Mr. Rector, I hereby accept the Chair of Public Law in the University of the North.



## NOTES

- 1) *R v Mbombela* 1933 AD 269. See infra n 53.
- 2) *S v Tshwape* 1964 (4) SA 327 (C). See infra n 60.
- 3) For instance, in the Federal Republic of Germany the principle applies without exception to all penal norms, especially since the last vestiges of the *versari* doctrine were removed by s 56 of the criminal code (*Strafgesetzbuch*, StGB) as amended in 1953. The principle has been confirmed by the Federal Constitutional Court (*BVerfGE* 9 169) and the Federal Supreme Court (*BGHSt* 2 200). As a result, if any statutory penal provision is in conflict with the *mens rea* principle, it will be held unconstitutional and invalid. For period before 1918/19 see Binding 319 n 6.
- 4) Baumann 1969 92.
- 5) According to Hall "there can never be a violation of a penal law . . . that is not immoral" (at 95); "the common, essential characteristic" of *mens rea* in different crimes is "the voluntary doing of a morally wrong act" (at 103). Denning 112: "In order that an act should be punishable, it must be morally blameworthy. It must be a sin." – Kaufmann 127ff.
- 6) Hommes 494: "juridische schuld en morele schuld moeten scherp worden onderscheiden". Hart 1968 37ff; Burchell & Hunt I 65; Baumann 1969 12; Liszt-Schmidt 208; Mezger-Blei 162: "Ethische Schuld und juristische Schuld sind nicht dasselbe". – Most emphatically: Grolman 17.
- 7) Welzel 16: "die für die Rechtsgemeinschaft wegen ihrer soziaethischen Verwerflichkeit unerträgliche Handlung oder Unterlassung".
- 8) E.g. political offences, such as launching a political party in a one-party state. (The simplistic argument that in the light of basic human rights this conduct should not be prohibited, i.e. that there is a wrong not in the prohibited act, but in the prohibition, does not affect the validity of the example. There is, at any rate, no obvious answer to the question whether a one-party system may be justified either generally or for certain countries in certain phases of their development. The criminal lawyer can only accept as fact: that such systems exist, that they are protected by penal law, and that the state of mind with which such laws are violated, can be morally and ethically irreproachable.)
- 9) Baumann 1969 92. – For a dogmatic history of the "Schuldbegriff" see Liszt-Schmidt 206-224, 256ff.
- 10) The term "Vorwerfbarkeit" was coined in 1907 by Reinhard Frank who perceived it as the essence of *mens rea* ("das Wesen der Schuld"); see Frank 133; Liszt-Schmidt 213; Hommes 538.
- 11) Hommes (537f) places "Zumutbarkeit" as the *specifieke kenmerk* of the *schuld-principe* above *verwijtbaarheid*: "kon van de toerekeningsvatbare dader van het delict in concreto redelijkerwijs, d i in het licht van de beginselen van de juridische moraal, een ander handelen dan hij heeft verricht worden gevergd?" In essence this hardly differs from what was already recognised in respect of negligence before the middle of the 19th century: "(W)o man das zur Abwendung des Nachtheils Nothwendige von dem Angeschuldigten nach allen seinen Verhältnissen (insbesondere auch nach den zur Zeit der Tat vorhandenen) gerechterweise nicht erwarten konnte, fällt die Zurechnung zur Culpa weg." (Mittermaier 104 and authorities there cited.)
- 12) Baumann 1969 93. – Liszt-Schmidt 215 defines *mens rea* as follows: "Schuld ist die Vorwerfbarkeit einer rechtswidrigen Handlung im Hinblick auf die Fehlerhaftigkeit des sie verursachenden psychischen Vorgangs". For other definitions see Jescheck 320; Schönke-Schröder 466ff; Maurach 428. Almost invariably the definitions remain formal; see infra n 15.
- 13) So that, the critics say, *Schuld* is no longer something in the mind of the actor, but merely a judgement passed by others (Baumann 1969 94). Cf infra n 40.
- 14) Jescheck 162. – For the dogmatic system of the *finale Handlungslehre* see Welzel *passim* (also previous editions). Understandably, Welzel's varying attempts to accommodate negligence in his "Finalismus" in which criminal doctrine pivots on the purpose-orientated act have not been successful; see Welzel "Zur Dogmatik im Strafrecht" in *Festschrift für Maurach* 3-8. – Cf Baumann 1968 359; Kaufmann 165ff; Mezger-Blei 56.
- 15) Kaufmann 176 on the formal character and emptiness of those definitions which equate *mens rea* with *Vorwerfbarkeit*: "(D)ie Begriffe Vorwerfbarkeit, Pflichtwidrigkeit oder auch Verantwortlichkeit sind indessen ganz und gar formal und besagen daher nichts über den Inhalt der Schuld". – 178: "Wo die Auffassung vertreten wird, dass die Vorwerfbarkeit das Wesen der Schuld sei, ja, dass die Schuld sich in der Vorwerfbarkeit erschöpfe, ist das Schuldprinzip zur völligen Bedeutungslosigkeit degradiert; wenn es dennoch proklamiert wird, so ist das nur ein Lippenbekenntnis. Wer es mit dem Schuldprinzip ernst meint, kann unter Schuld nicht nur Vorwerfbarkeit verstehen, sondern muss mit ihr einen materialen Inhalt verbinden". Kaufmann himself (153) defines "Schuld im materialen Sinne" as "die bewusste Willensentscheidung gegen das Veto, das sich in der Vorstellung von der sicheren oder möglichen Herbeiführung eines unerlaubten Erfolgs (im weitesten Sinne) ankündigt". With so much emphasis on the volitional element, unconscious negligence, which Kaufmann (141ff) does not recognise as a true form of *mens rea*, is, of course, excluded. Cf Liszt-Schmidt 256 n 1. See also infra n 63.
- 16) Cf Hall 72ff, 103.
- 17) See Burchell & Hunt I 148ff, II 373ff (II 373 n 43: "It is true that negligence is not really a state of mind, but it is nevertheless traditionally technically regarded as a form of *mens rea*"); De Wet & Swanepoel 140ff; Postma 97ff, 147. – In reality South African courts attach so much importance to subjective elements that, to my mind, sweeping statements on the allegedly "purely objective" test for negligence do not accurately reflect the position (see my forthcoming article "What happened to *luxuria*?" in *SALJ*). While an objective test may often be indispensable to determine not negligence as a form of *mens rea*, but unlawfulness of conduct, it obviously cannot replace the subjective one required by the *mens rea* principle.
- 18) This term, coined by Feuerbach (par 60; cf Köstlin 294ff), was condemned by Mittermaier and other writers (e.g. Berner 172) – largely, it may be assumed, on account of the presumptions of guilt combined with it by the Bavarian criminal code of 1813 (Mittermaier 117). Many other concepts and doctrines have, in the course of the centuries, been applied to the cases Feuerbach had in mind: *versari in re illicita*, *dolus indirectus*, *dolus eventualis*, etc. Cf H D J Bodenstern "Phases in the development of criminal *mens rea*" *SALJ* 1919 323-349, 1920 18-34 *passim*. South African judges still disagree on this type of cases; see the conflicting dicta *per* Steyn C J (for the majority of the Court) and *per* Rumpff J A (as he then was) in *S v Bernardus* 1965 (3) SA 287 (A).
- 19) If the test for negligence in South African criminal law were strictly objective except in cases of the "one recognised exception" (Burchell & Hunt I 151), i.e. those falling under (c) infra, three possibilities would have to be distinguished in this country:



- (a) Even the reasonable man could not have foreseen the possibility of death: Ali not guilty. (b) Death would have been foreseeable for the reasonable man, but was not foreseeable for Ali (with his personal background he may have been unable to imagine a public servant doing office-work at midnight): no *mens rea*, but Ali liable for culpable homicide. (c) Death would not have been foreseeable for the ordinary reasonable man, but was foreseeable for Ali: Ali guilty of culpable homicide, because the test is then what a reasonable man with Ali's knowledge or experience would have foreseen and done. Actually this amounts to a full subjective test in which even the actor's emotions, such as fear, can be taken into consideration; see *S v Fernandez* 1966 (2) SA 259(A) at 265C.
- 20) A typical case of *luxuria* is *S v Hedley* 1958 (1) SA 362 (N): When the accused fired a shot at a cormorant, the bullet ricocheted and killed a girl; such a possibility, though remote, had actually been foreseen by the actor. Conscious negligence means consciously taking a chance; acting with actual foresight of, but without consenting to possible harm. *S v Van Zyl* 1969 (1) SA 553 (A) at 557, per Steyn C J; De Wet & Swanepoel 142; A J Middleton *THR-HR* 1973 181-185; Köstlin 294ff; Jescheck 430; Mezger-Blei 222; Kaufmann 155. Van Bemmelen 112 defines conscious negligence as follows: "de dader verricht iets, waarbij hij de mogelijkheid van een bepaald gevolg vooruit ziet, maar aanneemt en ook hoopt, dat het gevolg niet sal intreden".
- 21) "Opset by moontlikheidsbewussyn", defined by De Wet & Swanepoel 126 in these terms: "Die dader handel opsetlik selfs al is die gevolg nie sy hoofogmerk nie, of deur hom as noodwendig voorgestel nie, en wel wanneer hy hom die gevolg as 'n moontlike voorgestel het, maar nogtans besluit om te handel, ook al sou die gevolg intree. Hy versoek hom met die risiko dat die gevolg sal intree en neem dit as't ware op die koop toe." *Dolus eventualis* is clearly and accurately distinguished from conscious negligence by Middleton op cit. Van Bemmelen 122 on "voorwaardelijk opzet": "In zo 'n geval heeft de dader dus onverschillig tegenover dat gevolg gestaan en dit op de koop toe genoemen". For various theories on *dolus eventualis* see Jescheck 222ff. Most German writers emphasise the volitional element in *dolus eventualis* ("bedingter Vorsatz"): e.g. Mezger-Blei 189ff, Baumann 1968 391, Maurach 263; so does B v D van Niekerk *SALJ* 1968 126f.
- 22) In the past *dolus indirectus* had a different meaning, at times related to the *versari* doctrine, and its definition was subject to considerable variations, see Bodenstern op cit *passim*; Grolman 23; Köstlin 293ff; Liszt-Schmidt 222. Mezger-Blei (188, 193) therefore prefers the term "second degree *dolus directus*" ("mittelbarer Vorsatz"), and most modern writers consider this form of intention merely as a variety of *dolus directus* (e.g. Bauman 1968 288).
- 23) However, another dividing-line may be decisive in respect of certain specific offences. For instance, when "knowingly" is an element of a crime, the minimum *mens rea* requirement may be *dolus directus*, to the exclusion of *dolus eventualis* (as, for instance, in s 187 StGB). - The "partial excuse" cases of South African criminal law (i.e. culpable homicide committed intentionally) are here left out of consideration.
- 24) "Der Dolus eventualis als Untergrenze des Vorsatzes bildet zugleich die Obergrenze der Fahrlässigkeit" (Mezger-Blei 223).
- 25) Burchell & Hunt I 117.
- 26) As far as our "legal intention" differs from Continental *dolus eventualis*, these doubts (commented on by B v D van Niekerk op cit 127) are all too well justified; see n 34.
- 27) *R v Huebsch* 1953 (2) SA 561 (A), headnote and at 567; De Wet & Swanepoel 152; Van Bemmelen 259; Burchell & Hunt I 379; the former German *Reichsgericht* (RGSt 61 160); Schönke-Schröder 308 and most other German writers.
- 28) Some writers (e.g. Schmidhäuser 477) are of opinion that *dolus eventualis* should not suffice as *mens rea* for attempt (cf Liszt-Schmidt 298 n 8).
- 29) At 154, with reference to Kohlrausch. For Köstlin *luxuria* was one of the forms of "Absichtlichkeit", "indirekte Absicht" (303ff).
- 30) Kenny 36; Glanville Williams 10ff, 19 (desire or "foresight of certainty")
- 31) Kenny 38; Glanville Williams 20.
- 32) It can have an even wider meaning, extending into the field of unconscious negligence; see *S v Van Zyl* 1969 (1) SA 553 (A); *S v Du Preez* 1972 (4) SA 584 (A).
- 33) According to Kenny 36f, the "reckless" actor foresees the possible or even probable consequences of his conduct, but does not desire them to happen. He may prefer them not to ensue, or he may not care whether they occur or not. This "very common attitude of mind" is often found in cases where death has been caused by the dangerous driving of motor vehicles. Cf Glanville Williams 12 and *passim*; Hall 115.
- 34) In South Africa *dolus eventualis* is often explained not in its original context of Continental general doctrines, but with reference to the English concept of recklessness. By thus blending Romano-Germanic with common law notions one loses sight of the volitional element regarding possible harm which characterises *dolus eventualis* but is absent in conscious negligence, while in recklessness it may or may not be present. Definitions of *dolus eventualis* have, consequently, become so wide that they cover the whole field of *luxuria*: "It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result" (*S v Sigwaha* 1967 (4) SA 566 (A) at 570B). Sometimes actual foresight of possible harm is seen as the only criterion of *dolus eventualis* (*S v Du Preez* supra at 588H; Burchell & Hunt I 127, II 385 n 165; J H Hugo *SALJ* 1973 337f). There are good reasons to call this diluted *dolus eventualis* "not actual, but legal intention" (the term used by Burchell & Hunt I 116ff). See my forthcoming article "What happened to *luxuria*?" In the context of this lecture the point is that, if differences between *dolus* and *culpa* were essentially qualitative, the line which separates them could not possibly in any country have been lowered, almost unnoticed, by a whole category.
- 35) Glanville Williams 20ff, 26, 30.
- 36) Russel 177 n 27; J C Smith "The Element of chance in criminal liability" *Natal University Law Review* 1972 4 (at 7, 11).
- 37) Nor can I agree with the view that in regard to *actus reus* and unlawfulness there are fundamental "structural" differences between intentional and negligent criminal conduct (Welzel 127ff; Maurach 537ff; cf Mezger-Blei 214ff and Jescheck 426f). Crimes of negligence, it is said, are characterised by the *objective* element of non-compliance with a duty of care (*Pflichtwidrigkeit*). However, where both the intentional and the negligent causation of harmful consequences are prohibited, the law imposes essentially the same duty not to injure the legal interest in question. That duty is violated not only when a nurse negligently fails to prevent a baby from drowning, but also when she wilfully throws it into the water; not only when a driver runs over a pedestrian through carelessness, but also when he does it on purpose. Thus, while the element of *Verletzung der objektiven Sorgfaltsanforderungen* may constitute a minimum requirement for unlawfulness, it does not, in my view, indicate a qualitative difference between negligent conduct and crimes committed intentionally. Besides, the vast majority of crimes for which negligence suffices as *mens rea* do not consist in the causation of harm, but merely in prohibited conduct, and



here it is even more obvious that the "structure" of the offence does not depend on the form of *mens rea*. (Cf Schönke-Schröder 536). What difference does it make whether a speed-limit is exceeded intentionally or negligently? Only the degree of culpability is affected thereby.

- 38) Or, according to some writes, even *negligentia*; see Feuerbach par 55; Mittermaier 102f. Cf Jescheck 428f; Maurach 535.
- 39) Mezger-Blei (at 164) with reference to *dolus* and *culpa*: "Diese Schuldformen sind zugleich bestimmte *Schuldstufen* (Schuldgrade)".
- 40) Not the blame (*verwyt*), but the mental attitude the actor is blamed for; see J C de Wet THR-HR 1970 72.
- 41) I respectfully agree with Burchell & Hunt (I 41ff, 55) that any attempt to formulate one "material" definition of crime, meant to apply to all criminal offences, must be doomed to failure. Such formulas are either devoid of substance or fail to cover the whole field, because in reality there are at least two main classes of crimes characterised by fundamental qualitative differences. Where these differences are ignored, some dogmatic problems will be found insoluble (see *infra* n 58).
- 42) See generally Hall 337; Kenny 28; Wharton 56; LaFave & Scott 29; Bassiouni 208.
- 43) For several examples see Kenny 28f. *Malum prohibitum* has often been defined as an offence of which "a wrongful intent is not an essential element" (Wharton 56). The distinction has also been confused with that between common law and statutory offences, or between petty offences and major crimes (Hall 339). In *R v McCoy* 1953 (2) SA 4 (SR) the Court equates *malum in se* with an act "unlawful in the sense of being itself a criminal act which could not in law be purged by complainant's consent". (Cf S A Strauss "Bodily injury and the defence of consent" *SALJ* 1964 179-193, 332-345, at 181ff, 340; Burchell & Hunt I 310ff). What the learned judge really had in mind can, with respect, hardly have been *malum in se*, but the *contra bonos mores* element which is often held to exclude the defence of consent in cases of bodily injury (s 226a StGB; Strauss op cit 181ff). If *mala in se* could be defined as crimes in which consent is irrelevant, even rape would not qualify as *malum in se*! The position is rather the reverse. Consent as a ground of justification presupposes a legal interest (*regsgoed*) affected by the act, and a consenting individual who is the sole bearer of that interest. Crimes directed against such interests are *mala in se*. *Mala prohibita*, on the other hand, are not directly injurious to legal interests nor, in particular, to individuals who might be able to consent. - In cases of bodily injury it will, of course, often be found that interests other than those of the consenting party are involved. Where the injuries render a person unfit for military service, or reduce his ability to work, or require expensive medical treatment, harm may be caused to the armed forces, an employer, a partner in business, a spouse, other dependants, a medical aid fund, etc. However, if in the absence of any such harm consent is considered irrelevant merely on account of the *contra bonos mores* element, the offence may well fall in our third class of prohibited conduct, i e violations of a moral code that are not injurious to legal interests.
- 44) *Inter alia* it has been used to justify strict liability, i e doing away with the *mens rea* principle in respect of *mala prohibita* (Hall 337ff; LaFave & Scott 29) and to apply rules closely related to the *versari* doctrine (Hall loc cit; Wharton 57; LaFave & Scott 30ff; Bassiouni 209).
- 45) Kenny 28; Hall loc cit; S A Strauss op cit 182; cf Burchell & Hunt I 84. But "(i) n spite of the logical objections to the distinction between offences *mala in se* and *mala prohibita*, the distinction is firmly embedded in the law and will undoubtedly continue to so remain" (Wharton loc cit).
- 46) According to Hall & Mueller 90ff, all crimes entail harm, and harm is the violation of legally protected interests. See Hall 212ff: Harm is "a central notion of penal theory"; it is "the focal point between the criminal conduct on the one side, and the punitive sanction, on the other" (213). "If harm is excluded, conduct and causation become irrelevant, and the combined result is a great loss in the systematization of the criminal law" (222). Hart 1965/69 urges "that the law should only be used to repress activities which do harm to others" (53) and sees "the end of punishment as the protection of human beings from secular harm" (54). In addition to, or instead of "moral turpitude", harm is stressed in some of the definitions of *mala in se*: they are "essentially injurious to others" (Bassiouni 208). Danger and not morality should be the decisive factor (LaFave & Scott 31). In accordance with this material concept of crime, the purpose of the criminal law is defined as "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests" (American Law Institute *Model Penal Code: Proposed Official Draft 1962 Philadelphia 1962 s 1.02*). - In Continental Europe, from the Age of Enlightenment, the conviction gained ground that only harmful conduct should be prohibited (Van der Linden: "schadelike daaden"; Quistorp: "schädliche Handlung"; article 5 of the French constitution of 1791: the law may not prohibit any acts that are not harmful to society; article 4: freedom consists in being able to do anything that is not harmful to others; Köstlin 32 on *mala in se*: "das peinliche Unrecht stiftet jederzeit einen äusserlichen Schaden".)
- 47) The concept of *Rechtsgut* (or *Schutzwert*) as that which the crime injures and which criminal law seeks to protect, dating from 1834 (Birnbaum), came to be accepted in German dogmatics after Karl Binding had published the first volume of his *Normen* (Leipzig 1872). It must not be confused with *Handlungsobjekt*, i e the concrete object destroyed, injured or taken away etc. For the further development of the concept see Sina, Marx and Hassemer. Some writers preferred the term "rechtlich geschütztes Interesse", which Binding rejected emphatically (353ff). Today both terms are often used interchangeably. Material unlawfulness was conceived by Franz von Liszt: the wrongful act is "das ein rechtlich geschütztes Interesse (Rechtsgut) verletzende oder gefährdende Verhalten" (E Schmidt 335; Liszt-Schmidt 173). Since about the mid-thirties of this century, *Rechtsgut* and harm as basic notions in criminal law came under attack by trends shifting the emphasis to *Sozialethik* (Nagler 4), *gesundes Volksempfinden* (ibid 5), *Pflichtverletzung* (violation of duty), *Ethisierung des Strafrechts* (ibid 9), *Treubruch* (ibid 10), *Willensstrafrecht* ("Der Erfolg wurde bagatellisiert ..." ibid 11, 12), *Täterstrafrecht*, *subjektive Unrechtsauffassung*, *Gesinnungsstrafrecht* (ibid 14) etc. Yet, assessing the impact of these tendencies, Nagler found in 1944 that, though the prevailing political ideology had brought about great changes in the choice and hierarchy of the protected values (ibid 6), the concept of *Rechtsgut* had remained indispensable (ibid 31), *inter alia* for distinguishing *mala in se* from *mala prohibita* ("das kriminelle Unrecht von dem polizeilichen", ibid 32). Today there are several writers who (not inspired by the political creed of the thirties!) stress *Sozialethik*, or accord more weight to the *Handlungsunwert* than to the *Erfolgsunwert* (harm), but few would deny that the primary, if not the only (Marx 70) function of the criminal law is the protection of *Rechtsgüter* or, at least, the prevention of "socially harmful" conduct (Hanack par 30f). In fact, some ancient penal norms which have no such function, have been abolished by the federal legislature.
- 48) Inst. Just. I I 3.
- 49) Jescheck 6 (without reference to *mens rea*): "Die den Strafnormen zugrunde liegenden Werturteile beziehen sich aber nicht nur auf die zu schützenden Rechtsgüter, sondern auch auf die Qualität der menschlichen Handlungen, die sie in ver-



werflicher Weise missachten." Crime is "ein Werk des menschlichen Willens, der den Geltungsanspruch des Rechtsguts missachtet und damit die Vertrauensbasis im Zusammenleben der Menschen erschüttert." Cf n 67.

- 50) The courts often comment on the accused's "disregard for human life" (or other protected interests) when they pronounce sentence. Although such remarks may also touch on the objective dangerousness of a conduct, they deal essentially with the mental element: among the factors which at the time of the act motivate the actor, there is not enough consideration or regard for the affected legal interest to restrain him from endangering or injuring it. This is what makes his state of mind blameworthy. Cf the test of "disregard for the life and safety of others" for determining *mens rea* in manslaughter, used by Lord Hewart C J in his "much cited direction to juries recommended in *R v Bateman* (1925) 19 Cr. App. R. 8, at p 11 (T.A.C.)" (as quoted by Kenny at 190).
- 51) It may also provide an answer to the question of the thoroughly depraved criminal who, having lost all sense of right and wrong, would seem to be blameless if awareness of unlawfulness is considered a necessary element of intention. German legal science has long been wrestling with this problem of "Rechtsblindheit" (Jescheck 343; Baumann 1968 348). From our point of view, the basic element of guilt is present when the "rechtsblinde" wrongdoer acts with utter disregard for the legal interests of others.
- 52) De Wet & Swanepoel 130: "By Mbombela was daar nie 'n sweem van opset om 'n mens om die lewe te bring nie, hoe kan hy nou skuldig wees aan moord?"
- 53) Burchell & Hunt I 257. - As it happens, another "tikoloshe" or "tokkelosh" ("tokkelossie") case has been reported after this lecture was delivered: *S v Jassane* 1973 (4) SA 658 (T), and in this decision, at 663f, Viljoen J extensively quotes with approval from the devastating criticism of *Mbombela* by De Wet & Swanepoel (129f) as well as from Burchell & Hunt (supra). The point is that to exclude intention a mistake of fact need no longer be "reasonable".
- 54) J C Smith op cit 13.
- 55) Regarding *mala in se* this view is in its effects not far removed from the doctrine applied to all offences by the former *Reichsgericht* (and rejected by virtually all German writers): "error iuris criminalis nocet", a mistake as to the criminal law is no excuse (RGSt 1 368; Nagler 489-495; Mezger-Blei 205; Jescheck 228). Apart from the dubious nature of the tests applied at the time it is submitted that the *Reichsgericht* would have been on safer ground if it had distinguished between *mala in se* and *mala prohibita* and confined its doctrine to the former.
- 56) For a study of offences of "pure disobedience" (*einfacher* or *reiner Ungehorsam*), Binding's chapter on the subject (397-412) is still a convenient point of departure although it was written before the "explosion" of regulatory legislation. There is a great amount of more recent literature; see e.g. Volz and writers there cited; R Schmidt 74ff; infra n 64.
- 57) This, I submit, may be the right point of departure for dealing with the confusing "claim of right" cases (Burchell & Hunt I 132ff, 264ff). A typical example of one class of those cases is *S v Rabson* 1972 (4) SA 574 (T) where the accused "believed that he had obtained all the necessary authority" to import certain plants into the province. The Court found "that he did not have knowledge of the unlawfulness of his conduct" and that since he intended to comply with the law, "it would not be in accordance with justice" to hold that he was guilty of criminal conduct (at 577). A decision which, with respect, deserves full approval, see Kobus van Rooyen *De Jure* 1973 82ff; contrast C R Snyman *THR-HR* 1973 185ff. There was in the mind of the accused no indifference to, or disregard of the statute.

- 58) Contrast Welzel who, denying the qualitative difference between *mala in se* and *Ordnungswidrigkeiten* (at 16) and applying the *mens rea* concept adopted by the *finale Handlungslehre*, says the answer must be found in the words used by the legislator: Where the statute *expressis verbis* prohibits the intentional doing of a certain act, intent does not include knowledge of the prohibition; it does if the statute uses words such as "bewusst verbotswidrig" - in conscious violation of the prohibition (at 175). Mezger-Blei (6, 211) convincingly shows, with reference to numerous examples, that Welzel's view is untenable. Cf Jescheck 345.
- 59) In the nursery nobody would overlook what is in truth the difference between *malum in se* and *malum prohibitum*. If the boy wilfully destroys his sister's favourite doll, will he be heard with the excuse that no one told him not to do so?
- 60) South African courts are not agreed on the validity of the presumption. In *S v Tshwape* (supra, n 2) the conviction was confirmed because "every person is presumed to know the law and ignorance of the law is no excuse" (at 330). About ten years later (in fact, after the date of this lecture), the Chief Justice of Rhodesia said: "It is ludicrous to suggest that even a lawyer with an encyclopaedic mind could learn the vast body of statute law" (*S v Zemura* 1974(1) SA 584 (R, AD), at 595). In this judgement Beadle C J referred with approval to De Wet & Swanepoel 136 ("By misdade waarby opset vereis word, moet regsokunde en regsdwaling steeds verskoningsgrond wees, omdat *dolus* of opset ontbreek, mits die dwaling wesentlik is. Dit is 'n billiker en suiwerder houding om in te neem as die groteske dat iedereen geag word die reg te ken").
- 61) Though from different premisses, essentially the same conclusions were reached by Arthur Kaufmann (130-137, with reference to his earlier book *Das Unrechtsbewusstsein in der Schuldlehre des Strafrechts* Mainz 1949). A similar distinction was already made in Roman criminal law, namely between *ignorantia iuris gentium* and *ignorantia iuris civilis* (see Feuerbach par 86 n 1; J W C van Rooyen *THR-HR* 1974 19ff; contrast Mittermaier 109; cf Köstlin 614ff), and although it appears to have been embodied in a rule of evidence rather than in substantive law, its effect must, in its more limited scope, have been similar. A woman's "*ignorantia iuris gentium* wat eng met die regsgevoel verband hou, word eenvoudig nie geglo nie" (Van Rooyen op cit 21 n 22). Glossators and commentators confirmed that view (Van Rooyen 22: "Dwaling ten opsigte van die *ius naturale* word egter nie geglo nie . . ."). For Feuerbach's theory of psychological compulsion, knowledge of the criminal law was of paramount importance, hence his general presumption: "Von jeder mit Verstand begabten Person wird im Allgemeinen als *rechtlich* gewiss (emphasis by Feuerbach) angenommen, dass sie mit den Strafgesetzen bekannt sei" (par 86). However, even Feuerbach (loc cit n 1) confined this rule to *mala in se*, namely "denjenigen Verbrechen, welche *iuris gentium* sind, d.h. an und für sich rechtswidrige oder moralisch schändliche Handlungen, (die) schon *naturali ratione* als unerlaubt betrachtet werden müssen". Certain categories of persons can invoke *ignorantia iuris* at least in respect of *mala prohibita*, i.e. "solchen Handlungen, welche nur nach den besonderen Gesetzen eines bestimmten Staats (*jure civili*) Verbrechen sind (wohin alle rein polizeiliche Übertretungen gehören)". The view expressed in this lecture would almost certainly have been arrived at by Köstlin if in his time the concept of *Rechtsgut* had been fully developed. Köstlin (25-29, 241, 256, 322-324, 612-625) realised that the very nature of crime and of criminal *mens rea* differs in *mala in se* ("wirklichen Verbrechen") on the one hand and *mala prohibita* ("blossen Polizeiübertretungen") on the other. He convincingly concluded that *ignorantia iuris* can be no excuse when the actor intended to do "das an sich Unrechte", while in *mala prohibita* an intentional violation presupposes knowledge of the prohibition. - Burchell & Hunt (I 261 n 7) consider the probable conse-



quences of adopting more or less the opposite policy, namely abandoning the traditional *ignorantia iuris* rule only in respect of common-law crimes. This would not "hamper severely the administration of justice", the learned authors say; "ignorance or mistake of law would seldom succeed as a defence to a common-law crime" because such crimes "are well known and almost invariably involve an element of moral turpitude". – The writers' view only confirms that, as far as *ignorantia iuris* is concerned, the crucial choice between expediency and justice has to be made mainly in the field of *mala prohibita*.

- 62) Cf *Sweet v Parsley* House of Lords (1969) I All ER 347 (HL); G N Barrie *SALJ* 1969 242-244; *R v Salmonson* 1960 (4) SA 748 (T); *S v Oberholzer* 1971 (4) SA 602 (A); *S v Goncalves* 1974 (2) SA 122 (NC).
- 63) Kaufmann 156ff holds that unconscious negligence cannot be a form of *mens rea* because "alle Schuld ist Willensschuld"; in particular he considers it incompatible with the *mens rea* principle to punish a person for merely forgetting to do something. The issue cannot be fully discussed here. However, if forgetting to do something can at all constitute blameworthiness, the object of the blame is, I think, lack of consideration or regard for that which is being forgotten. If such indifference to what ought to be kept in mind were no mental attitude, it could not be influenced by fear of punishment, and the criminal law should, indeed, not be concerned with it. But does not experience teach the opposite? – On the blameworthiness of mere forgetfulness: *S v Arenstein* 1964 (1) SA 361 (A) at 367; *S v Qumbella* 1966 (4) SA 356 (A); *S v Jassat* 1965 (3) SA 423 (A).
- 64) After Continental legal science had "from the time of the medieval law schools right down to this day" (i.e. 1870) with great predilection, but unsuccessfully tried to determine the dividing-line between criminal and "non-criminal" offences, it was decided to cover both in one penal code which was to become the German *Reichs-Strafgesetzbuch* (see the official memorandum in *Motive* 11). Jurists had been "driven to despair" (Köstlin 28) by the problem not so much of perceiving the "profound qualitative difference" (*Motive* loc cit) between *mala in se* (*Kriminalunrecht, peinliche, echte Verbrechen*) and *mala prohibita* (so-called *Polizeidelikte, Verwaltungsunrecht, reine Ungehorsamsdelikte*), but of drawing a line that would not cut across the definitions of several offences. (Cf Van Hamel 255ff). This accounted for the weaknesses of the *Polizeigesetzbücher* which existed in most German states, and for the fact that subsequently the distinction was blurred or abandoned, much to the disappointment of several great scholars (Köstlin 25ff, 256, 621ff; Binding 397). At any rate, if mere "police offences" were to be dealt with outside the courts, the distinction could not be purely qualitative, but had to observe quantitative limits. In the 20th century, with the staggering increase in the volume of regulatory legislation (*Nebenstrafrecht*) it was felt that too many people were turned into criminals on account of minor contraventions. Since 1945, therefore, efforts to "decriminalise" this area of law enforcement have in West-Germany led to the separation of "Ordnungswidrigkeiten" from criminal offences. The former are no longer visited with *Geldstrafe*, but *Geldbusse*, to be imposed by administrative authorities (subject to judicial review on application). Under the relevant legislation some offences are *Ordnungswidrigkeiten*, some are *Straftaten* and, significantly, some can be either, depending on their gravity *in concreto* (*Mischtatbestände*). Qualitative criteria of *Ordnungswidrigkeiten* have remained controversial. Sometimes, "silence of the voice of conscience" and absence of ethical blameworthiness are stressed, sometimes absence of harm to a *Rechtsgut*, in contradistinction from prejudice to merely administrative interests. At any rate, the test chosen by the legislator is a mixed one, i.e. it is neither purely quantitative nor purely qualitative. As a result, serious *mala prohibita* may not always qualify as *Ord-*

*nungswidrigkeiten*. (Ordinarily a *Bussgeld* does not exceed DM 1000, but much heavier *Geldbussen* can be provided for by specific statutes, e.g. DM 100 000 by the new Act for the protection of the environment). – Cf Cramer; Maurach 14-21; Baumann 1968 31-35; Jescheck 39-41.

- 65) Notably by Feuerbach who, at the beginning of the 19th century, categorised such offences (e.g. incest, sodomy) as *Polizeivergehen* (Feuerbach par 432, 449ff). This followed from his basic view that a necessary element of all *Kriminalunrecht* was the violation of a subjective right. Both his premiss and his conclusions were severely criticized by many writers (e.g. Köstlin 29), even in Mittermaier's additions to Feuerbach's own *Lehrbuch* (Mittermaier 703, 264ff). Later, however, after the general acceptance of the concept of *Rechtsgut*, it may have been easier to appreciate that there was some logic in Feuerbach's classification.
- 66) Cf Snyman op cit.
- 67) Reading in Schmidhäuser's *Lehrbuch* after this lecture was delivered, I find some striking points both of agreement and of disagreement to which I would have referred if I had been aware of them. In Schmidhäuser's system the *Rechtsgut* occupies a central position. It is defined as (169), or understood to be endowed with (196), a claim to being respected (*Achtungsanspruch*). A wrong (*Unrecht*) is a violation of that claim, determined by the will of the actor (*rechtsgutsverletzendes Willensverhalten*), but regardless of whether the actor is aware of that claim or not. Unlawfulness is a quality of the act, not of the consequences (harm), but only because the act is likely or calculated to bring about the harm (196ff). *Mens rea* (*Schuld*) means *rechtsgutsverletzendes geistiges Verhalten* (122); it depends on the question *nach der geistigen Teilhabe an den Wertvorstellungen des Gemeinschaftslebens* (120). No qualitative difference between *mala in se* and *mala prohibita* is recognised (207). Unlike other writers, Schmidhäuser strictly distinguishes will from intent. He considers *dolus eventualis* insufficient as *mens rea* for attempt (477), and in respect of conscious negligence he does not share the prevailing concept (341, 345f).



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