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Preface

What is insanity in modern criminal law? In most legal systems, modern criminal law presumes insanity to be a natural, legally and medically defined phenomenon (covering a range of medical disorders). Challenging these presumptions can result in a new perspective on insanity and serve as a basis for a revised matrix of insanity in modern criminal law. Each of the following examples challenges the above presumptions.

Example 1

A suffers from psychotic episodes, in the course of which she loses control over her physical motions. To retain her mental balance, she is instructed to take a pill every day at 12.00. She knows that if she fails to do so she will lose self-control within a few hours. Under the influence of the pill she is fully aware of her motions and capable of controlling them. When her abusive mother-in-law phones to say that she would be visiting in the afternoon, A decides to do away with her. With full awareness of her act, she chooses not to take the pill, intending to kill her mother-in-law. When her mother-in-law enters the apartment, A is having a psychotic episode and kills her. She is charged with murder, and pleads the insanity defense.

Modern criminal law accepts the legal mechanism of "transformation of fault" in various general defenses, as, for example, intoxication. These mechanisms are based on the European-Continental theory of *actio libera in causa*, which reproduces the perpetrator's fault from the point of entering the situation (intoxication, for example) to the point of the physical perpetration of the offense. Thus, if one drinks alcohol deliberately in order to lose control and kill someone, the mental state, at the point of drinking the alcohol (full awareness with specific intent) is copied to the point of the perpetration of the homicide, even if at that time the perpetrator was not aware of his actions. But because insanity is presumed to be natural, no similar legal mechanism is associated with it. A person is not presumed to enter psychotic state of his own free will, although as shown above, such capability exists.

Even if a transformation of fault mechanism were applied to insanity, it would be too narrow and partial. The mechanism transfers general intent or specific intent to

the point of physical perpetration, but in practice five different situations are possible:

(1) A deliberately does not take the medication in order to kill B (purpose, or specific intent);
(2) A does not take the medication, but unreasonably hopes the psychotic episode will not take place (recklessness);
(3) A forgets to take the medication, although any reasonable person would not have forgotten to do so (negligence);
(4) A forgets to take the medication, and no reasonable person would have remembered to take it under the specific circumstances, but A did not take all reasonable measures required to remember taking the medication (strict liability); and
(5) A is prevented from taking the medication (absence of fault).

In each of these five situations A kills B in the throes of a psychotic event. Does criminal law really address the problem in all five cases?

Example 2

C is mentally retarded. His biological age is 30, but his mental age is that of a 6-year-old. If C commits an offense, in most legal systems the insanity defense applies to him. But is C truly insane? From the legal point of view insanity is not adequately defined and relies mostly on so-called definitions, which are associative.

The most appropriate defense for C would be infancy, if we interpret this defense as relating to one's mental rather than biological age. Infancy has been accepted as general defense based on the presumption that under certain age no person is capable to consolidating a fault. This defense is aimed at the mental state of the perpetrator, and it should not be relevant regarding mentally retarded persons.

The age discrepancy works in the opposite direction as well. If D's biological age is 6 but her mental age is 15, should she be exempt from criminal liability? A deep understanding of insanity, therefore, would influence other general defenses, such as infancy, and a proper legal definition of insanity is likely to change the boundaries between insanity and other general defenses.

When a person begins a drug rehabilitation program, he experiences symptoms that affect his mind. If he commits an offense during the treatment, he may use the intoxication defense (because the reason for his conduct was drugs) or the insanity defense (because he could not control his impulses in the absence of drugs). A few years ago, hypoglycemic and hyperglycemic conditions were classified under insanity in criminal law, although diabetes is not a mental illness. In some legal systems epilepsy was also considered insanity. Proper legal definition of insanity would clarify such cases.

Example 3

The judge must decide whether the arrested person who has been brought before her is insane. The person occasionally hears voices that tell him to perform various acts. As long as these acts caused no damage, no one paid much attention. But recently the voices told him to kill his son, a helpless child. He therefore tied up the child and pulled out a knife, intending to kill him. Suddenly, the voices told him to stop, at which point he was arrested for abusing a helpless child. Is this person insane and a public danger? The case, naturally, recasts the biblical story of Abraham and Isaac (Genesis 22):

> And Abraham said unto his young men, Abide ye here with the ass; and I and the lad will go yonder and worship, and come again to you. And Abraham took the wood of the burnt offering, and laid it upon Isaac his son; and he took the fire in his hand, and a knife; and they went both of them together. . . .And they came to the place which God had told him of; and Abraham built an altar there, and laid the wood in order, and bound Isaac his son, and laid him on the altar upon the wood. And Abraham stretched forth his hand, and took the knife to slay his son. And the angel of the LORD called unto him out of heaven, and said, Abraham, Abraham: and he said, Here am I. And he said, Lay not thine hand upon the lad, neither do thou any thing unto him: for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son from me.

In most legal systems this is a case of an attempted murder. Nevertheless, Abraham is considered a cultural hero. Millions of people worldwide accept him as the father of their nation. Today he would probably be excluded from society for being dangerous, and separated from his son. Many of the biblical prophets would probably be considered insane by today's standards, making us wonder whether insanity is a cultural rather than a psychiatric matter, and whether medical definitions of insanity are relevant to law and society. Insanity may be dependent on time, place, and social environment rather than a medical diagnosis.

The objective of this book is to develop a comprehensive, general, and legally sophisticated theory of insanity for modern criminal law, based on existing provisions of the criminal law. The resulting matrix of insanity aggregates all modern insights about insanity into a single, coherent legal theory. The theory must be practical as well as pragmatic, so that it can be implemented by practitioners immediately.

The theory rests on three main pillars. The first is the connection to general criminal law. Accordingly, all general defenses are considered *negative fault elements*, i.e., part of the principle of fault in criminal law: the mental element requirement is the positive fault element, whereas general defenses form the negative element. The general defenses, including intoxication, are distinguished from specific defenses, which are not necessarily negative fault elements.

Moreover, unclear and perplexing distinctions (for example, between exemptions, excuses, justifications, etc.) are replaced with a proposed powerful distinction between *in personam* and *in rem* defenses. This compelling distinction has many uses in criminal law and serves general defense theory better than the distinctions mentioned above. Consider, for example, two joint perpetrators who

commit a robbery. In one case, one pleads insanity and his plea is accepted. In another case, one pleads self-defense and his plea is accepted. The question arises when does the pleaded defense cover the other perpetrator as well, even if he did not enter such a plea? The proposed distinction provides the answer.

The second pillar is the legal definition of insanity as a negative fault element that must be capable of contradicting all possible components of the fault, those that fall under cognition as well as volition (e.g., irresistible impulse). It must also draw clearly the borderlines of other tangential general defenses, especially insanity and narcotics-free intoxication, insanity under narcotics and intoxication, infancy and insanity as they relate to mentally retarded individuals, and insanity and automatism. The legal definition is intended to be functional rather than classificatory. The effect of insanity on the perpetrator's cognition and volition is considered, not whether the symptoms meet the requirements of various mental illnesses in the medical lexicon. For example, OCD (obsessive-compulsive disorder) may be accepted as insanity in one case but not in another, based on its functional effect on the perpetrator's cognition or volition.

The third pillar is the relevance of external definitions of insanity to the above legal definition. Should insanity, as understood in criminal law, be automatically subordinate to its psychiatric definitions? Psychiatry itself has undergone vast changes in its understanding of insanity, especially when it moved into the domain of dynamic psychiatry. Should criminal law be affected by these changes? And what happens when medical definitions contradict the social one, and the same person may be regarded as a prophet or a madman?

Chapter 1 explores the past and present of insanity defense in criminal law. With regard to the past, it comparatively explores both its history and prehistory, including the beliefs that insanity is religious punishment for certain sins, an idea that has persisted since ancient Egypt until the development of the dynamic psychiatry in the 1930s. Both medical and legal definitions are explored (Is insanity medical question or social question?). The chapter also examines what is considered insanity in current modern criminal law, seeking to identify the parameters of an accurate legal definition. Are psychiatric reports relevant? What is the difference between insanity and not being competent to stand trial for mental reasons? Is insanity permanent or can it be temporary? Is insanity absolute or can it be partial?

Chapter 2 investigates some of the basic concepts used to develop the ideas presented in subsequent chapters. A coherent and comprehensive theory of criminal law includes four basic principles: legality, conduct, fault, and personal liability. General defenses are part of the principle of fault (negative fault elements), together with the mental element requirement (positive fault elements). These elements are complementary to each other and similarly structured.

General defenses are distinguished from specific ones, a distinction that is relevant to both substantive law (the general scope of the defense) and procedural law (the burden of proof). General defenses may be divided into *in personam* and *in rem* types, a distinction that affects various aspects of criminal liability.

Some *in personam* defenses in criminal law are tangential to insanity. Such three main defenses are infancy, intoxication, and automatism. The definitions of these defenses externally and indirectly shape the boundaries of insanity. Chapter 3 discusses the implications of these tangential defenses for insanity, with special emphasis on cases that fall within gray areas, for example, mentally retarded persons, automatism, internal coercion, brainwashing, withdrawal symptoms, use of drugs for mental balance and depression, etc.

The main objective of the chapter is to clearly demarcate the boundaries between the insanity defense and tangential *in personam* defenses, and thus answer the question whether insanity is isolated phenomenon, or it may have various similarities to other defenses. This question has also practical legal significance towards the consequences of accepting the claim during the trial.

Chapter 4 discusses the transformation of fault. When a perpetrator voluntarily puts himself into a situation that requires *in personam* defense, it is not just to apply this defense. For example, if a person drinks alcohol deliberately, and subsequently commits an offense, it is not just to exempt him from criminal liability based on the intoxication defense. Modern criminal law solves this problem by transforming the fault that existed at the time when the perpetrator placed himself in a situation that removed his control to the time of the commission of the offense. This is the "transformation of fault" legal mechanism.

In European criminal law, small part of this mechanism is referred to as *actio libera in causa* doctrine. This legal mechanism is problematic because it is not applicable to insanity and because it is only partial, as it does not cover all fault states (purpose, recklessness, negligence, strict liability, and absence of fault, as exemplified above). The objective of this chapter is to delineate a coherent, conclusive, and accurate transformation of fault mechanism based on tangential defenses, which solves the problem of voluntarily entering into a situation of insanity with no required changes of the current law.

The general theory presented in this book is based on lectures delivered in the Criminal Law course in the faculty of Law, Ono Academic College, lectured by the author.

I would like to thank personally to Professor Noomi Katz, director of the Research Institute for the Health and Medical Professions for her generous support in this project. Under her conduct in the past 8 years, the Research Institute is open-minded to explore new horizons towards the linkage between law and medical professions. I also thank her for inviting me to lecture on this issue to the researchers of the Research Institute. I also wish to thank Ono Academic College for supporting this project and Anke Seyfried for accompanying the publication of the book from its inception to its conclusion. Finally, I wish to thank my daughters for their thought-provoking ideas.

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The Modern Defense of Insanity

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1.1 The Evolution of Insanity as a General Defense in Criminal Law

Two evolutions are involved in shaping insanity as a general defense: medical and legal. The medical evolution reflects developments in the understanding of the phenomenon of mental disorders; the legal evolution reflects the elaboration of the social consequences of insanity in daily situations. Both evolutions are discussed below.

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1.1.1 The Medical Evolution: Religion vs. Science

The first known attempt to classify mental disorders was in ancient Egypt, toward the end of the forth millennium BC.[1] This classification had to do mostly with the concept of religious sin, with the gods punishing the sinner by having an evil spirit take control over his soul.[2] In monotheistic religions it is believed that mental disorder is the punishment for a person's sins, therefore it makes no sense to explore the nature of the mental disorder to seek a cure.[3] No person is allowed to countermand God's will, as expressed by the person's mental disorder. It is how God wished it to be.

Although a few scholars objected to this religious concept, it prevailed in all spheres of life and society until the mid-1700s. Consequently, not only was there no incentive to intervene in the divine punishment, but the religious institution used the cases of mental disorder in order to deter the population from becoming potential sinners. Naturally, redemption was possible only through absolute belief in God. But the stubborn people persisted in their heresy, and therefore God did not cure their mental disorder.

By the mid-1700s, new attitudes toward mental disorder had evolved. These attitudes were not based on the religious concept of sin and punishment, and therefore mental disorder was no longer considered divine punishment.[4] Pioneering research in the field documented the symptoms of various types of mental disorders and attempted to classify them according to symptoms. Ironically, because of the depth of religious belief, the main beneficiaries of this research were religious leaders and clerics who used the results to deter believers from sinning by exposing the variety of divine punishment.[5]

When society or the family sought treatment for a specific mental disorder, no physician was called for help or advice sought because the issue was not considered to be a medical one. In general, the objective of the treatment was to ease suffering,

[1] Karl Menninger, Martin Mayman and Paul Pruyser, The Vital Balance 420–489 (1963); George Mora, *Historical and Theoretical Trends in Psychiatry*, 1 Comprehensive Textbook of Psychiatry 1, 8–19 (Alfred M. Freedman, Harold Kaplan and Benjamin J. Sadock eds., 2nd ed., 1975).

[2] Michael Moore, Law and Psychiatry: Rethinking the Relationship 64–65 (1984); Anthony Platt and Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227 (1966); Wolf Wolfensberger, Normalization: The Principle of Normalization in Human Services 12–25 (1972).

[3] Sander L. Gilman, Seeing the Insane (1982); John Biggs, The Guilty Mind 26 (1955).

[4] Walter Bromberg, From Shaman to Psychotherapist: A History of the Treatment of Mental Illness 63 (1975).

[5] George Rosen, Madness in Society: Chapters in the Historical Sociology of Mental Illness 33, 82 (1969); Edward Norbeck, Religion in Primitive Society 215 (1961).

and the "treatment" was religious.[6] The reason was considered to be obvious. Dealing with mental disorder required communication with the supernatural world, and the professionals who dealt with mental disorders were not physicians but priests.[7] Physicians dealt exclusively with physical ailments, not mental ones.

In 1775, Franz Mesmer, a German physician, made the first attempt to explain mental disease using the medical terms of "animal magnetism."[8] Mesmer argued that an invisible liquid with strong magnetic properties is present in the universe, holds the stars in place, and affects human health. He advocated treatment with magnets to cure mental disease by balancing the patients' personal magnetic properties. This was a crucial point in the development of psychiatry. From this point onward, scholars considered mental disease as a human rather than a religious matter, and psychiatry became part of the medical science.

Two main trends developed in psychiatry. The first one identified the causes of mental illness as physical, having to do with the physical state of the brain.[9] The second one identified them as emotional in nature, affecting the feelings of the mentally ill person.[10] According to the second trend, people were diagnosed to be mentally ill if their feelings and volition were not balanced. The diagnosis was made by a physician who specialized in treating mental illness.

In 1835, James Prichard, an English physician, developed the term "moral insanity," which encompassed two main situations. The first was one of moral disorientation, when the person was incapable of understanding what was the moral way to act in certain situations. The second was one of deficient moral judgment, when people held mistaken concepts about the moral way to act, although they were aware of common moral values.[11] The deficient moral judgment was manifest primarily as a deviation from common conduct, especially in a sexual context. The accepted concept was that immoral sexual conduct can cause insanity.[12]

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[6] Judith S. Neaman, Suggestion of the Devil: The Origins of Madness 55 (1975); Seymour L. Halleck, *A Critique of Current Psychiatric Roles in the Legal Process*, 1966 Wis. L. Rev. 379, 383 (1966).

[7] Michael L. Perlin, The Jurisprudence of the Insanity Defence 40–41 (1994).

[8] Henri F. Ellenberger, The Discovery of the Unconscious: The History and Evolution of Dynamic Psychiatry 53–69 (1970).

[9] Franz G. Alexander and Sheldon T. Selesnick, History of Psychiatry: An Evaluation of Psychiatric Thought and Practice from Prehistoric Times to the Present 151–152 (1966); George Zilboorg, A History of Medical Psychology 437 (1941).

[10] Ellenberger, *supra* note 8, at p. 284.

[11] James Cowles Prichard, A Treatise on Insanity and Other Disorders Affecting the Mind (1835); Arthur E. Fink, Causes of Crime: Biological Theories in the United States, 1800–1915 48–76 (1938); Janet A. Tighe, *Francis Wharton and the Nineteenth Century Insanity Defense: The Origins of a Reform Tradition*, 27 Am. J. Legal Hist. 223 (1983).

[12] Peter McCandless, *Liberty and Lunacy: The Victorians and Wrongful Confinement*, Madhouses, Mad-doctors, and Madmen: The Social History of Psychiatry in the Victorian Era 339, 354 (Scull ed., 1981); Vieda Skultans, English Madness: Ideas on Insanity, 1580–1890 69–97 (1979); Michel Foucault, Madness and Civilization 24 (1965).

Naturally, moral sexual conduct was consistent with Victorian values of human behavior.

By the end of the nineteenth century, these trends and attitudes, including the notion of moral insanity, had faded under strong religious American influence. Americans were concerned that medical developments in the area of insanity may harm the religious beliefs, moral standards, and legal praxis in the United States.[13] American scholars preferred the traditional and satisfactory explanations of insanity as divine punishment for sinners. This influence originated in the United States and dominated research in this field until the late 1970s.[14]

The American influence has led legislators and scholars to oppose a general defense of insanity in criminal law. The American influence did not extent to Europe, however. By the end of the nineteenth century, scientific research in psychiatry, centered in Europe, had become much more accurate, marking a renaissance of psychiatry and the birth of modern psychiatry. Around that time, in Europe, the first rational model of mental illness was developed by Emil Kraepelin, the first scientific theory of schizophrenia was proposed by Eugen Bleuler, the first neurological model of psychiatry was developed by John Jackson, and many other models were put firth by various researches.

Various fields and sub-fields of psychiatry emerged at the same time. These fields included the psychology of sexuality, psychopathology, the study of dreams, and the study of the subconscious, under the influence of Sigmund Freud. In this way modern psychiatry began to consolidate.[15] One of the most significant branches of the modern psychiatry was dynamic psychiatry, which sharply criticized the theological models of human behavior, the theories of supernatural powers dominating human nature and the human mind, and naturally, the religious belief that insanity is a divine punishment for religious sins.[16]

The critique initiated by modern dynamic psychiatry followed parallel developments in the fields of criminology and penology, especially serving the development of rehabilitation as a legitimate consideration in sentencing offenders.[17] These developments had obvious and derivative significance for criminal liability and criminal law. But although the different branches of modern psychiatry criticized the theological and religious explanations of insanity in similar ways, they lacked similar concepts, insights, or attitudes toward the proper ways of treating mental illness and disorders. These branches proposed different explanations for the essence, and consequently the proper treatment, of mental illness.

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[13] Harry Elmer Barnes, The Repression of Crime 248–259 (1926); Ellenberger, *supra* note 8, at pp. 171–174.

[14] Edwin Fuller Torrey, The Death of Psychiatry 92 (1975).

[15] Ellenberger, *supra* note 8, at pp. 284–289, 290–318.

[16] Henry Weihofen, *The Metaphysical Jargon of the Criminal Law*, 22 A.B.A.J. 267, 270 (1936).

[17] Seymour L. Halleck, *The Historical and Ethical Antecedents of Psychiatric Criminology*, Psychiatric Aspects of Criminology 8 (Halleck and Bromberg eds., 1968); Franz Alexander and Hugo Staub, The Criminal, The Judge, and the Public 24–25 (1931); Franz Alexander, Our Age of Unreason: A Study of the Irrational Forces in Social Life (rev. ed., 1971).

For example, the distinction between physical and mental psychiatry originated in the two main trends of psychiatry that existed at the end of the eighteenth century, a distinction that remains relevant to this day. The different branches of psychiatry explain differently the etiology of mental illness and propose different solutions for curing it.[18] Although new trends in modern psychiatry reject earlier explanations and solutions, and new methods replace old ones, the psychiatric discourse is a scientific one, based on scientific developments. Therefore, psychiatric insights into mental illness are subject to scientific developments in that field, which affect also the legal evolution of insanity.

1.1.2 Legal Evolution: The Interplay Between the M'Naghten Rules and the Irresistible Impulse Test

The legal evolution of insanity, especially as a general defense in criminal law, was not isolated from its medical evolution. Some crucial points in the legal evolution were influenced and encouraged by the medical evolution. Under Roman law, it was not acceptable to impose criminal liability upon the mentally ill, and in certain circumstances of public danger, mentally ill persons were held in public custody, not in order to cure them or treat their illness, but to keep them away from the public and prevent potential harm to society.[19] The custody was not considered punishment, but a cautionary measure to protect society.

By the twelfth century, courts in Europe pointed out the need for a general and accurate theory that accounts for the essence of insanity in order to exempt insane offenders from criminal liability.[20] This approach was probably the consequence of the academic legal studies in the new European institutions called "universities." Legal academic studies required a general scientific methodology, which had to address the issue of insanity as well. The legal examination of insanity did not require an understanding of the reasons for insanity, only the identification of its overt symptoms, in order to determine the extent of the criminal liability of the offender.

Theories of criminal law have spawned various legal indicators and tests used to identify insane offenders in order to determine their criminal liability. These indicators reflect the social, religious, theological, and medical developments in the area of insanity. By the mid-nineteenth century, three main tests were developed

[18] August B. Hollingshead and Fredrick Redlich, Social Class and Mental Illness (1958).

[19] Digesta, 21.1.23.2; Digesta, 1.18.13.1; Olivia F. Robinson, The Criminal Law of Ancient Rome 16 (1995).

[20] Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 Geo. L. J. 1371, 1380 (1986); Joseph H. Rodriguez, Laura M. LeWinn and Michael L. Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L. J. 397, 406–407 (1983); Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Common Law*, 12 Cal. L. Rev. 105 (1924).

to legally diagnose the insane offender, to be replaced in 1843 in England by the M'Naghten rules. The three tests were:

(1) the good and evil test;
(2) the wild beast test; and
(3) the right and wrong test.

The good and evil test appeared for the first time in 1313 in English common law.[21] The offender in that case was under the age of seven, which was the minimal age for imposing criminal liability under English common law. The test reflected Medieval theological concepts regarding mental illness. Mentally ill persons, like infants, were considered incapable of committing sins because they were not capable of free will in their condition. Consequently, these offenders lacked the capability to distinguish between good and evil, and could not choose between the two of their own free will.[22]

The terminology of the good and evil test is theological, derived primarily from the biblical story of the original sin and the expulsion from Eden.[23] The exemption from criminal liability of the insane offender was based on the concept that insanity was in itself a punishment and satisfied the necessity to punish offender. Additional punishment was considered double punishment, and therefore it was not acceptable.[24] This was the prevailing test in the English common law between the fourteenth and the eighteenth centuries.[25] During that time, English courts needed a concrete way to examine the capability of the offender to distinguish between good and evil. Therefore, in 1616 the test was redefined to refer to persons who were not capable of counting from 1 to 20, who did not understand the quantity implied by the number 20, who did not recognize their parents, or did not distinguish between useful and harmful matters. Such persons were considered "idiots," unless they were able to read and write.[26] An offender who has been identified as an

[21] Y.B., 6 & 7 Edw. II (1313).

[22] Anthony Platt and Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227, 1231–1233 (1966); Dan Michel, Ayenbit of Inwyt, Or Remorse of Conscience 86 (1340, Morris ed., 1866).

[23] Genesis 2:9, 16, 3:1–21.

[24] Stephen L. Golding, *Mental Health Professionals and the Courts: The Ethics of Expertise*, 13 Int'l J. L. & Psychiatry 281, 287 (1990).

[25] Platt and Diamond, *supra* note 22, at pp. 1233–1234.

[26] Crotty, *supra* note 20, at pp. 107–108 quotes the definition of the term "idiot" from the 1616 edition of Novel Natura Brevium:

> And he who shall be said to be a Sot and Idiot from his Birth, is such a person who cannot accompt or number Twenty-pence, nor can tell who was his Father, or Mother, nor how old he is, &c. so as it may appear that he hath no understanding of Reason what shall be for his Profit, or what for his loss: But if he have such Understanding that he know and understand his Letter, and do read by teaching or Information of another Man, then it seemeth he is not a Sot, nor a natural Idiot.

idiot was not considered to have legal personhood, and therefore was not subject to the imposition of criminal liability.

Without a basic understanding of the moral value of the conduct it was not possible to impose criminal liability, but in practice only extreme cases of insanity passed the test. Most cases, as understood at the time, were not accepted as insanity.[27] The good and evil test was modified from time to time by the courts in order to fit the factual reality and developments in the understanding insanity, and in 1724 it was replaced by the wild beast test.

To apply the wild beast test, the judge instructed the jury to exonerate the offender for reason of insanity if it was found that he did not understand his conduct and behaved no better than a wild beast. Such a person did not deserve punishment under criminal law.[28] This test was a combination of seventeenth century doctrines regarding criminal liability and religious attitudes towards insanity, which prevailed in England in those days. Indeed, the term "wild beast" was a mistranslation of the original Latin term "brutis" (brutes), from the thirteenth century, when the concept was enunciated by the English jurist, Bracton.[29]

This term did not appear before in any description of insanity. At the beginning of the eighteenth century, "wild beast" referred mostly to livestock and to animals of the meadow such as badgers, foxes, dear, and rabbits.[30] The wild beast test raised the criteria for being considered insane, reducing the rate of acceptance of the insanity defense in criminal cases. The test emphasized the cognitive capabilities of the offender rather than his impulses, as its name might imply.[31]

The test prevailed in English common law until 1812, when it was replaced by the right and wrong test, which was the most significant step toward the M'Naghten rules, adopted in 1843. According to the right and wrong test, the insanity defense could not be accepted, if the offender had adequate understanding to distinguish between right and wrong or good and evil.[32] Because the terms good and evil were too vague to be interpreted, the courts preferred right and wrong as sole criterion for the test.[33] The principal difference between the wild beast and the right and wrong

[27] Valerie P. Hans and Nigel Vidmar, Judging the Jury 187–188 (1986).

[28] Arnold, (1724) 16 How. St. Tr. 695:

> a mad man. . . must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than a brute, or a **wild beast**, such a one is never the object of punishment (emphasis not in original).

[29] Anthony Platt and Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. Hist. Behav. Sci. 355, 360 (1965); Henry de Bracton, De Legibus et Consuetudinibus Angliae (1260; G. E. Woodbine ed., S. E. Thorne trans., 1968–1977).

[30] Jacques M. Quen, *Isaac Ray and Charles Doe: Responsibility and Justice*, Law and the Mental Health Professions: Friction at the Interface 235, 237 (Barton and Sanborn eds., 1978).

[31] Perlin, *supra* note 7, at p. 76.

[32] George D. Collinson, Idiots, Lunatics, and Other Persons Non Compos Mentis 477, 636, 671 (1812).

[33] Oxford, (1840) 9 Car. & P. 525, 173 Eng. Rep. 941.

tests was that the latter abandoned all moral standards affected by religion in favor of the legal standards of right and wrong.

These standards were not based on moral understanding but on broad definitions of criminal offenses. "Wrong" parallels "forbidden" by the law, and "right" parallels "allowed." Criminal offenses define the borderline between what is legally right and wrong, so that the function of the court is to determine whether the offender understood the prohibition. This test opened wider opportunities for an insanity defense, and it was criticized for not embracing the medical developments of insanity.[34] The test prevailed in English courts until 1843.

On January 20, 1843 Daniel M'Naghten (or McNaughton) shot Edward Drummond, the private secretary of the British Prime Minister, Robert Peel, intending to assassinate the Prime Minister. Drummond was wounded and died 5 days later. M'Naghten suffered from symptoms of paranoia and believed that he was persecuted by the Tory party. The court of first instance heard testimonies of experts in mental illnesses in order to understand the mental capabilities of the offender.[35] The court understood that acquitting the offender would result in his being placed in a psychiatric hospital because he was dangerous to the public.

At the end of the trial, the court acquitted M'Naghten for reason of insanity based on the right and wrong test, provoking a sharp debate in Britain. With the encouragement of Queen Victoria, a special session of the House of Lords was convened. The House of Lords presented to the Court five questions to determine the effect of insanity on the imposition of criminal liability. The answers of the Court amount to the M'Naghten rules, which are considered to be the modern legal basis for the insanity defense in criminal law. The five questions were[36]:

(1) What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?
(2) What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?
(3) In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?
(4) If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

[34] Herbert Hovenkamp, *Insanity and Responsibility in Progressive America*, 57 N.D. L. Rev. 541, 552 (1981).

[35] M'Naghten, (1843) 10 Cl. & Fin. 200, 8 Eng. Rep. 718.

[36] Ibid at p. 203 (full citation).

(5) Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

The answer of the Court to the first question was: "[t]he first question, as I understand it, is, in effect, what is the law respecting the alleged crime, when at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done; and therefore request to be permitted to answer the question only so far as it comprehends the question, whether a person, circumstanced as stated in the question, is, for that reason only, to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding? And I am of opinion that he is not.

There is no law, that I am aware of, that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves or is necessarily connected with such an unsoundness, this is not a matter of law but of physiology, and not of that obvious and familiar kind as to be inferred without proof".[37]

The answer of the Court to the second question was: "[s]econd, the questions necessarily to be submitted to the jury, are those questions of fact which are raised on the record. In a criminal trial, the question commonly is, whether the accused be guilty or not guilty: but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions, as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the Judge: a discretion to be guided by a consideration of all the circumstances attending the inquiry.

[37] Ibid at. pp. 204–205.

In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject".[38]

The answer of the Court to the third question was: "[t]hird, there are no terms which the Judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the Judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused".[39] The answer of the Court to the fourth question was included in the first answer.[40]

The answer of the Court to the fifth question was: "[f]ifth, whether a question can be asked, depends, 'not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such, that such a question as either of those suggested, is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has merely been present and heard the witnesses: these circumstances, of his never having seen the person before, and of his having merely been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful; though I will not say that an inquiry might not be in such a state, as that these circumstances should have such an effect".[41]

Thus, under the M'Naghten rules, criminal liability is imposed on the offender even if he committed the offense in a state of insanity as long as he was aware of the criminal prohibition while he was committing the offense. The court presumes the offender sane unless otherwise is proven. The insanity must relate to the time when the offense was committed, and it refers to the cognitive capability of the offender to distinguish between right and wrong. The criminal liability is imposed only based on the subjective understanding of the factual situation by the offender, including a factual mistake. Medical reports may be relevant only if the question before the court is medical.

The M'Naghten rules formed the legal basis for the insanity defense in the Anglo-American legal systems,[42] but the terms used in these rules were not clear

[38] Ibid at. pp. 205–206.

[39] Ibid at. p. 206.

[40] Ibid at. pp. 206: "Fourth, the answer which I have given to the first question, is applicable to this".

[41] Ibid at. pp. 206–207.

[42] Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 Hastings L. J. 1 (1988); United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986); State v. Holder, 15 S.W.3d 905 (Tenn. Crim. App. 1999); Hunter v. State, 489 So.2d 1086 (Miss. 1986); State v. Smith, 256 Neb. 705, 592 N.W.2d 143 (1999); Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001); State v. Hartley, 90 N.M. 488, 565 P.2d 658 (1977); State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991); Vann v. Commonwealth, 35 Va. App. 304, 544 S.E.2d 879 (2001).

enough to be interpreted by the lawyers. After the M'Naghten rules were adopted, mental illness was interpreted narrowly, and it referred mostly to specific types of psychosis.[43] Later it was interpreted more broadly, to include other mental disorders, among them other types of psychosis, neurosis, and even very low IQ, as long as it could be identified as the cause for the offender's inability to understand the difference between right and wrong.[44]

This legal situation does not reduce the definition of insanity to certain types of mental disorders or mental phenomena, but it examines the effect of given mental disorder on the understanding of individual persons of the difference between what is legally right and wrong. Thus, when the functional effect of the mental disorder is emphasized, significant types of mental disorder would not be classified as insanity under criminal law because the M'Naghten rules require a causal relation between the mental disorder and the inability to distinguish between right and wrong.[45]

The factual causal relation is at the heart of the M'Naghten rules and the basis for accepting insanity as a defense in a given criminal trial. The ability to distinguish between right and wrong was interpreted to relate to the cognitive abilities of the offender to understand properly the legal social control system in a given society. These abilities may be summed up as awareness of the general meaning of a criminal prohibition.[46] In most Anglo-American courts, these cognitive abilities were interpreted as the offender's ability to understand the nature of his conduct and its quality in light of the criminal prohibition.[47]

The general understanding of the offender that his conduct represents the commission of an offense is the key term in determining insanity under the M'Naghten rules. If the offender lacks these cognitive abilities he is considered insane under the substantive criminal law, and incompetent to stand trial (*non compos mentis*) under procedural criminal law.[48]

The key term "wrong," which refers to the criminal prohibition, was not easily interpreted after M'Naghten. It was asked whether it refers to the legal or to the moral meaning of the prohibition.[49] For example, the offender who sets fire to a brothel under the delusion that he is commanded by God to do so in order to advance his redemption, he is fully aware of the criminal prohibition against setting the fire. The offender understands that his conduct is legally prohibited, but he

[43] Abraham S. Goldstein, The Insanity Defense 48 (1967).

[44] State v. Elsea, 251 S.W.2d 650 (Mo. 1952); State v. Johnson, 233 Wis. 668, 290 N.W. 159 (1940); State v. Hadley, 65 Utah 109, 234 P. 940 (1925); Henry Weihofen, Mental Disorder as a Criminal Defense 119 (1954).

[45] See The American Law Institute, Model Penal Code – Official Draft and Explanatory Notes (1962, 1985) (hereinafter "**American Model Penal Code**"), Appendix A to article 4.01.

[46] Wayne R. LaFave, Criminal Law 382–383 (4th ed., 2003).

[47] Montgomery v. State, 68 Tex. Crim. App. 78, 151 S.W. 813 (1912); Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930); Cochran v. State, 65 Fla. 91, 61 So.187 (1913); State v. McGee, 631 Mo. 309, 234 S.W.2d 587 (1950).

[48] For that distinction see below at Sect. 1.4.1.

[49] James Fitzjames Stephen, A History of the Criminal Law of England 149 (1883, 1964).

considers it to be morally commendable. The M'Naghten rules did not explicitly interpret which type of "wrong" the court must address: the legal or the moral one. English common law preferred the legal meaning over the moral one,[50] and American courts have left the decision to the jury,[51] so that at times the wrong is legal and at others it is moral.[52]

The M'Naghten rules also address the factual mistake doctrine. Factual mistake functions as independent defense in criminal law, irrespective of what caused it. Naturally, the cause may be insanity, but not necessarily. Insanity may make it easier to prove factual mistake, but it is not necessary for such a proof. The reference the M'Naghten rules make to medical reports is not only for cases of insanity, but applies to any expert report. According to the rules of evidentiary law, such a report is admissible only if it refers to the one of the factual issues raised in the trial.

The M'Naghten rules were criticized primarily for three reasons. The first was that the rules are based on archaic insights and perspectives, no longer in use. Mental disorder is not considered to affect only the cognitive capabilities of the person but all aspects of human personality, including volition and feelings, which in most cases are also involved in delinquency.[53] The second reason was that the rules are not sufficiently accurate to identify the individuals on whom no criminal liability should be imposed. The general distinction between right and wrong does not satisfy this purpose.[54] The third reason was that the questions presented in M'Naghten rules were not answerable by psychiatrists or expert physicians. The distinction between right and wrong is not a medical matter, at least not *only* a medical matter, and it involves deep understanding of social sciences, philosophy, and more.[55] In light of this criticism of the M'Naghten rules, various changes were suggested, some slight, others quite comprehensive.

To answer the first critique, it has been suggested to expand the legal definition of insanity beyond the cognitive elements, as understood based on the M'Naghten rules. The suggestion was to add a parallel test to the M'Naghten rules, which is not restricted to the cognitive aspects of insanity; it has come to be known as the irresistible impulse test, focused on the volitional aspects of the human mind. Thus,

[50] Windle, [1952] 2 Q.B. 826, [1952] 2 All E.R. 1, 36 Cr. App. Rep. 85, [1952] W.N. 283.

[51] State v. Hamann, 285 N.W.2d 180 (Iowa 1979); State v. Boan, 235 Kan. 800, 686 P.2d 160 (1984); State v. Andrews, 187 Kan. 458, 357 P.2d 739 (1960); State v. Crenshaw, 98 Wash. 2d 789, 659 P.2d 488 (1983).

[52] People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915).

[53] Royal Commission on Capital Punishment, 1949–53 Report 80 (1953).

[54] Samuel J. Brakel and Ronald S. Rock, The Mentally Disabled and the Law 386 (1971); Manfred S. Guttmacher and Henry Weihofen, Psychiatry and the Law 420 (1952).

[55] American Model Penal Code, *supra* note 45, Appendix A to article 4.01; Francis A. Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 Marq. L. Rev. 494, 498 (1962).

if mental disorder produced uncontrollable conduct, it should be legally valid as an insanity defense.[56] The irresistible impulse test was not based on the cognitive understanding of the criminal prohibition. Insanity based on the irresistible impulse test was accepted by the courts as a defense against the imposition of criminal liability even if the offender understood the factual reality, distinguished between right and wrong, and was fully aware of the wrongfulness of his conduct. Therefore, in various legal systems the irresistible impulse test has led courts to accept the insanity defense in cases of uncontrollable will or feelings even if the alleged mental disorder did not affect directly the cognitive aspects of the offender's mind.

The irresistible impulse test was considered to supplement the M'Naghten rules with regard to the principle of fault in criminal law. Whereas the M'Naghten rules related to the cognitive aspects of the human mind, the irresistible impulse test related to volition, resembling the structure of the principle of fault in criminal law, as discussed below.[57]

The irresistible impulse test, however, is based on earlier rulings than the M'Naghten rules,[58] and some courts have used it before the M'Naghten rules were formulated. Three years before M'Naghten, an English court in Oxford handed down a ruling based on insane volition.[59] The Oxford case was not mentioned in M'Naghten probably because delusions were considered to affect human cognition rather than volition, and Daniel M'Naghten suffered from delusions. The court in M'Naghten seems to have considered the irresistible impulse test to be irrelevant to its case. But because of the wide acceptance of the M'Naghten rules, the irresistible impulse test was rejected in the English common law, and considered "most dangerous."[60]

The reappearance of the irresistible impulse test was due only to the criticism of the M'Naghten rules for abandoning the volition aspects of the human mind. Embracing the irresistible impulse test together with the M'Naghten rules was possible because of some adjustments in the original test for the M'Naghten rules. Thus, it was required that the irresistible impulse be derived from a mental illness, and that the impulse be of sufficiently high degree to nullify the free choice

[56] George E. Dix, *Criminal Responsibility and Mental Impairment in American Criminal Law: Responses to the Hinckley Acquittal in Historical Perspective*, 1 Law and Mental Health: International Perspectives 1, 7 (Weisstub ed., 1986); State v. Hartley, 90 N.M. 488, 565 P.2d 658 (1977); Vann v. Commonwealth, 35 Va. App. 304, 544 S.E.2d 879 (2001); State v. Carney, 347 N.W.2d 668 (Iowa 1984).

[57] Below at Sect. 2.1.2.

[58] Isaac Ray, The Medical Jurisprudence of Insanity 263 (1838); Forbes Winslow, The Plea of Insanity in Criminal Cases 74 (1843); Sheldon S. Glueck, Mental Disorders and the Criminal Law 153, 236–237 (1925).

[59] Edwin R. Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. Pa. L. Rev. 956, 961 (1952); Oxford, (1840) 9 Car. & P. 525, 173 Eng. Rep. 941.

[60] Burton, (1863) 3 F. & F. 772, 176 Eng. Rep. 354.

of the offender to decide whether or not to commit the offense, even if the impulse was not accidental or temporary, but permanent and foreseeable by the offender.[61]

In practice, this "adjustment" deviates from the literal meaning of the term "impulse." Most impulses are neither permanent nor foreseeable, but this interpretation fits many of the symptoms of mental illness that affect the volition of the human mind.[62] A general criticism of the adjusted irresistible impulse test and of its legal combination with the M'Naghten rules focuses on the uncontrollable character of the conduct, which is the consequence of mental illness. In general, complete loss of control over the volition of the offender was required to pass the test. When the loss of control is not complete, the irresistible impulse test does not qualify the offender as insane.[63]

Thus, the criticism of the M'Naghten rules was that the test restricts insanity to a minority of the cases, and to the rarest ones.[64] By contrast, it was argued that the irresistible impulse test widens excessively the boundaries of the insanity defense. Therefore, it was regarded to be more suitable as a consideration in sentencing the offender rather than in determining his criminal liability, because it includes some indirect ingredients of the distinction between right and wrong.[65] This argument was too robust to be ignored, and therefore some courts preferred not to apply the test as a basis for accepting the insanity defense.[66] Application of the irresistible impulse test was not considered to reduce the level of deterrence in criminal law.[67]

Because of the general criticism of the M'Naghten rules and of the irresistible impulse test, various legal systems adopted different attitudes toward these tests and their combination. American law accepted the criticism of the M'Naghten rules and of the irresistible impulse entirely. In 1871, the M'Naghten rules were fully rejected, together with the irresistible impulse test, in a New Hampshire ruling owing to the above criticism. A new indicator for insanity was established,

[61] State v. Thompson, Wright's Ohio Rep. 617 (1834); Clark v. State, 12 Ohio Rep. 483 (1843); Commonwealth v. Rogers, 48 Mass. 500 (1844); Parsons v. State, 81 Ala. 577, 2 So. 854 (1887).

[62] State v. Davies, 146 Conn. 137, 148 A.2d 251 (1959); Commonwealth v. Harrison, 342 Mass. 279, 173 N.E.2d 87 (1961).

[63] Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. Chi. L. Rev. 367, 375 (1954).

[64] American Model Penal Code, *supra* note 45, Appendix A to article 4.01; United States v. Kunack, 17 C.M.R. 346 (1954).

[65] John Barker Waite, *Irresistible Impulse and Criminal Liability*, 23 Mich. L. Rev. 443, 454 (1925).

[66] People v. Hubert, 119 Cal. 216, 51 P. 329 (1897):

> We do not know that the impulse was irresistible, but only that it was not resisted. Whether irresistible or not must depend upon the relative force of the impulse and the restraining force, and it has been well said to grant immunity from punishment to one who retains sufficient intelligence to understand the consequences to him of a violation of the law, may be to make an impulse irresistible which before was not.

[67] Edward D. Hoedemaker, *"Irresistible Impulse" as a Defense in Criminal Law*, 23 Wash. L. Rev. 1, 7 (1948). For the deterrence considerations in criminal law see Gabriel Hallevy, The Right to Be Punished – Modern Doctrinal Sentencing 25–36 (2013).

according to which, if commission of the offense was the product of mental illness, the offender was exempt from criminal liability.[68] This general indicator was not accepted outside New Hampshire,[69] but in the meantime, until 1954, American courts did not consider themselves as bound by the M'Naghten rules of by the irresistible impulse test.

In 1954, the New Hampshire indicator was used to fill the vacuum resulting from the rejection of the M'Naghten rules and of the irresistible impulse test.[70] The ruling was that no criminal liability is imposed on any offender if commission of the offense was the product of any "mental disease or defect." This indicator, destined to replace the much criticized combination of the M'Naghten rules and the irresistible impulse test, offers an adequate theoretical alternative. But the courts did not interpret the relevant terms included in the alternative, which consequently became vague and too flexible.

The alternative indicator determined no guidelines for recognizing mental diseases or defects. Therefore, it is possible to infer that any slight mental defect can become the basis for an exemption from criminal liability for reason of insanity. Furthermore, the term "product" was not interpreted either, leading to the question whether any product may be considered a "product" in this context. If, for example, the commission of the offense is a by-product of various phenomena, only one of which, even a secondary one, is a mental defect, is it considered to be an adequate basis for the insanity defense?

As a result, this alternative was criticized by both lawyers and psychiatrists.[71] The main criticism focused on the fact that the terms "mental disease or defect" and "product" were not defined. In individual cases, the courts attempted to interpret these terms,[72] but eventually, the alternative was rejected entirely in 1972 because of this criticism.[73] The American Law Institute Model Penal Code proposed using

[68] State v. Jones, 50 N.H. 369 (1871); State v. Pike, 49 N.H. 399 (1870); State v. Cegelis, 138 N.H. 249, 638 A.2d 783 (1994); Isaac Ray, Medical Jurisprudence of Insanity 39 (5th ed., 1871).

[69] State v. Peel, 23 Mont. 358, 59 P. 169 (1899); State v. Keerl, 29 Mont. 508, 75 P. 362 (1904); State v. Narich, 92 Mont. 17, 9 P.2d 477 (1932); People v. Hubert, 119 Cal. 216, 51 P. 329 (1897); State v. Craig, 52 Wash. 66, 100 P. 167 (1909); Eckert v. State, 114 Wis. 160, 89 N.W. 826 (1902).

[70] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[71] Edward de Grazia, *The Distinction of Being Mad*, 22 U. Chi. L. Rev. 339 (1955); Warren P. Hill, *The Psychological Realism of Thurman Arnold*, 22 U. Chi. L. Rev. 377 (1955); Manfred S. Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. Chi. L. Rev. 325 (1955); Wilber G. Katz, *Law, Psychiatry, and Free Will*, 22 U. Chi. L. Rev. 397 (1955); Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 Yale L. J. 761 (1956).

[72] For the term "product" see Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957); Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961); Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957); Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967); For the term "mental disease or defect" see Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959); McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).

[73] United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

the M'Naghten rules together with the irresistible impulse test, with a slight rephrasing concerning the substantial capacity of the offender.[74]

The principal elements of the M'Naghten rules were incorporated into the Model Penal Code under the test for evaluating the criminality of the offender's conduct using the terms of the right and wrong test. The significant elements of the irresistible impulse test were also accepted under the alternative for determining whether the offender's conduct conforms to the requirements of law. The Model Penal Code proposal, designed to provide an adequate answer to both the cognitive and volitive aspects of the mental defect, was embraced by various courts across the United States.[75]

The United States Congress accepted a test based on the M'Naghten rules in 1984 as part of its legislation.[76] Thus, both the M'Naghten rules and the irresistible impulse test, with the slight rephrasing, are now the conclusive test for the acceptability of the insanity defense in American criminal law.[77]

In Britain, the M'Naghten rules remain the legal basis for the acceptance of the insanity defense in criminal law. Although in Britain mentally deficient offenders plea diminished responsibility rather than insanity, the defense is still widely used in British courts. The irresistible impulse test has been rejected in Britain as "most dangerous,"[78] therefore insanity is examined only in relation to its cognitive aspects. The volition aspects of insanity are not considered legitimate criteria for the acceptance of the insanity defense.

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[74] In the American Model Penal Code, *supra* note 45, at pp. 61–62, it was suggested within article 4.01:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law;
> (2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[75] United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966); United States v. Currens, 290 F.2d 751 (3rd Cir. 1961); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1970); Wion v. United States, 325 F.2d 420 (10th Cir. 1963); Beltran v. United States, 302 F.2d 48 (1st Cir. 1962).

[76] 18 U.S.C.A. §17.

[77] Commonwealth v. Herd, 413 Mass. 834, 604 N.E.2d 1294 (1992); State v. Curry, 45 Ohio St.3d 109, 543 N.E.2d 1228 (1989); State v. Barrett, 768 A.2d 929 (R.I. 2001); State v. Lockhart, 208 W. Va. 622, 542 S.E.2d 443 (2000).

[78] Burton, (1863) 3 F. & F. 772, 176 Eng. Rep. 354; Kopsch, (1925) 19 Cr. App. Rep. 50; True, (1922) 16 Cr. App. Rep. 164; Sodeman, [1936] 2 All E.R. 1138; Attorney-General for the State of South Australia v. Brown, [1960] A.C. 432, [1960] 1 All E.R. 734, [1960] 2 W.L.R. 588, 44 Cr. App. Rep. 100. In Canada see Creighton, (1909) 14 C.C.C. 349.

The legal debate in Britain over the insanity defense parallels the discussion about the mental element requirement.[79] This attitude is consistent with the legal understanding that the mental element is the positive aspect of the principle of fault, and insanity is part of its negative aspect, as discussed below.[80] A favorable court ruling on an insanity defense is considered a legal rather than a medical ruling.[81] In general, English law any mental deficiency may be considered insanity for purposes of the application of the M'Naghten rules, if it interferes with the offender's ability to make the distinction between right and wrong.[82]

In France, the insanity defense applies to any mental or neurologic deficiency, if it denies the offender the capability to distinguish between right and wrong or prevents physical control over his conduct.[83] There is no restriction to specific types of mental deficiency. Thus, factual causation is required between the mental or neurologic deficiency and the commission of the offense. The French law emphasizes the free choice of the offender with regard to the commission of the offense.

An offender who commits an offense in a state of insanity is considered to be coerced and not having a free choice as to whether or not to commit the offense, therefore it is not legal to impose criminal liability on him. The coercion, in this case, is internal and its cause is mental.[84] The insanity test references the time of the commission of the offense, not to the time of the trial.

In Germany, insanity is an integral part of the offender's fault. The presumption of insanity is explicitly stated in the German Penal Code.[85] This presumption negates the offender's fault if all conditions are met, leaving two possible options:

[79] Roach, [2001] E.W.C.A. Crim. 2698; Attorney-General's Reference (No. 3 of 1998), [2000] Q.B. 401, [1999] 3 All E.R. 40, [1999] 3 W.L.R. 1194, 49 B.M.L.R. 124, [1999] 2 Cr. App. Rep. 214, [1999] Crim. L.R. 986.

[80] See below at Sect. 2.2.2.

[81] Sullivan, [1984] 1 A.C. 156, [1983] 2 All E.R. 673, [1983] 3 W.L.R. 123, 77 Cr. App. Rep. 176, 148 J.P. 207.

[82] Kemp, [1957] 1 Q.B. 399, [1956] 3 All E.R. 249, [1956] 3 W.L.R. 724; Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386, [1961] 3 All E.R. 523, [1961] 3 W.L.R. 965, 46 Cr. App. Rep. 1.

[83] The first part of article 122-1 of the French Penal Code provides:

> N'est pas pénalement responsable la personne qui était atteinte, au moment des faits, d'un trouble psychique ou neuropsychique ayant aboli son discernement ou le contrôle de ses actes.

[84] Catherine Elliott, French Criminal Law 120 (2001).

[85] Article 20 of the German Penal Code provides:

> Ohne Schuld handelt, wer bei Begehung der Tat wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen Schwachsinns oder einer schweren anderen seelischen Abartigkeit unfähig ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln.

that no criminal liability is imposed or that diminished responsibility is attributed to the offender.[86]

The conclusive test for insanity in German criminal law is whether the offender is mentally capable of understanding the prohibition breached by his conduct. The relevant prohibition is legal, not moral or other. Inability to understand the prohibition is the result of a pathologic mental or cognitive deficiency, of mental illness, or of volitive deficiency.[87] Thus, German criminal law is open to all plausible causes for insanity, which is examined dynamically and subjectively for the individual offender.[88]

In sum, the legal evolution of insanity as a general defense in criminal law may be described as an interplay between the M'Naghten rules and the irresistible impulse test. This interplay delineates an approach toward insanity that combines both the cognitive and volitive aspects of the human mind. Deviation from this combination is rare, and generally both aspects play a role in the legal definition of insanity.

1.2 What Is Insanity? Defining Insanity Internally

To use the insanity defense in criminal law, it is essential to be able to define insanity. The definition of insanity rests on two foundations: an internal and an external one.[89] The internal foundation considers insanity an isolated phenomenon, whereas the external one considers boundaries of insanity in relation to other tangential defenses. Both are necessary to form the matrix of insanity. The internal foundation of the definition applies to social, medical, and legal insanity.

1.2.1 The Relativity of Social Normality

To understand what insanity is, we must make a detour into the social understanding of normality. Most people consider a person insane relatively to themselves or to other so-called *normal* people. If a standard normal person could be described accurately, this could form the basis for a comparison between any individual

[86] Due to article 21 of the German Penal Code, which provides:

> Ist die Fähigkeit des Täters, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln, aus einem der in § 20 bezeichneten Gründe bei Begehung der Tat erheblich vermindert, so kann die Strafe nach § 49 Abs. 1 gemildert werden

[87] RG 21, 131; RG 73, 121; BGH 3, 194; BGH 7, 238; BGH 7, 325; BGH 8, 113; BGH 11, 20; BGH 14, 30; BGH 19, 201; BGH 23, 133; BGH 23, 176; BGH 23, 356; BGH 28, 357; BGH 34, 22; BGH 35, 143; OGH 3, 19; OGH 3, 80; MDR 1983, 447; VRS 61, 261.

[88] Hans-Heinrich Jescheck und Thomas Weigend, Lehrbuch des Strafrechts – Allgemeiner Teil 437–443 (5 Auf., 1996).

[89] The external foundation is discussed below at Sects. 3.1.4, 3.2.3, and 3.3.4.

person and *normality*. But inevitably questions arise: Who is a normal person? How is normality defined? Or more radically, are there any normal people? Can normality be defined at all?

People use the expression "normal" when referring to human behavior that is not considered exceptional from their point of view. Certain groups of people may share a common view of what is exceptional behavior. But there is no generally accepted definition for exceptionality. Various societies and cultures, at different times, may develop different points of view in this regard. For example, talking to invisible spirits may be considered normal in some religious societies, but abnormal in others.

Nevertheless, that which is exceptional is not necessarily banned or oppressed. It would be inaccurate and simplistic to divide all possible types of human behavior into normal and abnormal. A more accurate division includes at least three categories: normal, above-normal, and sub-normal (Fig. 1.1).[90]

In the above scheme, the two outside ranges are infinite and form the borderlines of the middle range. Both above-normality and sub-normality are infinite and may include infinite types of human behavior, even exceeding the "normal" imagination. The key difference between above-normality and sub-normality is not necessarily intrinsic, but a function of the way the society treats the two: the abnormality of above-normality is generally encouraged, whereas that of sub-normality is generally deprecated. Two mothers meet with their children's elementary school teacher. One is told that her child is a mathematical genius, far ahead of her biological age. The other is told that her child is exceedingly nervous and violent, much beyond his age.

Both children are outside the range of normality, but in most modern societies the first mother would be advised how to encourage her daughter's abnormality, whereas the other would be advised how to repress that of her boy. These recommendations are entirely dependent on the prevalent views of society and the given time. The exceptionally aggressive boy may have been categorized as above-normal in ancient Sparta and encouraged to develop his tendencies into a professional skill, whereas the mathematical skills of the young girl may have resulted in her being declared a witch in some mediaeval societies. The skills are the same, but the societies in which they manifest are different. Therefore, normality is

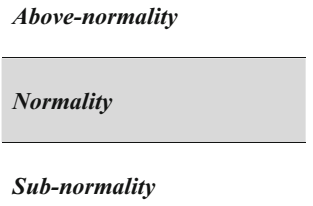

Fig. 1.1 The range of normality

[90] We prefer these terms to "infra-normality" and "ultra-normality," particularly because "ultra-normality" seems to mean "very normal," which is simply "normal".

a social matter, dependent on time and culture rather than on the chemistry of the brain.

Similarly, there is no assurance that what is currently considered sub-normal behavior will not be categorized normal or even above-normal in the future. Various normal and above-normal behaviors in the past would definitely be categorized sub-normal today, and some would even require exclusion from society on grounds of dangerousness. It would be instructive to reexamine some model behaviors of past cultural heroes based on the current understanding of normality in most Western societies.

People who claim to hear voices that others cannot hear, and that these voices command them to take certain actions, are generally referred to psychiatric evaluation. In most cases, they would be classified as abnormal, and therefore insane. These people match the profiles of most of the ancient prophets, whom modern Western society tends to admire, teach their prophecies, and even learn about their ways. Nevertheless, some of their acts would be classified as criminal offenses under modern criminal law, and people committing these acts today would be excluded from society. The Biblical character of Abraham is a good example.[91]

Abraham heard voices that others couldn't hear, commanding him to kill his son. He obeyed these voices, committing what in modern criminal law would be called attempted murder.[92] Under modern criminal law, the courts would have to protect society from such persons. What made Abraham into a cultural hero was the combination of the time and society in which his acts were committed. The Bible supplies many such examples, as well as examples of the opposite nature.

[91] See above in the preface of the book.

[92] Genesis 22:3–13:

> And Abraham rose up early in the morning, and saddled his ass, and took two of his young men with him, and Isaac his son, and clave the wood for the burnt offering, and rose up, and went unto the place of which God had told him. Then on the third day Abraham lifted up his eyes, and saw the place afar off. And Abraham said unto his young men, Abide ye here with the ass; and I and the lad will go yonder and worship, and come again to you. And Abraham took the wood of the burnt offering, and laid it upon Isaac his son; and he took the fire in his hand, and a knife; and they went both of them together. And Isaac spake unto Abraham his father, and said, My father: and he said, Here am I, my son. And he said, Behold the fire and the wood: but where is the lamb for a burnt offering? And Abraham said, My son, God will provide himself a lamb for a burnt offering: so they went both of them together. And they came to the place which God had told him of; and Abraham built an altar there, and laid the wood in order, and bound Isaac his son, and laid him on the altar upon the wood. And Abraham stretched forth his hand, and took the knife to slay his son. And the angel of the Lord called unto him out of heaven, and said, Abraham, Abraham: and he said, Here am I. And he said, Lay not thine hand upon the lad, neither do thou any thing unto him: for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son from me. And Abraham lifted up his eyes, and looked, and behold behind him a ram caught in a thicket by his horns: and Abraham went and took the ram, and offered him up for a burnt offering in the stead of his son.

In biblical times, people who favored the voice of logic were not necessarily considered heroes.

For example, King Ahaz, who reigned over Judea between 733 and 727 BC, faced an invasion by enemies. Rather than accepting the dangerous advice of one prophet to fight the enemies alone, he chose to call on the Assyrian Empire for help, saving Judea from devastation. At the end of his reign, King Ahaz left Judea stronger than before his reign, in control of larger territories. But the biblical narrator considers King Ahaz as sinner for being reasonable, whereas the prophet who claimed to have heard the voices that Ahaz refused to heed is considered a cultural hero.[93]

It is puzzling that although times and cultures have changed, people worldwide still consider some of the past heroes as cultural models to this day, despite the fact that today many would have been referred to psychiatric evaluation and separated from society. The answer to this puzzle may have to do with the collective memory of society, in which past understandings, attitudes, and insights passed from one generation to the next are accumulated.

Even when the general attitude of society toward such cases has changed entirely, the interpretation of the past may still remain unchanged, not unlike the way children remember adults. The child usually remembers an adult as a giant. After many years of not seeing that adult, the grown-up child of yore is surprised that the adult is in reality much shorter than imagined, but even after discovering the true height of the adult, the image of the adult as a giant is still difficult to supplant. It is interesting, however, that it is much easier to cross from sub-normality to beyond-normality and from beyond-normality to sub-normality rather than to cross from each of them to normality. That may reflect that most societies make small changes in their understandings of normality in comparison to dramatic changes through time in their understandings towards abnormality.

The ambivalent attitude of modern society toward the abnormal heroes of the past may be one of the reasons for the complicated present approaches to abnormality. In some cases, the analogy with heroes of the past would be expected to

[93] 2 Kings 16:2, 5-9:

> Twenty years old was Ahaz when he began to reign, and reigned sixteen years in Jerusalem, and did not that which was right in the sight of the Lord his God, like David his father. . . .
>
> . . .Rezin king of Syria and Pekah son of Remaliah king of Israel came up to Jerusalem to war: and they besieged Ahaz, but could not overcome him. At that time Rezin king of Syria recovered Eilat to Syria, and drave the Jews from Eilat: and the Syrians came to Eilat, and dwelt there unto this day. So Ahaz sent messengers to Tiglath-pileser king of Assyria, saying, I am thy servant and thy son: come up, and save me out of the hand of the king of Syria, and out of the hand of the king of Israel, which rise up against me. And Ahaz took the silver and gold that was found in the house of the Lord, and in the treasures of the king's house, and sent it for a present to the king of Assyria. And the king of Assyria hearkened unto him: for the king of Assyria went up against Damascus, and took it, and carried the people of it captive to Kir, and slew Rezin.

raise doubts in the judges' minds regarding the insanity of the offender. The more attached society is to its past culture, the easier it should be for its judges to recall the past heroes. In traditional cultures, this can be a crucial factor in the assessment of insanity.

The key question is how abnormality is reflected in insanity. Clearly, not all cases of abnormality are automatically classified as insanity. Moreover, abnormality and normality are not inclusive or total. A person's behavior may be classified as normal in one aspect and abnormal in another, and similarly, it may be classified sub-normal at one respect and above-normal in another. For example, some autistic persons have extremely high powers of concentration and analysis of detailed information. At the same time, they experience difficulties in creating social connections. Both characteristics are considered abnormal, but one is above-normal and the other sub-normal.

It is not accurate, therefore, to classify the person in general as normal, above-normal, or sub-normal, but rather particular behaviors should be classified as such. Thus, a person who hears voices may behave normally in every other respect, so that the terms *normal* and *abnormal* would not be sufficiently accurate to describe the person, but would be accurate enough to describe his behavior. Naturally, the accuracy must be considered within the range of social norms, i.e., society would consider the behavior to be normal or abnormal based on the concrete circumstances surrounding the matter at hand.

The social meaning of insanity is not some monovalent abnormality or sub-normality. First, not all abnormality or sub-normality is automatically considered insanity. Second, the reason of abnormality is inherent in the classification. Neither a mathematical genius nor an extremely aggressive person is necessarily insane. Nevertheless, because normality is not part of insanity, the connection between normality and insanity is essential but not sufficient.

If a person behaves "normally" based on how society defines normality, he is not within the spectrum of insanity. Even if he suffers from a mental deficiency, as long as it does not affect his behavior to the extent that it exceeds the boundaries of normality, he cannot be considered insane. This classification is purely social, regardless of any medical diagnosis. For example, a person who hears voices but has trained himself to ignore them would not be considered abnormal because his behavior is not affected by the mental deficiency. The public interest is raised only when behavior exceeds the range of normality.

Is any deviation from normality a form of insanity? If the exceptional behavior is encouraged by society, the public interest is not aroused and no criminal liability is contemplated. Thus, only when the deviation is within the sub-normality range may the abnormality be relevant to insanity. And only when the abnormality is the result of problematic behavior, based on the perspective of society, is it considered an object for social intervention by means of criminal law. Otherwise, there is no public interest in initiating such a process.

Every society defines its own range of sub-normal behavior that requires intervention. That range is relative to the fundamental social values in effect in a given society. For example, cheating may be deemed sub-normal behavior in certain

societies, but only some types of cheating may be considered subject to social intervention. In most Western societies, cheating the tax system is considered to justify intervention, but not cheating on one's spouse.

The sub-normality used to assess insanity is not measured by the degree that the behavior exhibits, lest any commission of a severe offense is classified as insanity. Sub-normality refers to the routine mental processes of a person. Murdering a business competitor is not necessarily the result of insanity, but murdering that competitor because the murderer thinks he has the divine right to kill anyone interfering with his activities may be considered insanity in its social meaning. Raping a woman because of sexual lust is generally not considered insanity, but doing so because the rapist thinks that this is the proper way to treat a woman may be considered insanity.

Exceeding normality is an essential condition for insanity, but not a sufficient one. The cause for the abnormality must be mental or internal. If the manner in which the person understands factual reality because of mental deficiency affects his behavior and brings it into the abnormal range, the conditions for social insanity are met. Otherwise, the behavior may be the result of a simple factual error. A mental deficiency affects the way in which the person understands factual reality in general, which may constitute the main difference between factual mistake and insanity as general defenses.

Consider a person charged with rape. The defense claims that the offender had thought the intercourse was consensual. If this error is circumstantial, owing to particular facts, it may be considered a factual mistake but not insanity. But if the offender in general does not accept the possibility of anyone refusing to have sexual relations with him, insanity may be considered. First, it is necessary to examine whether the behavior is within the range of abnormality. If in the given society men are wooed extensively, and sexual offers by men are seldom refused, such behavior may not necessarily be abnormal.

Next, if the behavior is classified as abnormal, its cause is examined. If the cause is mental, insanity may be relevant. Different societies may have different definitions for what is considered to be a mental cause or mental deficiency, as discussed above.[94] The mental cause may have to do with both cognition and volition, and the different balance of the two in the definitions of the mental cause in different societies reflects the significant social aspect of insanity.

Therefore, the range of normality is relative. This relativity is measured in social terms, and any society may have different ranges of normality, bounded by different borderlines. As a result, abnormality is also relative. Different societies may consider the same types of behavior as normal, above-normal, or sub-normal. Given that abnormality is the social trigger for insanity, insanity is also socially relative, defined differently in different societies. This raises two additional questions about the meaning of insanity: is insanity a social phenomenon or medical one, and what classification is relevant for legal purposes?

[94] Above at Sect. 1.1.2.

1.2.2 Medical Insanity vs. Functional Insanity and Their Relevance to Legal Insanity

As discussed above,[95] the medical understanding of insanity has begun relatively late. When insanity became a subject for research, medical scholars began to categorize the various symptoms of different types of insanity. This classification served as the basis for psychiatry as a branch of medicine. Today, when a psychiatrist treats a patient, diagnosis of the symptoms is the initial step. Then symptoms are assembled into a wider diagnosis of the mental deficiency or illness of the patient, which in turn makes it possible to apply the right treatment.

By categorizing the symptoms and the mental deficiency, the psychiatrist can benefit from the experience of other psychiatrists, who have already treated patients with the same symptoms. It is the assumption of the medical understanding of insanity that mental deficiency is a medical problem, and that medical problems can be solved by medical means. Thus, at the focus of medical insanity are the chemistry of the brain and other physical descriptions of the patient's body. In its methodology, this treatment is not substantially different than the medical treatment of influenza.

It is therefore not uncommon to find a solution for insanity based on medications. Although the medications are not intended to cure the mental deficiency, they can be used to balance the mental state of the patient. From the point of view of social insanity, as discussed above,[96] medications contain chemicals intended to suppress those characteristics of the patient that are considered to be sub-normal. The chemical suppression is intended to reduce to a minimum all types of behaviors that society or the psychiatrist consider sub-normal. Naturally, psychiatrists from different cultures with different behavioral habits may recommend different medical treatments.

The medical diagnosis is affected by the social understanding of insanity. In general, when behavior falls within the normal range, no psychiatric treatment or medication are considered, regardless of whether or not a person suffers from mental deficiency. The argument applies to all types of mental deficiency, so that if the mental deficiency has some external behavioral symptoms, it is subject to psychiatric treatment. Unrelated to any of the above, people who are aware of mental deficiency that involves no behavioral symptoms can initiate treatment voluntarily, but this is of no concern to criminal law.

Medical insanity is therefore governed by the categorization of symptoms relating to the person's external behavior. But insanity may have a wider meaning, and we must take into account that the medical understanding of insanity is most likely not complete yet. If psychiatry cannot explain *every type* of insanity and *all* mental deficiencies, medical insanity is too narrow a tool for evaluating insanity for legal purposes. If there is even one mental phenomenon that is not properly

[95] Above at Sect. 1.1.1.

[96] Above at Sect. 1.2.1.

explained from the medical point of view, medical insanity cannot be the ultimate way of understanding insanity, and psychiatry cannot define insanity for criminal law purposes.

If not psychiatry, what is there to help us define insanity unequivocally? The answer to this question represents the most significant step toward defining legal insanity. If criminal law is concerned with anti-social behavior, legal insanity must be determined based on a person's behavior. The relevant connection that must be taken into account is the effect of mental deficiency on a person's behavior as it relates to the criminal sphere. Thus, the determination of insanity for legal purposes is functional and not medical or merely social. The question, therefore, is whether mental deficiency had any effect on the functionality of the person in the commission of the anti-social behavior.

Medical or social analysis may support the understanding of the mental situation of the offender and the severity of the deviation from normality, but the ultimate determination of legal insanity can be achieved only through functional analysis. It is the task of the court to analyze the connection between mental deficiency, if alleged, and the commission of the offense. Every society may choose the relevant aspects of functionality that it is willing to accept under given circumstances for the purpose of determining legal insanity. Therefore, if mental deficiency is shown to have affected a person's cognition or volition, in most legal systems it can become the basis for legal insanity.[97]

How can the court determine whether mental deficiency has affected the offender functionally? In other words, how can the court be convinced that mental deficiency is the reason for the anti-social behavior? Moreover, how can the court be sure that the offender suffers from mental deficiency at all? These questions are still within the legal sphere, and therefore psychiatry is not required to provide the ultimate answers. Functionally, as long as the reason is internal, the medical categorization into mental deficiencies and illnesses is immaterial. Thus, functional insanity is dynamic and informed by its concrete effect on the person, even if the medical categorization does not support that conclusion.

Consequently, legal insanity can be broader or narrower than medical insanity, as the case may be. If the court is persuaded that the offender's behavior is deeply affected functionally by internal reasons, the fact that these internal reasons are not categorized medically as insanity would not prevent it from accepting the insanity defense in a given case. Furthermore, when psychiatry categorizes the offender's symptoms as clear indications of mental illness, but this does not functionally affect the offender, the court is not bound to accept the insanity defense.

The ultimate test for legal insanity is therefore functional. The legal elements of insanity are concerned with its functional meaning. Medical measures may assist in painting a clearer image of the offender's mental deficiency from the evidentiary point of view. If the offender claims that he suffers from certain symptoms that impair the clarity of his mind, and if psychiatric evaluation supports this claim

[97] See above at Sect. 1.1.2.

based on the categorization of these symptoms into certain mental deficiencies that affect the human mind in a way described by the offender, this may provide helpful evidence for the court to reach the factual conclusion that the offender indeed suffers from a mental deficiency that affects his mind.

At the same time, ascribing excessive importance to the medical analysis in determining legal insanity is wrong and can be dangerous. It is wrong because legal insanity can be determined only by functional analysis; and it can be dangerous because the offender may manipulate the medical analysis to benefit from the insanity defense. Thus, when the offender knows the medical manifestation of a given mental deficiency, he may be able to fake the symptoms in order to obtain the required medical diagnosis, although functionally he may not have been affected by any internal reasons in the commission of the offense. The only way to prevent such manipulation is to avoid a situation in which the court automatically embraces the psychiatric report.

Psychiatric reports, therefore, have no more than evidentiary value that either supports or undermines claims of insanity. These reports bring evidence, but should not replace judicial discretion with respect to the functional analysis of the offender's state of mind at the time of the commission of the offense. The separation of legal insanity from medical or social insanity forms the basis of the discussion of the legal elements of insanity.

1.3 The Legal Elements of Insanity

1.3.1 The Presumption of Insanity

The legal basis for the acceptance of the insanity defense in criminal law is the presumption of insanity. The legal evolution of insanity within the various legal systems has produced different contents for this presumption, as discussed above.[98] The presumption of insanity is an absolute presumption (*praesumptio juris et de jure*), in other words, an irrefutable one. Thus, when the elements of the presumption are consolidated, the conclusion cannot be legally rebutted. Despite differences between various legal systems, the legal basis for the acceptance of insanity in criminal law appears to be the same. The presumption may be generally formulated as follows:

A person, who as a result of uncontrollable mental deficiency, subjectively lacks cognitive or volitive capabilities to assess a certain conduct that was factually caused by his mental deficiency, is presumed to be incapable of consolidating the required fault for the imposition of criminal liability.

Based on this presumption, the offender's fault is nullified when the uncontrollable mental deficiency disabled his cognitive or volitive capabilities to evaluate a certain conduct. The general defense of insanity is defined based on this

[98] Ibid.

presumption as part of the principle of fault in criminal law, as discussed below.[99] Insanity becomes part of the negative fault element of criminal liability, similarly to all other general defenses in criminal law. Analytically, the presumption of insanity includes five elements, which function as cumulative conditions for the application of the presumption by the court:

(1) The identity of the offender;
(2) The mental deficiency;
(3) The inability to control the mental deficiency, from the offender's point of view;
(4) The nullification of:
    (i) the cognitive abilities of the offender with respect to the commission of the given offense, or
    (ii) the volitive capabilities of the offender with respect to the commission of the given offense;
(5) The factual causal link between the mental deficiency and the commission of the given offense.

These conditions are discussed below.[100]

The burden of proof for all five elements is on the party that wishes to rely on it during the trial. In most cases, this means that the burden of proof is on the offender, who seeks to prevent the imposition of criminal liability on the ground of insanity. It is not always the offender, however, who claims insanity. In some legal systems, in order to begin psychiatric procedures for the treatment of a person, it is necessary to initiate criminal proceedings, in which case the prosecution makes a claim of insanity. In such cases, the court stops the criminal proceedings, and after being persuaded of the offender's insanity, psychiatric procedures are initiated accordingly.[101]

The party that bears the burden of proof, whether it is the prosecution or the offender, needs to raise no more than a reasonable doubt regarding the sanity of the offender. In some legal systems, general defenses must be proven by a preponderance of evidence. If the presumption is properly proven, the conclusion of the presumption is absolute, and therefore the offender is presumed to be incapable of consolidating the required fault for the imposition of criminal liability. Such a person would not be convicted under the given charge, and no criminal liability would be imposed on him.

The presumption relates to the time of the commission of the offense, and not the time of the trial. The time of the trial is relevant for procedural purposes, as discussed below.[102] For the imposition of criminal liability, the time of the

[99] Below at Sect. 2.2.2.
[100] Below at Sects. 1.3.2, 1.3.3, and 1.3.6.
[101] See below at Sect. 1.4.1.
[102] Ibid.

commission of the offense is the only relevant time, exactly as it is the relevant time for checking all the other requirements for criminal liability, including the factual and mental elements. Thus, to use the insanity defense, a reasonable doubt must be raised regarding the sanity of the offender when committing the offense.

For the insanity defense to apply, an offender must be considered insane at the time of the commission of the offense. If by the time he stands the trial, his mental deficiency abates or is completely cured, it does not affect the status of the criminal liability of the offender because the relevant time is that of the commission of the offense. The change may affect his competence to stand trial, but not the imposition of criminal liability. This is because the presumption refers to the substantive law and to criminal liability, and it is therefore examined in relation to the commission of the offense. When the offender undergoes psychiatric evaluation at the beginning of the criminal trial to assess his present mental condition, the result is irrelevant for the purposes of the imposition of criminal liability.

Because the presumption of insanity is an absolute presumption, the conclusion cannot be refuted as long as all its five elements are proven. In this situation, no criminal liability is imposed on the offender if the offense has been committed while the offender was considered insane. Even if it is proven beyond a reasonable doubt that, although he was insane at the time of the commission of the offense, the offender has consolidated the required fault for the imposition of criminal liability, no criminal liability is imposed. Consequently, as an absolute presumption, it can be voided in two principal ways:

(1) Negating the elements of the presumption; or-
(2) Imposing legal restrictions on applying the presumption.

To negate the elements of the presumption, it is necessary to prove the inexistence of at least one of them in the supplementary burden of proof. For example, if the offender must prove all five elements by raising a reasonable doubt regarding their existence, the prosecution needs to prove beyond reasonable doubt that at least one of them did not exist at the time of the commission of the offense. It is not necessary to prove the non-existence of *all* elements, but only of one, because the elements are cumulative conditions, and if even one of these conditions is not proven, the entire presumption is not proven. When the relevant party fails to prove the existence of the elements of the presumption, the court cannot apply the presumption and the insanity defense is rejected.

The imposition of legal restrictions on the application of the presumption is part of the *ex ante* considerations of the legislator or the court. The legislator can exclude certain situations from the applicability of insanity. For example, certain offenses may not be subject to the insanity defense, certain mental deficiencies may not be considered insanity, etc. Using this alternative may result in unjust outcomes for the offender, who may be quite insane and incapable of consolidating the required fault, therefore this alternative is rarely used. The elements of the presumption are discussed below.

1.3.2 Humans and Corporations

The first element of the presumption of insanity is the identity of the offender. The reference of the presumption to human beings is obvious, because humans are subject to mental deficiencies since time immemorial. Nevertheless, the question remains whether the insanity defense is exclusive to humans. Humans are not the only legal entities that can commit offenses; so are corporations. The key question here is whether a physical body is required for insanity.

In general, since the seventeenth century, corporations have been among the modern offenders, although they lack spirit, soul, or a physical body.[103] Corporations were recognized already by Roman law, but the evolution of the modern corporation began in the fourteenth century, when English law demanded permission from the King or Parliament to recognize a corporation as legal.[104] Early corporations in the Middle Ages were mostly ecclesiastical bodies that were active in the organization of church property. From these bodies evolved associations, commercial guilds, and professional guilds that eventually formed the basis for commercial corporations.

During the sixteenth and seventeenth centuries, hospitals and universities were also commonly incorporated.[105] In addition to these, commercial corporations developed to solve problems of division of ownership among several owners of a business.[106] When people established a new business, ownership could be divided between them by establishing a corporation and dividing the shares and stocks between the "shareholders." This pattern of ownership division has been perceived as efficient in minimizing the risks of the owners with respect to the financial hazards of the business, and as a result corporations have become common.[107]

Use of corporations flourished during the first industrial revolution, to the point where they have been identified both with the fruits of the revolution and with the misery of the lower classes and of the workers (who were created by the revolution). Corporations were regarded as being responsible for the poverty of the workers, who did not share in the profits, and for the continuing abuse of children employed by the corporations. As the revolution progressed, public and social pressure on the corporations increased, until legislators were forced to restrict the activities of corporations.

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[103] William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 Emory L. J. 647 (1994); Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 Wash. U. L. Q. 393 (1983).

[104] William Searle Holdsworth, A History of English Law 475–476 (1923).

[105] William Searle Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 Yale L. J. 382 (1922).

[106] William Robert Scott, The Constitution and Finance of English, Scotish and Irish Joint-Stock Companies to 1720 462 (1912).

[107] Bishop Carleton Hunt, The Development of the Business Corporation in England 1800–1867 6 (1963).

In the beginning of the eighteenth century, the British parliament enacted statutes against the abuse of power by corporations, the very power granted to them by the state for the benefit of social welfare.[108] To ensure the effectiveness of these statutes, they included criminal offenses. The offense used for this purpose was that of public nuisance.[109] This legislative trend was deepened as the revolution progressed, and in the nineteenth century most developed countries had advanced legislation regarding the activities of corporations in a variety of contexts. To be effective, this legislation included criminal offenses as well, prompting the conceptual question: How can criminal liability be imposed on corporations?

Criminal liability requires a factual element, whereas corporations possess no physical body. Criminal liability also requires a mental element, whereas corporations have no mind, brain, spirit, or soul.[110] Some European countries refused to impose criminal liability on non-human creatures, and revived the Roman rule whereby corporations were not subject to criminal liability (*societas delinquere non potest*). But this approach was highly problematic because it created legal shelters for offenders. For example, an individual who did not pay his taxes was criminally liable, but when the individual was a corporation, it is exempt. This provided an incentive for individuals to work through corporations and evade paying taxes. Eventually all countries subjected corporations to criminal law, but not until the twentieth century.

The Anglo-American legal tradition accepted the idea of the criminal liability of corporations early because of its many social advantages and benefits. In 1635, it was for the first time criminal liability for corporations was enacted and imposed.[111] This was a relatively primitive imposition of criminal liability because it relied on vicarious liability, but it enabled the courts to impose criminal liability on corporations in a way that was separate from the criminal liability of any of its owners, workers, or shareholders. This structure remained in effect throughout the eighteenth and nineteenth centuries.[112]

The major disadvantage of criminal liability based on vicarious liability was that it required valid vicarious relations between the corporation and another entity,

[108] See, e.g., 6 Geo.I, c.18 (1719).

[109] New York & G.L.R. Co. v. State, 50 N.J.L. 303, 13 A. 1 (1888); People v. Clark, 8 N.Y. Cr. 169, 14 N.Y.S. 642 (1891); State v. Great Works Mill.& Mfg. Co., 20 Me. 41, 37 Am. Dec. 38 (1841); Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. 339 (1854); Commonwealth v. New York Cent.& H. River R. Co., 206 Mass. 417, 92 N.E. 766 (1910).

[110] John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalised Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

[111] Langforth Bridge, (1635) Cro. Car. 365, 79 Eng. Rep. 919.

[112] Clifton (Inhabitants), (1794) 5 T.R. 498, 101 Eng. Rep. 280; Great Broughton (Inhabitants), (1771) 5 Burr. 2700, 98 Eng. Rep. 418; Stratford-upon-Avon Corporation, (1811) 14 East 348, 104 Eng. Rep. 636; Liverpool (Mayor), (1802) 3 East 82, 102 Eng. Rep. 529; Saintiff, (1705) 6 Mod. 255, 87 Eng. Rep. 1002.

which in most cases happens to be human.[113] Consequently, when the human entity acted without permission (*ultra vires*), the corporation was exempt of responsibility. To exempt a corporation of liability, it was sufficient to include a general provision in its incorporation papers prohibiting the commission of any criminal offense on behalf of the corporation.[114] This deficiency resulted in the replacement in Anglo-American legal systems of the model of criminal liability for corporations during the late nineteenth century and early twentieth century.[115]

The new model was based on the identity theory. In some types of cases the criminal liability of corporations derives from its organs, whereas in other types of cases criminal liability is independent. When the criminal offense requires an omission (e.g., no-payment of taxes, not fulfilling legal requirements, not observing workers' rights, etc.), and the duty to act is the corporation's, the corporation is criminally liable independently, regardless of any criminal liability of other entities, whether human or not. When the criminal offense requires an act, the acts of its organs are related to the corporation if they were committed on its behalf, with or without permission.[116] The same structure works for the mental element, for *mens rea*, negligence, and strict liability alike.[117]

Consequently, the criminal liability of the corporation is direct, not vicarious or indirect.[118] If all requirements of an offense are met by the corporation, it is indicted regardless of any proceedings that may be in effect against any human entity. If convicted, the corporation is punished separately from any human entity. Punishments for corporations are considered to be not less effective than for humans. However, the main significance of the modern legal structure of criminal liability of corporations is conceptual. Since the seventeenth century, criminal liability has not been a uniquely human domain. Other entities, non-human, are

[113] Severn and Wye Railway Co., (1819) 2 B. & Ald. 646, 106 Eng. Rep. 501; Birmingham, &c., Railway Co., (1842) 3 Q. B. 223, 114 Eng. Rep. 492; New York Cent.& H.R.R. v. United States, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909); United States v. Thompson-Powell Drilling Co., 196 F. Supp. 571 (N.D. Tex. 1961); United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975); United States v. Carter, 311 F.2d 934 (6th Cir. 1963); State v. I. & M. Amusements, Inc., 10 Ohio App. 2d 153, 226 N.E.2d 567 (1966).

[114] United States v. Alaska Packers' Association, 1 Alaska 217 (1901).

[115] United States v. John Kelso Co., 86 F. 304 (Cal. 1898); Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., [1915] A.C. 705.

[116] Director of Public Prosecutions v. Kent and Sussex Contractors Ltd., [1944] K.B. 146, [1944] 1 All E.R. 119; I.C.R. Haulage Ltd., [1944] K.B. 551, [1944] 1 All E.R. 691; Seaboard Offshore Ltd. v. Secretary of State for Transport, [1994] 2 All E.R. 99, [1994] 1 W.L.R. 541, [1994] 1 Lloyd's Rep. 593.

[117] Granite Construction Co. v. Superior Court, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983); Commonwealth v. Fortner L.P. Gas Co., 610 S.W.2d 941 (Ky. App. 1980); Commonwealth v. McIlwain School Bus Lines, Inc., 283 Pa. Super. 1, 423 A.2d 413 (1980); Gerhard O. W. Mueller, *Mens Rea and the Corporation – A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. Pitt. L. Rev. 21 (1957).

[118] Hartson v. People, 125 Colo. 1, 240 P.2d 907 (1951); State v. Pincus, 41 N.J. Super. 454, 125 A.2d 420 (1956); People v. Sakow, 45 N.Y.2d 131, 408 N.Y.S.2d 27, 379 N.E.2d 1157 (1978).

also subject to the criminal law. Although some adjustments were needed to make this legal structure applicable, but eventually non-human corporations have become subject to criminal law. Today, this seems entirely natural, as it should.

Consequently, if corporations are subject to criminal liability, and if they are capable of consolidating positive fault elements, why should the insanity defense not apply to them as well? The general defense of insanity requires a mental, or inner, defect that causes cognitive or volitive malfunction. There is no need to demonstrate any specific type of mental disease, and any mental defect is satisfactory. The question is, how can we know about the existence of that "mental defect." Because the mental defect is examined functionally and not based on certain categories, the symptoms of that mental defect are critical for its identification.

The inner defect causes cognitive or volitive malfunction, whether it is classified as a "mental disorder," a chemical imbalance in the brain, an electric imbalance in the brain, etc. The inner cause is examined based on its functional effect on the human mind. This is the legal situation with humans, and the same holds true for corporations. The more complicated and advanced the corporation is, the higher the probability of inner defects mostly in the decision-making process. Some inner defects do not cause the corporation to malfunction, but others do. If the inner defect causes a malfunction of the corporation, it matches the definition of insanity in criminal law.

Because corporations are capable of forming all *mens rea* components, and given that these components consist on cognitive and volitive components owing to the *mens rea* structure, it is quite likely that some inner defects can cause these capabilities to malfunction. When an inner defect causes such a malfunction it matches the definition of insanity in criminal law. Partial insanity is applicable when the cognitive or volitive malfunctions are not complete. Temporary insanity is applicable when these malfunctions affect the offender (human or corporation) for a certain period of time.[119]

It is possible to argue that this is not the typical character of the insane person because it does not match the concept of insanity reflected in psychiatry, culture, folklore, literature, and even the movies. Nevertheless, it is insanity from the perspective of criminal law. First, the criminal law definition of insanity is different from its definitions in psychiatry, culture, etc., and it is the definition that is used for humans. There is no reason why a different definition should be used for corporations. Second, criminal law does not require a mental disease for human insanity, so why should we require it for corporations?

The definition of insanity used by criminal law may seem too technical, but if the offender meets its requirements it is applied. If both human and corporation offenders have the capability of meeting the insanity requirement in criminal law, there is no legitimate reason for making the general defense of insanity applicable

[119] People v. Sommers, 200 P.3d 1089 (2008); McNeil v. United States, 933 A.2d 354 (2007); Rangel v. State, 2009 Tex. App. 1555 (2009); Commonwealth v. Shumway, 72 Va. Cir. 481 (2007).

for one but not for the other. Consequently, it appears that the general defense of insanity is applicable to corporations. Nevertheless, the main objects of insanity are the human offenders.[120]

1.3.3 Temporary and Permanent Mental Disorders

The second element of the presumption of insanity is the mental deficiency. The main purpose of this element is to distinguish between different reasons for nullifying the offender's fault. This element is also significant for the offender's therapy and rehabilitation, if he were to be found incompetent to stand a trial, as discussed below.[121] In general, there can be two main options for identifying the mental deficiency as such, but only one of these is relevant to the presumption of insanity. One is categorical and the other is functional.

Based on the categorical option, mental deficiency is identified as such according to a determined list of accepted mental deficiencies, regardless of the effect the deficiency had on the individual offender in any given case. There are two main difficulties with this option. First, it is over-inclusive. Lists of this type may include mental deficiencies that may affect most of the population in ways that would justify the insanity defense. Second, it is under-inclusive. Lists of this type may fail to include various mental deficiencies that might justify applying the insanity defense for the individual offender, although most of the population may not be affected by the given mental deficiency in the same way. Furthermore, for such a list to be complete, it would be necessary to predict mental deficiencies that have not yet been discovered or categorized.

Based on the functional option, a given mental deficiency must be examined for its *de facto* effect on the individual offender, with respect to both his cognitive and volitive capabilities. The question whether this mental deficiency is categorized as such or not is irrelevant for the functional option. The same mental deficiency may be considered to justify the insanity defense for one offender but not for another, depending on the particular symptoms of the mental deficiency of each offender. If these symptoms include, for the individual offender, the negation of cognition or volition, the insanity defense may be justified regardless its medical categorization.

The functional option includes a *de facto* examination of the cognitive and volitive capabilities of the offender. No assumptions are made based on general medical or psychiatric research that does not relate specifically to the particular offender. Because the person's fault is personal and subjective, this is the most relevant option for examining mental deficiencies for the purpose of applying the insanity defense. The term "mental deficiency" can have different interpretations in different contexts, but in the specific context of the presumption of insanity in

[120] For the applicability of insanity defense for artificial intelligence systems see Gabriel Hallevy, When Robots Kill – Artificial Intelligence under Criminal Law 128–130 (2013).

[121] See below at Sect. 1.4.1.

criminal law the functional option appears to be the most appropriate way of implementing the basic rationales of the insanity defense.[122]

The functional examination of mental deficiency is traditionally regarded as requiring "mental deficiency" and not any other kind. This traditional requirement is reexamined below.[123] If the traditional requirement is valid, when the cause of a given deficiency in the offender's brain is the presence of certain chemicals, it may be classified as being more relevant to intoxication than to insanity.[124] But if the chemicals are part of the natural secretion of the offender's endocrine system, is their presence considered relevant to insanity or to intoxication?

The functional examination does not require a permanent mental deficiency, spanning the offender's entire life. The mental deficiency must be functional, that is, affecting the cognition or volition of the offender only at the time when the offense was committed. The consequences of the mental deficiency relate only to the commission of the offense. For the purpose of the applicability of the insanity defense, the relevant time of the mental deficiency is the time of the commission of the offense, that is, the exact time when the offender committed the conduct component of the offense. Whether the mental deficiency existed at any other time is not relevant for the applicability of the insanity defense. For example, if the mental deficiency worsened after the commission of the offense, this does not affect the criminal liability of the offender, but it may affect the question of his competence to stand trial. Thus, use of the functional examination of mental deficiency raises the question of temporary insanity.

The term "temporary insanity" generally refers to a mental deficiency that occurs in response to certain stimuli. The outburst affects the offender's cognition or volition and places it within the realm of insanity. As long as the stimulus is absent, the offender displays full cognition and control over his volition. After he experiences an outburst, when the stimulus subsides, its effect over cognition and volition subsides as well. Indeed, temporary insanity refers to a permanent mental deficiency of a low intensity, which under a certain stimulus escalates to a degree where the mental deficiency affects functionally the offender's cognition or volition.

Under the functional examination of mental deficiency there is no legal reason to prevent the acceptance of temporary insanity as part of the insanity defense in criminal law. If at the time when the offense was committed the mental deficiency functionally affected the offender's cognition or volition, the behavior is covered by the insanity defense. The temporary character of the mental deficiency is

[122] State v. Elsea, 251 S.W.2d 650 (Mo. 1952); State v. Johnson, 233 Wis. 668, 290 N.W. 159 (1940); State v. Hadley, 65 Utah 109, 234 P. 940 (1925); Henry Weihofen, Mental Disorder as a Criminal Defense 119 (1954); K. W. M. Fulford, *Value, Action, Mental Illness, and the Law*, Action and Value in Criminal Law 279 (Stephen Shute, John Gardner and Jeremy Horder eds., 2003).

[123] Below at Sect. 1.3.4.

[124] State v. White, 27 N.J. 158, 142 A.2d 65 (1958); Barbour v. State, 262 Ala. 297, 78 So.2d 328 (1954).

immaterial as long as it was fully functional at the time when the offense was committed. The fact that in his daily life the offender is generally unaffected by the mental deficiency makes no difference for the insanity defense as long as it was in effect at the time of the commission of the offense.

The attitude toward other *in personam* defenses is analogous.[125] For example, the fact that an offender is often intoxicated does not affect the applicability of the intoxication defense as long as he is affected by intoxication at the time the offense is committed. In the same way, if the offender acts under automatism when the offense is committed he may be covered by the automatism defense, even if he never experienced automatism at any other time in his life. Similarly, various legal systems have accepted the fact that temporary insanity is covered by insanity defense in criminal law.[126]

1.3.4 Uncontrollable Mental Disorder

The third element of the presumption of insanity is the inability to control the manifestations of the mental deficiency, specifically, his awareness and the means available to respond adequately. The element of control is examined from the offender's subjective point of view, not objectively. For example, if the mental deficiency can be balanced by medication but the offender is not aware of it (or of the mental deficiency itself), subjectively the mental deficiency is not considered controllable.

When the offender suffers from mental deficiency that affects his cognition or volition, but he is being treated medically and his mental state is therefore balanced, the mental deficiency is considered to be controllable. If the offender continues medical treatment, and the deficiency is under his mental control, the presumption of insanity does not apply. It is necessary to distinguish between the ability to control the mental deficiency and *de facto* control over it. To control the mental deficiency, by medications or by any other means, it must be controllable from the offender's point of view.

The ability to control the mental deficiency is indeed a preliminary condition for controlling it. Nevertheless, control *de facto* over the mental deficiency may not be achieved for various reasons, some of which may be related, directly or indirectly, to the offender, and others, which may not be related to him. The third element of the presumption of insanity does not require *de facto* control over the mental deficiency, only the capability to control it. In other words, only the preliminary

[125] For the definition of *in personam* defenses see below at Sect. 2.2.2.

[126] Kemp, [1957] 1 Q.B. 399, [1956] 3 All E.R. 249, [1956] 3 W.L.R. 724; Kingston, [1995] 2 A.C. 355, [1994] 3 All E.R. 353, [1994] 3 W.L.R. 519, [1994] Crim. L.R. 846, 99 Cr. App. Rep. 286, 158 J.P. 717; People v. Sommers, 200 P.3d 1089 (2008); McNeil v. United States, 933 A.2d 354 (2007); Rangel v. State, 2009 Tex. App. 1555 (2009); Commonwealth v. Shumway, 72 Va. Cir. 481 (2007).

condition is required. If the offender has no capability to control the mental deficiency, he could probably not have controlled it.

The ability to control the mental deficiency is examined subjectively, through the eyes of the offender. The offender may not be aware of the existence of the mental deficiency or of the medical treatment needed to alleviate its symptoms. Consequently, the presumption of insanity is not applicable to an offender who is undergoing medical or other treatment to control his mental deficiency (which is therefore controllable). For example, if the offender deliberately avoids taking his medication in order to experience a violent outburst of his mental illness, and during this outburst he commits a criminal offense, the insanity defense is not applicable.

If the deliberate avoidance is specifically intended to facilitate the commission of the offense, the insanity defense does not apply, as noted. This type of situations is covered by the concept of the transformation of fault, discussed below,[127] when the offender who has the ability to control his mental deficiency chooses not to do so. The fault of not controlling the mental deficiency may be transferred to the point when the offense was committed. Naturally, if the mental deficiency is controllable and the offender has in practice brought it under control, the insanity defense does not apply because the offender did not act under the influence of insanity.

1.3.5 Negation of Cognition or Volition and Partial Insanity

The forth element of the presumption of insanity involves the negation of either the cognitive or of the volitive capabilities of the offender with respect to the commission of the offense. Both alternatives of this element are supplementary to the functional examination of the mental deficiency, as discussed above. The functional examination concerns both the cognitive and the volitive aspects of the mental deficiency, therefore incorporation of the two alternatives into the forth element reflects this functional examination.

The combination of cognitive and volitive elements has been accepted in Anglo-American legal systems that embraced the M'Naghten rules with the irresistible impulse test, as well as in European-Continental legal systems.[128] The negation of the offender's cognitive capabilities may refer to his understanding of his conduct or of the legal prohibition against it. Naturally, only the legal prohibition is subject to this understanding, not the morality of the conduct. For instance, an offender who is under the delusion that God commanded him to set fire to a brothel executes the command based on the understanding that his conduct brings redemption to all mankind. He fully understands that this conduct is prohibited by human law, but from his point of view the conduct is morally correct.

[127] Below at Sect. 4.2.4.

[128] For these tests see above at Sect. 1.1.2.

Because the offender understood that setting on fire to the brothel is legally prohibited, his cognitive capabilities concerning the existence of the legal prohibition and his duty to observe it were not negated by his mental deficiency. He therefore set the fire while fully aware that his conduct represented a criminal offense, even if he found some moral, religious, or other justification for his conduct. Consequently, in this case the forth element has not been consolidated, and the presumption of insanity does not apply.

The negation of the offender's volitive capabilities refers to his inability to control his will or the conduct that serves that will. When the will becomes irresistible, the offender has no internal powers to oppose it. This deficiency may be manifest both as acts and as omissions. When the mental deficiency creates an impulse to act in a certain manner or creates a feeling of paralysis that prevents acting in a certain manner, both are manifestations of the negation of the offender's volition with respect to a certain conduct. In these situations the offender is internally coerced to engage in a certain conduct (act or omission).

The internal coercion negates the offender's free will to choose between permitted and prohibited conduct. For example, a person sees another person in danger and need of immediate help, but does not provide the required assistance. In some legal systems this is considered a criminal offense.[129] In this case, however, the reason for the conduct is that the offender's memory of a similar event from the past causes an internal spasm that paralyzes him. The spasm coerces the offender's conduct. Similarly, a father yelling aggressively at his son causes a psychotic spasm that makes the son assault his father to stop the yelling. Again, it is the spasm that coerces the offender's conduct.

In both examples above, the offender's will is negated as far as the conduct in question is concerned, irrespective of the cognitive capabilities of the offender. The negation of the will does not assume or require a simultaneous negation of cognitive abilities. The negations of cognition or of volition are alternatives and not independent preliminary conditions. These alternatives are part of the functional examination of mental deficiency for the applicability of the insanity defense. Consequently, for the consolidation of the forth element, it is sufficient to negate either the cognition or the volition of the offender, and it is not necessary to negate both.

The availability of two alternatives may raise a question regarding partial insanity. Partial insanity refers to the full negation of the offender's cognition with regard to some of the components of the factual element of the offense. Partial insanity does not involve the negation of the will or of any volitive aspects of insanity, only to the cognitive aspects. Under partial insanity, cognition is fully negated, as the partiality does not refer to the degree of negation (i.e., the degree of cognition) but to its objects. Thus, partial insanity refers to full cognition with regard to a portion of the objects (components of the factual elements).

[129] In most European-Continental legal systems, it is considered a criminal offense, whereas in the Anglo-American legal tradition, it is not in general.

Complete insanity manifests as the full negation of all components of the factual element. For example, in the case of rape the offender is required to be aware of the conduct (having sexual intercourse) and of the circumstances (human victim and absence of consent). If the offender experiences full insanity with regard to cognition, it manifests as lack of awareness of both conduct and circumstances. The offender is required not to be aware of conduct (he is not aware of having sexual intercourse) or of circumstances (he is not aware that the victim is human and that no consent has been given for the conduct). Such situations are very rare.

In most cases, the offender is aware of some of the components of the factual elements, although not of all of them. In the above example, the offender might be aware of the conduct and of the human victim, but not of the absence of consent. Such situations are much more common. Therefore, partial insanity is much more common than full insanity. Since criminal liability requires meeting cumulative conditions, partial insanity is legally equal to full insanity. This means that the negation of even one component of the mental element, required for the full imposition of criminal liability, nullifies the possibility of imposing criminal liability.

If follows that for the presumption of insanity, it is not necessary to experience the symptoms of full insanity at the time of the commission of the offense with regard to all components of the factual element. If the mental deficiency caused the offender not to be aware of one of the components of the factual element, this completely negates the offender's fault as far as the imposition of criminal liability is concerned. In the above example, if the offender was not aware of the absence of the victim's consent because of mental deficiency, an adequate basis exists for the applicability of the presumption of insanity, and subject to the other elements of the presumption, no criminal liability is imposed on the offender.

At the same time, partial insanity does not necessarily prevent imposition of *all* criminal liability. Certain types of criminal liability may be imposed on an offender experiencing partial insanity if his personal fault satisfies another criminal offense, although not the original one. Only if the partial insanity negates the fault required by *all* criminal offenses with respect to the same factual element, is no criminal liability imposed in any case. In the above example, if the partial insanity negates the awareness of the absence of consent, the offender is not criminally liable for rape, because consensual sexual relations with an adult are not considered rape.

But the legal result is different if the victim is a minor. If the partial insanity negated the awareness of the absence of consent but did not negate the awareness of the victim's biological age, criminal liability may still be imposed. In this case, the partial insanity negated one of the components of fault required for the imposition of criminal liability, but it did not negate the fault required for statutory rape. Having consensual sexual relations with a minor is statutory rape, and in this case the partial insanity did not negate any of the fault components required to impose criminal liability for the offense.

Thus, practically, the court must examine the fault components present in each case after the components affected by the partial insanity have been eliminated. The remaining fault components must then be matched with the factual element

components present in the case. If the combination of fault and factual element components meets the requirements of certain criminal offense, the court may impose criminal liability for that offense. Only if that combination does not match the requirements of any criminal offense is the offender free from criminal liability.

1.3.6 Factual Causation

The fifth element of the presumption of insanity is factual causal relation between the mental deficiency and the commission of the particular offense. This element refers only to factual causation, because legal causation is already incorporated in the mental element requirement of the offense.[130] The definition of factual causation for the presumption of insanity is similar to the requirement of factual causal relation between the conduct and the results within the general requirements of the factual element, *mutatis mutandis*. Thus, the mental deficiency must function as a *causa sine qua non* for the commission of the offense.

The mental deficiency must be considered as the ultimate cause for the commission of the offense in the way in which it was committed. The commission of the offense must be a direct result of the mental deficiency. It is immaterial whether this factual cause is supplementary to other causes, as long as without the certain mental deficiency the criminal offense at hand could not have been committed in the way that is was. The general rules of factual causation accepted in criminal law are relevant for the fifth element of the presumption, with a slight change: conduct is replaced with mental deficiency, and result with the commission of the offense.

Naturally, this factual causation requirement is not a substitute for the factual causation requirement that is part of the factual element, if required. For example, if the offender is charged with murder, the prosecution must still prove beyond reasonable doubt the factual causation between the offender's conduct and the result (the victim's death). Additionally, if the offender wishes to use the presumption of insanity, he must raise at least a reasonable doubt regarding the factual causal relation between his mental deficiency and the commission of the offense. The two factual causal relations represent two separate requirements, and one does not replace the other.

Nevertheless, the general rules of factual causation are applicable to both requirements. These rules include the legal definition of the ultimate reason (*causa sine qua non*), raising the probability of the occurrence of the factual event, situations with multiple reasons (alternative, supplementary, cumulative, and parallel reasons), the continuity of causation, and the intervening cause (*novus actus interveniens*).[131] Consequently, if the offender suffers from a certain

[130] For the elements of legal causation see Gabriel Hallevy, Theory of Criminal Law Vol. II, 103–119 (in *mens rea*), 314–331 (in negligence), 366–373 (in strict liability) (2009).

[131] Ibid.

mental deficiency that was not the ultimate cause for committing the offense in the way in which it was committed, no factual causation exists between them.

In this case, it turns out that the offense would have been committed anyway, regardless the offender's mental deficiency. Therefore, the mental deficiency was not involved in the internal process of the offender and it did not cause him to commit the offense in the exact way in which it was committed. The presumption of insanity, therefore, is inapplicable. In this case, the mental deficiency is nothing more than part of the external background circumstances that do not affect the commission of the offense. If all five elements of the presumption of insanity are consolidated, the presumption is applicable and the insanity defense can be used.

1.4 The Consequences of Insanity in Criminal Law

The question of the consequences of insanity in criminal law refers to the legal and therapeutic aspects. The legal aspects involve the creation of legal immunity for the offender, and the therapeutic aspects involve appropriate treatment outside of criminal law (medical, social etc.). Both aspects are discussed below.

1.4.1 The Legal Consequences: Negation of Criminal Liability vs. Negation of Competence to Stand Trial

The legal consequences of insanity are relevant when the offender is legally recognized as insane. Insanity has two main legal aspects: substantive and procedural. The substantive aspect relates to criminal liability (rejecting it), whereas the procedural aspect has to do with the offender's competence to stand trial (rejecting it as well). Nevertheless, the two represent different legal aspects of insanity, and their consequences are not identical. The offender may be criminally liable, as far as the substantive law is concerned, but incompetent to stand trial, or conversely, the offender competent to stand trial but not liable criminally.

The basic distinction between the two legal aspects derives from the distinction between substantive and procedural law. The insanity defense grants the offender personal substantive immunity from criminal liability. This immunity is not formed at the time of prosecution or of the trial, only at the time when the offense was committed.[132] If the offender's mental condition has changed since then, this has no bearing on the criminal liability. The offender is criminally liable only if at the time when the offense has been committed the presumption of insanity did not exist.

Incompetence to stand trial grants the offender immunity from prosecution. Under this immunity, the offender is not charged with any offense, whether or not he is criminally liable. Similarly to all procedural immunities, the relevant time is the time of the trial, not the time when the offense was committed. Consequently,

[132] See above at Sects. 1.1.2 and 1.3.1.

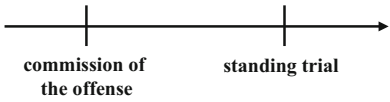

Fig. 1.2 The relevant points in time for insanity

two relevant time points must be examined with respect to the offender's insanity: the time of the commission of the offense and the time of the trial (Fig. 1.2). The two points in time are distinct, and generally the time of the trial is later than the time of the commission of the offense.[133]

In some situations, insanity at one point in time may reflect insanity at the other point, but still the two points in time are distinct and must be examined separately. Based on this distinction, we can identify four possible situations of insanity that may have different consequences:

(1) Insanity at the time of the commission of the offense, but not at the time of standing trial;
(2) Insanity at the time of standing trial, but not at the time of the commission of the offense;
(3) Insanity at both points in time;
(4) Insanity at none of these points.

In the first situation, the offender is competent to stand the trial and can be prosecuted for the offense, but when the court comes to decide on the issue of criminal liability, the substantive immunity (i.e., the insanity defense) becomes relevant and no criminal liability is imposed on the offender. Indeed, this is the only situation in which the insanity defense can be claimed. Only if the offender is competent to stand trial, is there a trial at which the issue of criminal liability is decided. If the offender is incompetent to stand trial, the opportunity for resorting to the insanity defense never arises.

The second situation is one in which, for example, the offender suffers from mental deficiency that did not affect his cognition at the time he committed the offense. After the offense is committed, the offender experiences a worsening in his mental deficiency, which passes the threshold at which cognition is affected to the point of insanity, and by the time of the trial the offender is incompetent to stand trial. The relevant point of time for examining the offender's incompetence is any point of time in the course of the trial. Thus, if the insanity sets in after the offender has been charged, no further actions is taken. If the insanity occurs later, after the trial has started, the trial is stopped and no further action is taken.

The last point of time when the insanity claim for procedural purposes can be raised is the time of the verdict. After the court has issued its verdict, the procedural immunity ceases to apply. For example, if the insanity is raised for procedural purposes at the time of the appeal, it does not affect the validity of the verdict of the

[133] Generally, but not always. The trial may focus on preventive measures regarding predictable acts.

first instance, unless the claim refers not only to the offender's present situation but to his mental state while the trial was being conducted in the first instance. In this case, the appeals court may annul the proceedings of the first instance but not exonerate the offender, because the insanity was irrelevant for the commission of the offense.[134]

In the third situation insanity is claimed at both points in time: the offender was insane both at the time of the commission of the offense and at the time of the trial. Thus it appears that no criminal liability may be imposed on the offender, and he is incompetent to stand trial. In this case, however, the procedural insanity takes precedence. If the offender is incompetent to stand trial, whether or not he was insane at the time of the commission of the offense, no criminal proceedings are initiated against him and therefore the opportunity to claim substantive insanity does not arise. Thus, when the offender is incompetent to stand trial, the procedural immunity obviates the need for claiming the insanity defense.

In the forth situation, the offender may have experienced insanity at some point in his life, but none of the episodes occurred at the time when the offense has been committed or at the time of the trial. Under these circumstances, the offender is considered perfectly sane both for the purpose of standing trial and for the imposition of criminal liability. At most, his mental background may serve as mitigating considerations when the appropriate punishment is considered.

In general, the question of punishment of mentally ill offenders is relevant only when the illness does not supply an adequate defense from criminal liability. In these situations the court imposes criminal liability, but may choose to balance it with an appropriate punishment.[135] For example, what should be the appropriate punishment of a mentally ill offender who robs a pharmacy to obtain the medicine he cannot afford to purchase? If the illness forms a general defense from criminal liability, no punishment is imposed. As aforesaid, in this context, "illness" is defined socially rather than medically because different social perspectives affect its classification, especially if the illness is mental.

For example, a person who suffers from obsessive-compulsive disorder is considered criminally liable in most legal systems, but the question remains whether he should be considered mentally ill for purposes of the imposition of the appropriate punishment. The legal question is whether the mental health of the

[134] For the interactions between courts of the first instance and higher courts see Gabriel Hallevy, *Rethinking the Legitimacy of Anglo-American High Courts' Judicial Review of Determining Factual Findings in Courts of the First Instance in Criminal Cases*, 5 High Court. Q. Rev. 13 (2009).

[135] Jill Peay, *Mentally Disordered Offenders, Mental Health and Crime*, Oxford Handbook of Criminology 746–774 (Maguire, Morgan and Reiner eds., 3rd ed., 2002); Elizabeth Burney and Geoffrey Pearson, *Mentally Disordered Offenders: Finding a Focus for Diversion*, 34 Howard J. Crim. Justice 291 (1995); Michael H. Tonry, Sentencing Matters 19 (1996).

offender affects the four general considerations of punishment: retribution,[136] deterrence,[137] rehabilitation[138] and incapacitation.[139]

Retribution is not affected by the state of mental health of the offender, as the social harm caused by the commission of the offense is not affected by the state of mental health of the offender but it is evaluated objectively, regardless of the offender's identity. Nevertheless, the subjective pricing of suffering contained in retribution may be affected by the offender's health. This effect, however, is not different from the effect of any other personal characteristic considered by the court as part of the subjective pricing of suffering. Therefore, the mental health of the offender has no significant value with regard to retribution.

Deterrence may be affected by the offender's mental health state. When deterrence is examined for the purpose of imposing an appropriate punishment intended to prevent reoffending, the court must consider the personal characteristics of the offender. In most cases, the measures required to deter mentally ill offenders are milder than those needed to deter other offenders because of the quality of their mental-cognitive and bodily capabilities, and because of the effect these capabilities have on decision-making processes. The lower the quality of these capabilities, the lower the tendency to take risks, in most cases.

But this assumption is too general and does not necessarily apply to the entire population of offenders of mentally ill health. The rationality assumption of deterrence may also be over-inclusive with regard to mentally ill offenders, especially concerning the inner processes of risk-taking and decision-making. Public deterrence is also affected by the offender's state of mental health. When the message to society is excessively forgiving and merciful, and the court uses extremely mild measures, the tendency of the population of mentally ill offenders may be to take advantage of the forgiving and merciful approach in order to commit further offenses and pay a low price if caught.

Rehabilitation is least affected by the state of mental health of the offender. Rehabilitation is based on the evaluation of the offender's personal rehabilitation potential. Mentally ill offenders are assumed to have lower personal rehabilitation potential than other offenders. This assumption is based on the fact that the inner world of the mentally ill offender is deeply affected by the illness, and changing his inner world is difficult, if not impossible, because of the mental illness. Lower rehabilitation potential makes the effectiveness of rehabilitation programs very low *ex ante*.[140]

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[136] For the general considerations of retribution see Gabriel Hallevy, The Right to Be Punished – Modern Doctrinal Sentencing 15–24 (2013).

[137] Ibid, at pp. 25–36.

[138] Ibid, at pp. 37–46.

[139] Ibid, at pp. 46–56.

[140] In some cases, physical illness may affect the mental state of the offender and his rehabilitation potential (as in the case of a disabled person who responds to physical illness by driving beyond the speed limit). Consequently, personal rehabilitation potential should be evaluated individually for each physically ill offender. Only when the physical illness is diagnosed as affecting the personal rehabilitation potential should this personal characteristic be considered with regard to rehabilitation as a general purpose of punishment.

Incapacitation is affected indirectly by the state of mental health of the offender. Incapacitation is intended to reduce the social endangerment posed by the offender and stop him from reoffending. The personal characteristics of the offender play a dominant role in choosing the most appropriate measure for incapacitating him. If the offender is mentally ill, his capabilities to reoffend may be lower at the relevant illnesses and lesser measures are required, if any, to incapacitate his delinquent capabilities. Consequently, with regard to incapacitation as a general purpose of punishment, the court must consider the measures that are most appropriate for incapacitating the offender's delinquent capabilities.

In three of the above four situations of insanity, the offender is not subject to criminal liability or cannot stand trial. Legally, such an offender is outside the criminal law system, and therefore not subject to criminal sanctions. But he still needs some therapy, and perhaps is still a danger to society. Therefore, in most legal systems, in addition to its legal consequences, insanity has some other consequences.

1.4.2 Therapeutic Consequences: Alternatives to Criminal Liability and Standing Trial for Insane Offenders

When the offender is competent to stand trial and the insanity defense is not applicable, most likely he has to face the legal consequences of the commission of the offense. If one of these terms is absent, the offender is likely not to stand trial and not to be subject to criminal liability. These cases open for the door to the therapeutic consequences, answering both the need of society to protect itself from the offender and the offender's personal need for therapy.

Criminal liability and criminal trial are not intended for therapeutic purposes. Imposing criminal liability on the insane offender or subjecting him to a trial would mean tormenting him for no good reason. Furthermore, it would not be efficient because of the limited cognitive or volitive capabilities of the insane person. Thus, no purpose is served by punishing an offender who does not understand what happened or what is wrong with his actions. At the same time, releasing the offender without supervision or treatment does not answer the need of society to protect itself from the danger posed by the offender and does not meet the offender's need for therapy.

Some legal systems prefer to impose diminished criminal liability when the presumption of insanity applies. Thus, when all elements of the presumption are proven, the court does not exempt the offender from criminal liability but imposes a diminished one. For example, French law prefers diminished liability over full exemption, and the rate to which liability is diminished is within the discretion of

the court.[141] Similar court discretion applies in German law as well.[142] In Britain, judicial discretion allows the imposition of criminal liability for lighter offenses,[143] and some Anglo-American legal systems follow this practice.[144]

Diminished criminal liability is not aimed at providing treatment for the offender, although it may reduce the danger that the offender poses to society. The therapeutic consequences are alternatives to criminal liability, aimed at providing treatment to the offender and at the same time protecting society, the main purpose being the latter, and the offender's needs secondary in importance.[145]

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[141] The last part of article 122-1 of the French Penal Code provides:

> La personne qui était atteinte, au moment des faits, d'un trouble psychique ou neuropsychique ayant altéré son discernement ou entravé le contrôle de ses actes demeure punissable. Toutefois, la juridiction tient compte de cette circonstance lorsqu'elle détermine la peine et en fixe le régime. Si est encourue une peine privative de liberté, celle-ci est réduite du tiers ou, en cas de crime puni de la réclusion criminelle ou de la détention criminelle à perpétuité, est ramenée à trente ans. La juridiction peut toutefois, par une décision spécialement motivée en matière correctionnelle, décider de ne pas appliquer cette diminution de peine. Lorsque, après avis médical, la juridiction considère que la nature du trouble le justifie, elle s'assure que la peine prononcée permette que le condamné fasse l'objet de soins adaptés à son état.

[142] Article 21 of the German Penal Code provides:

> Ist die Fähigkeit des Täters, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln, aus einem der in § 20 bezeichneten Gründe bei Begehung der Tat erheblich vermindert, so kann die Strafe nach § 49 Abs. 1 gemildert werden.

See more for German rulings: RG 68, 167; BGH 7, 28; BGH 20, 264; BGH 21, 27; BGH 35, 143; OGH 2, 324; VRS 50, 24; BVerfGE 50, 5.

[143] Sections 2(1),(1A),(1B) of the Homicide Act, 1957, c.11 provide:

> [(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
> (a) arose from a recognised medical condition,
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are--
> (a) to understand the nature of D's conduct;
> (b) to form a rational judgment;
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.].

See more for British rulings: Byrne, [1960] 2 Q.B. 396, [1960] 3 All E.R. 1, [1960] 3 W.L.R. 440, 44 Cr. App. Rep. 246.

[144] People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949); People v. Goedecke, 65 Cal.2d 850, 56 Cal. Rptr. 625, 423 P.2d 777 (1967); State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997).

[145] Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); Stoneberg v. State, 106 Idaho 519, 681 P.2d 994 (1984); State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984); Jones v. United States,

Society may combine these purposes under its concept of welfare, but the protection of society remains the main purpose.[146]

The higher priority granted to the protection of society is manifest, for example, in the preference to isolate the insane offender from society by committing him to a mental institution, despite the fact that modern psychiatry does not necessarily consider such commitment to be the optimal treatment from the medical point of view. Nevertheless, in many cases such commitment serves both purposes. In these cases, the therapeutic alternative is aimed also to stabilize the offender or to reduce the effect of the symptoms, enabling him to function within society, without the need to take further action. It is assumed also that treatment can rehabilitate the culprit as an offender, not only as an insane person.

Judicial discretion can be applied to the decision about therapeutic alternatives at two critical junctures. These opportunities match the points in time at which the competence to stand trial and the offender's criminal liability are examined. Thus, if the court decides that the offender is not competent to stand trial, it is within its discretion to order therapeutic alternatives. Similarly, if the court decides not to impose criminal liability for reason of insanity, at the time of the verdict, the therapeutic alternative may be incorporated into the verdict, based on judicial discretion.

Generally, the court is not required to impose the therapeutic alternative, but the concrete circumstances of the offender, the social risk he poses, and the availability of relevant treatments may affect the decision. For example, if at the time when the offense has been committed the offender suffered from a certain mental deficiency, but by the time of the trial he was medically stable and in control, it makes no sense to resort to the therapeutic alternatives because the offender no longer poses a threat to society. But a different decision is required if the offender continues to endanger society because of his mental deficiency.

The treatment can assume various forms. It may include intensive treatment under close medical supervision, or light treatment administered by the community health services. The character of the treatment does not depend on the severity of the offense but on the characteristics of the mental deficiency and on the steps required to stabilize the offender. Duration of the treatment also depends on the characteristics of the mental deficiency rather than on the severity of the offense. The maximum punishment for the offense is not a limitation for the duration of treatment.

463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983); Addington v. State, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 Cath. U. L. Rev. 961 (1996).

[146] Compare: Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Tribby v. Cameron, 379 F.2d 104 (D.C. Cir. 1967); Darnell v. Cameron, 348 F.2d 64 (D.C. Cir. 1965); Marshall v. Kort, 690 P.2d 219 (Colo. 1984); Cherif M. Bassiouni, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 DePaul L. Rev. 291 (1965); David L. Bazelon, *Implementing the Right to Treatment*, 36 U. Chi. L. Rev. 742 (1969); Jay Katz, *The Right to Treatment – An Enchanting Legal Fiction?*, 36 U. Chi. L. Rev. 755 (1969).

For example, if the offense carries a maximum punishment of 2 years of imprisonment, the duration of psychiatric treatment may be longer than 2 years if the offender's medical condition justifies it.[147] In most legal systems, the duration of the treatment is subject to standards of plausibility. The decision to release the offender from treatment is affected more by the offender's progress and his mental condition than by the severity of the offense. The primary test concerns the danger that the offender poses to society because of his mental condition.

If the offender reaches a point where his mental deficiency no longer endangers society, there is no social justification for continuing the treatment.[148] Commission of a new offense, after termination of the treatment, starts a new criminal process. If the mental deficiency has been treated and brought under control, and if there was no ultimate reason for offending, the presumption of insanity is not applied and criminal liability is likely to be imposed. In most legal systems, the primary diagnosis for competence to stand trial is performed by an objective medical authority (e.g., district psychiatrist), following a court order.

The psychiatric evaluation is intended to examine the danger to society posed by the offender's mental deficiency. Given the nature of evidentiary law, the evaluation is no more than a recommendation to the court, and the court is definitely not bound by it. Thus, even if based on the psychiatric evaluation the offender is insane, the court may rule otherwise. Nevertheless, only in rare cases does the court reject the psychiatric evaluation. The court also uses the diagnosis to decide on the most appropriate treatment for the mental condition of the offender.

[147] Overholser v. Leach, 257 F.2d 667 (D.C. Cir. 1958); Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960); *In re* Clark, 86 Kan. 539, 121 P. 492 (1912).

[148] DeVeau v. United States, 483 A.2d 307 (D.C. App. 1984); United States v. LaFromboise, 836 F.2d 1149 (8th Cir. 1988); Government of the Virgin Islands v. Wallace, 679 F.2d 1066 (3rd Cir. 1982); Underwood v. People, 32 Mich. 1 (1875); *In re* Boyett, 136 N.C. 415, 48 S.E. 789 (1904); Miller v. Superintendent, 198 Md. 659, 80 A.2d 898 (1951); People v. D'Angelo, 13 Cal.2d 203, 88 P.2d 708 (1939); State v. Wooster, 293 Mont. 195, 974 P.2d 640 (Mont. 1999); Foucha v. State, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992); Taylor v. Commissioner, 481 A.2d 139 (Me. 1984).

Integrating Insanity with the Principle of Fault in Modern Criminal Law

2

Contents

2.1 The Principle of Fault in Modern Criminal Law

The insanity defense is an integral part of substantive criminal law. Its place among the principles of criminal law may reflect the legal attitude and insights toward it, which are essential for understanding the boundaries between the insanity defense and the tangential *in personam* defenses (see Chap. 3). Below is described the manner in which insanity is integrated with the principle of fault in modern criminal law in three steps: (a) the outlines of criminal law theory, (b) the outlines of the principle of fault and of the negative fault elements, and (c) the relevant defenses that are art of the "family" of defenses of insanity.

G. Hallevy, *The Matrix of Insanity in Modern Criminal Law*,
DOI 10.1007/978-3-319-20597-7_2

2.1.1 The Basic Structure of Criminal Law Theory

Criminal law is part of the scientific sphere called "law," or "the legal science". Therefore, criminal law is a scientific sphere. In the past, in the Anglo-American legal systems, there was a conceptual difficulty in classifying law as a science because of its development through case-laws, which made use of the praxis of binding precedents (*stare decisis*). This attitude matched the general scientific development in Anglo-American countries, which was casuistic. By contrast, the European-Continental legal systems considered law to be a science,[1] and therefore in Europe it was necessary to study at the university to become a jurist. In the first university in Europe, the University of Bologna, law was one of the scientific subjects being studied.[2] The Faculty of Law of Bologna played a crucial role in the development of law in the Middle Ages (*jus commune*).[3]

In the modern era there seems to be no controversy that the law represents indeed a scientific sphere.[4] The law should therefore develop through legal research, using the relevant research methodologies, some of which are unique to this particular scientific sphere. This is also the reason for placing the legal studies in the academia.[5] If the law is as science and requires a scientific methodology, it is necessary to create a single scientific theory that governs the law. This is a fundamental endeavor in every science, including the law. Such a theory must meet two requirements: it must describe accurately all relevant events without using any random elements and it must predict accurately all relevant future events.[6]

The emergence of such a new theory is not always simple. The primary theory appears to be inconclusive after some time, and exceptions arise that the theory

[1] For the development of the law as science in the Middle Ages and afterwards in Europe see Harold J. Berman and Charles J. Reid Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 Syracuse J. Int'l L. & Com. 1 (1994).

[2] University of Bologna was established in 1088 AD, and it is considered as the first university in Europe. For the development of the law as science in the European universities see Hastings Rashdall, The Universities of Europe in the Middle Ages 135 (1935).

[3] John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 7–14, 27–34 (1969).

[4] W. D. Lewis, *The Law of England Considered as a Science*, 10 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 23 (1849); George W. Goble, *Law as a Science*, 9 Ind. L. J. 294 (1934); John D. Appel, *Law as a Social Science in the Undergraduate Curriculum*, 10 J. Legal Educ. 485 (1958); John J. Bonsignore, *Law as a Hard Science: On the Madness in Method*, 2 ALSA F. 49 (1977); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 Vt. L. Rev. 1 (1980); Lynn R. Campbell, *Law as a Social Science*, 9 Dalhousie L. J. 404 (1984); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 Emory L. J. 1005 (1989).

[5] George L. Priest, *Social Science: Theory and Legal Education: The Law School As University*, 33 J. Legal Educ. 437 (1983); Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. Legal Educ. 311 (1998).

[6] Stephen W. Hawking, A Brief History of Time 18 (1989).

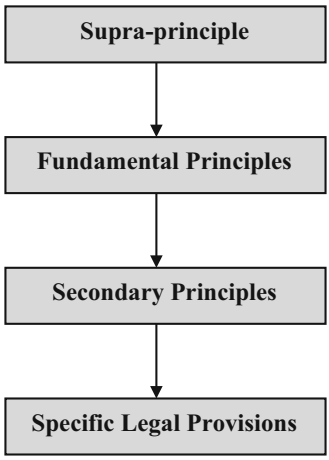

Fig. 2.1 The structure of scientific legal theory

cannot explain. As a result, amendments or changes are introduced in the primary theory to account for the exceptions. When the theory can no longer explain the exceptions, it is replaced by a new one. The new theory may also turn out to be inconclusive, and must therefore be amended, changed, or replaced.[7]

Legal theory is developing in the same way. A single legal theory that would clarify all relevant legal issues would not be restricted to specific legal areas. In the context of this book, however, the theory is restricted to criminal law, therefore the theory under consideration is Criminal Law Theory. The need for such a theory in criminal law is crucial. The large number of doctrines, legal norms, exceptions, and exceptions to the exceptions muddied the waters of criminal law, which have become vague and unclear. The single theory of criminal law, which organizes all of criminal law and speaks with one coherent voice, is about legal social control. Society controls the individuals through criminal law, and therefore the justifications of criminal law theory must be based on social approaches and explanations.

A scientific theory has various levels of application. The levels are hierarchical, with lower levels subordinated to the higher ones. The highest level represents the essence of the theory, generalized into a supra-principle. This supra-principle is the core of the theory, and all other levels are subordinated to it. Exceptions at this level require replacing the entire theory. From the supra-principle derive the fundamental principles that break down the supra-principle into basic legal principles, which in turn guide the application of the supra-principle. From each fundamental principle derive secondary principles. It is the secondary principles that create the legal form of the concrete application of the fundamental principles. From each secondary principle derive specific legal provisions that make the secondary principles applicable to specific events. Figure 2.1 shows a schematic description of this four-level structure.

[7] Ibid, at pp. 19–22, 147–160.

According to this structure, specific legal provisions cannot contradict secondary principles, secondary principles cannot contradict fundamental principles, and fundamental principles cannot contradict the supra-principle. This structure functions as a template, which is then filled with content relevant to criminal law theory.

The supra-principle of criminal law theory is the principle of free choice. According to the supra-principle, no criminal liability can be imposed on an individual unless the individual has chosen to commit a criminal offense. When an individual is compelled to commit an offense, imposing criminal liability is not considered to be justified. The individual autonomy of the human being is the social concept behind the supra-principle.[8] To function as the supra-principle of criminal law theory, the free choice must be well defined. Although free choice may seem to be related to the modern political philosophy of the eighteenth century, its origins reach back to the dawn of humanity.[9] When certain regimes rejected the free choice concept, they were considered to be illegitimate.

The principle of free choice negates determinism. The basic assumption of free choice is that free choice is possible. Deterministic concepts, which regard individual behavior to be dominated by external forces, negate the principle of free choice.[10] Determinism may be relative. Under certain circumstances, when an object falls from an individual's hand, the path of the object may not be under the individual's control, but causing the object fall may be.

From the supra-principle derive the fundamental principles. In criminal law theory there are four fundamental principles:

(1) The principle of legality;
(2) The principle of conduct;
(3) The principle of fault (the principle of culpability); and-
(4) The principle of personal liability.

[8] Andrew Ashworth, Principles of Criminal Law 25–28 (5th ed., 2006); Anthony John Patrick Kenny, Freewill and Responsibility (1978); Herbert L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law ch. 6 (1968).

[9] Ronald Dworkin, Taking Rights Seriously 180 (1977); Joseph Raz, The Morality of Freedom 425 (1986); Barbara Hudson, *Pushing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy and Practice*, Penal Theory and Practice 302 (Robin Antony Duff ed., 1994); Ronald Dworkin, A Matter of Principle 181–204 (1985).

[10] Paul R. Dimond and Gene Sperling, *Of Cultural Determinism and the Limits of Law*, 83 Mich. L. Rev. 1065 (1985); Morris D. Forkosch, *Determinism and the Law*, 60 Ky. L. J. 350 (1952); John L. Hill, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 Geo. L. J. 2045 (1988); Ian Shrank, *Determinism and the Law of Consent - A Reformulation of Individual Accountability for Choices Made without Free Will*, 12 Suffolk U. L. Rev. 796 (1978); Jos Andenaes, *Determinism and Criminal Law*, 47 J. Crim. L. Criminology & Police Sci. 406 (1957); Michele Cotton. *A Foolish Consistency: Keeping Determinism out of the Criminal Law*, 15 B. U. Pub. Int. L. J. 5 (2006).

The supra-principle of free choice refers to the individual's choice between permitted and forbidden behavior. To enable free choice it is necessary to draw accurately the borderline between "permitted" and "forbidden." The rules of formation of what is "permitted" and "forbidden" are embodied in the first fundamental principle of criminal law theory, the principle of legality.[11]

When an individual chooses to commit a forbidden act, the act must be physically carried out to duly enable the imposition of criminal liability. The rules of formation of the physical appearance of free choice are embodied in the second fundamental principle of criminal law theory, the principle of conduct, the objective expression of free choice.

Exercise of an individual's free choice requires certain mental positions in the individual's mind, including both positive and negative aspects. The positive aspects are embodied in the mental elements of the offense, the negative aspects in the general defenses.[12] Thus, an offense may require specific intent in order to impose criminal liability—a positive aspect (mental element). When the individual is incapable to form culpability (*doli incapax*), owing to insanity, infancy, lack of self-control, uncontrollable intoxication, etc., the possibility of imposing criminal liability is negated because of subjective reasons related to the negative aspects.

The rules of formation of the mental appearance of free choice are embodied in the third fundamental principle of the criminal law theory, the principle of culpability, the subjective expression of free choice. This principle is most known as the principle of fault in criminal law.

Since imposition of criminal liability requires free choice on the part of the individual, it is necessary that the free choice be the individual's own and personal free choice. One individual is not criminally liable for the free choice of another.[13] Free choice and criminal liability are embodied in the same legal entity. The rules of formation of the personal appearance of free choice are embodied in the fourth fundamental principle of criminal law theory, the principle of personal liability. The four fundamental principles are the outcome of the supra-principle of free choice and derive from it.

From the four fundamental principles derive secondary principles. From each of the four fundamental principles derive four secondary principles. The secondary principles form a concrete and specific template for the application of the fundamental principles. From each of the secondary principles derive specific legal

[11] For the principle of legality in criminal law see Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law (2010).

[12] Ashworth, *supra* note 8, at pp. 157–248.

[13] See 2 Kings 14:6: "But he did not execute the sons of the assassins. He obeyed the Lord's commandment as recorded in the law scroll of Moses, Fathers must not be put to death for what their sons do, and sons must not be put to death for what their fathers do. A man must be put to death only for his own sin"; Ezekiel 18:20: "The person who sins is the one who will die. A son will not suffer for his father's iniquity, and a father will not suffer for his son's iniquity; the righteous person will be judged according to his righteousness, and the wicked person according to his wickedness".

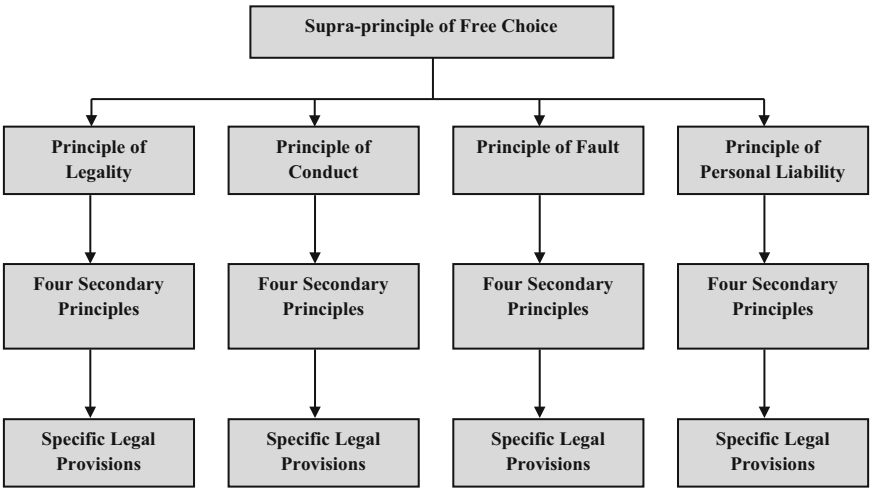

Fig. 2.2 The structure of criminal law theory

provisions, the specific applications of secondary principles. The specific legal provisions represent concrete rules of imposition of criminal liability upon the individual. Figure 2.2 illustrates schematically the four-level structure of criminal law theory.

There are no exceptions to criminal law theory, not in its structure and not in its content.

2.1.2 The Role and Development of the Principle of Fault in Modern Criminal Law

Because free choice is a supra-principle of criminal law theory, it is implemented, among others, through the principle of fault. This requires that no criminal liability be imposed on a offender without a fault (*nullum crimen sine culpa*). Fault, therefore, becomes an essential condition for the criminalization of offenses and the imposition of criminal liability. The development of the principle of fault in modern criminal law can be divided into three main stages.[14] Initially there were some sporadic requirements of fault, but they were not considered as a general requirement. Second, the concept of fault emerged as one of the requirements for the imposition of criminal liability, and finally, in modern criminal law, as a general requirement. The requirement is relevant both for the legislator, when enacting criminal offenses, and for the court, when imposing criminal liability. The modern principle of fault is the result of the development of these three stages over the centuries.

[14] Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 974–975 (1932).

The first stage of development, which included some sporadic requirements of fault, endured in most legal systems since ancient times until the thirteenth century. In the ancient East, the fault was necessary, albeit not as general requirement but as a unique one in certain offenses. No general defenses based on fault were developed in these legal systems, but certain situations were accepted as not justifying the imposition of criminal liability upon the offender. Specific requirements of fault appear in the Hammurabi codex,[15] and even earlier codes include implicit requirements of fault, such as knowledge, for the enactment of certain offenses.[16]

For example, conviction for rape required proof of intent to the have sexual intercourse without the woman's consent.[17] If it is proven that the woman consented, it is not considered rape, but some other sexual offense, say, adultery.[18] If the offender can prove a factual mistake with regard to the woman's consent (ignorance or deliberate misleading on the part of the woman), he is acquitted of the charge for reason of lack of fault.[19] Some of the fault requirements were relevant also to the imposition of civil liability in tort law.[20]

Hebrew law recognizes four degrees of fault, although not as a general requirement of fault but only in particular cases. The highest degree is malice, in the case of a free and aware choice to commit the offense, and it results in full liability of the offender.[21] The second degree is quasi-malice, representing a free choice to commit the offense but as a result of mistaking the law (the offender did not consider his act to be a criminal offense). This situation presupposes an unverified suspicion regarding the criminality of the conduct, at it resembles the modern willful blindness. In these cases diminished liability is imposed on the offender.[22] The third

[15] For example, law 206 of Hammurabi codex provides (L.W. King trans.):

> If during a quarrel one man strikes another and wounds him, then he shall swear, 'I did not injure him wittingly', and pay the physicians.

[16] See Reuven Yaron, The Laws of Eshnunna 264–268 (2nd ed., 1988).

[17] Law 26 of Eshnunna codex provides (Yaron trans.):

> If a man brought bride payment for a man's daughter, but another without asking her father and/or her mother, forcibly seized her and deflowered her – it is a case of life indeed; he shall die.

[18] Law 28 of Eshnunna codex provides (Yaron trans.):

> If a man took a man's daughter without asking her father and/or her mother: – (i). . .; (ii) If he subsequently fixed contract and/or marriage feast for her father and/or her mother and took her, she is 'a wife'. The day in the lap of a man she will be seized, shall die, shall not live.

[19] Yaron, *supra* note 16, at p. 265, 283.

[20] Law 5 of Eshnunna codex provides (Yaron trans.):

> If a boatman was negligent and caused the boat to sink, whatever he caused to sink, he shall pay in full.

[21] Rambam, Sabbath, A, 1.

[22] Babylonian Talmud, Makkot, 9A.

degree is negligence, which results in further diminished liability,[23] and the forth degree is absence of fault, resulting in acquittal.[24] Jewish law also recognizes some general defenses, including duress, necessity, and self-defense, but under restrictions such as reasonability, duty to confront the danger, disproportionality, mistake of fact, infancy, and insanity.[25]

Roman law did not recognize accidents as a basis for the imposition of criminal liability.[26] Consequently, certain offenses required awareness (*mens rea*) for imposition of criminal liability, and others even required intent (*dolus, fraus*).[27] Nevertheless, there was no general requirement of fault in Roman law.[28] Before the classic period, the fault was considered objective, proven based on legal presumptions.[29] Failure to prove fault, when it was required, was basis for diminished sentencing, but not of acquittal. From the classic era onward, the standard of fault was subjective.[30] By specific statute (*Lex Aquilia*), fault also included recklessness, but resulting in diminished sentencing.[31]

Roman law recognized also negative fault elements. Some of these were considered defenses, whereas others were considered personal standards to be met to face a criminal trial and to be considered a offender. The standards referred to the personal data of the offender (*in personam*) and not necessarily to the offense (*in rem*). One standard required that the offender be alive at the time of the trial, unless the offense was high treason (*perduellio*), in which case the court had jurisdiction over dead offenders as well (and the consequences could be significant for the offender's family).[32]

Another standard concerned maturity: the offender was required to be older than 7 years at the time of the commission of the offense, and under that age no criminal liability could be imposed.[33] Offenders who were older than 7 years but not all their secondary gender indicators were present, were still not considered mentally mature unless the prosecutor could prove otherwise.[34] If the offender's infancy

[23] Rambam, Shgagot, E, 8.

[24] Ibid.

[25] Yaacov Bazak, Law and Psychiatry – Legal Responsibility and Mental Defects 341–371 (2006).

[26] Digesta, 48.19.11.2; Codex Justinianus, 9.16.4(5).

[27] Digesta, 48.4.3; Modestinus, 12; Codex Justinianus, 9.16.1, 9.22.20, 9.7.1; Codex Theodosianus, 9.4.1; Ulpian, 1 ad ed. aed. Cur.

[28] Albert Levitt, *The Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117, 118 (1923).

[29] Digesta, 50.16.236; Gaius, 4 ad XII T.

[30] Digesta, 3.2.11.4; Ulpian, 6 ad ed; Gaius, 2 rer. Cott. & 2 inst.

[31] Collatio Mosaicarum et Romanarum Legum, 1.6.1-4, 1.11.3-4; Digesta, 48.8.1.3, 48.19.5.2; Ulpian, 7 de off. Proconsulis; Paulus (1 manual): "magna neglegentia culpa est; magna culpa dolus est".

[32] Digesta, 38.16.1.3; Ulpian, 12 ad Sab; Codex Theodosianus, 9.14.3; Codex Justinianus, 9.8.5.

[33] Digesta, 9.2.5.2; Ulpian, 18 ad ed; Modestinus 8 reg.

[34] Digesta, 29.5.14; Ulpian, 1 ad ed. aed. Cur.; Codex Justinianus, 9.47.7, 9.24.1.6; Codex Theodosianus, 9.24.4.1.

was accepted, it functioned as a defense against criminal liability and against torture.[35]

Sanity was also considered such a standard. Insane offenders were not acquitted or released, but they were remanded to custody for reasons of public safety.[36] This was not considered to be a punishment of the insane offender, but merely a measure of caution. Sanity was not examined medically, but socially. If society considered the offender to be insane, the designation was absolute, final, and conclusive. Other standards had to do with personal immunities for senior public officials who could not be prosecuted while in office.[37]

Roman law recognized also some *in rem* defenses, having to do with the offense itself and not the person of the offender. For example, self-defense was accepted as a legitimate defense, the restriction being that the offender had to use the minimal measure of force required to neutralize the attacker.[38] In some cases no such restrictions were considered, and self-defense was conceived more broadly.[39] Roman law also recognized the defense of execution of a justified superior order,[40] because by its nature, obedience negates *mens rea*.[41]

Mistake of fact and ignorance of the law were also considered to negate *mens rea*, because no evil was involved in the commission of the offense.[42] Nevertheless, such mistakes did not lead to acquittal but to a lenient punishment, because it was the duty of Roman citizens to know the law, although it was not necessarily required of women, offenders under the age of 25, and non-citizens,[43] subject to some restrictions.[44] In 212 AD, Roman citizenship was extended to all residents of the Empire (*Constitutio Antoniana*), which automatically applied the obligation to know the law to all residents of the Empire.[45]

The sporadic fault requirements described above were not part of all ancient legal systems. In some legal systems, criminal liability rested on pillars of absolute liability: it was sufficient to prove the factual element of the offense in order to

[35] Digesta, 48.18.10; Ulpian, 1 ad ed.

[36] Digesta, 1.18.13.1; Ulpian, 7 de off. Proconsulis.

[37] Digesta, 48.2.12.

[38] Collatio Mosaicarum et Romanarum Legum, 7.3.2-3; Digesta, 48.8.9; Ulpian, 37 ad ed.; Codex Justinianus, 9.16.2-3.

[39] Codex Theodosianus, 9.14.2; Codex Justinianus, 3.27.1.

[40] David Daube, *Defence of Superior orders in Roman Law*, 72 L.Q. REV. 494, 585 (1956); Digesta, 50.17.167.1.

[41] Digesta, 48.2.12.4, 48.10.5; Codex Theodosianus, 9.10.4, 9.17.1; Codex Justinianus, 3.27.1, 9.12.8; Digesta, 50.17.4; Ulpian, 6 ad ed.

[42] Digesta, 39.4.16.5; Collatio Mosaicarum et Romanarum Legum, 1.12.1; Codex Justinianus, 9.16.1; Suzzane Dixon, *Infirmitas Sexus: Womanly Weakness in Roman Law*, 52 TR 343 (1984); Olivia F. Robinson, *Women and the Criminal Law*, 8 ANN. PERUGIA 527 (1985).

[43] Digesta, 2.1.7.4; Ulpian, 3 ad ed.; Codex Theodosianus, 9.14.3.2; Codex Justinianus, 9.8.5.3.

[44] OLIVIA F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 17 (1995).

[45] WILHELM REUSCH, DIE HISTORISCHE WERT DER CARACALLA VITA IN DEN SCRIPTORES HISTORIAE AUGUSTA (1963).

impose criminal liability. These legal systems did not distinguish properly between criminal law and tort law, as the elements of the offense and the tort were identical, and the remedy was the same. These include the Irish legal system before the Norman conquest,[46] the Salic law in Europe,[47] and early English law before the reign of Henri II.[48] The turning point in these legal systems is related to the adoption of Christian theology.

The second stage of development is characterized by the formation of the general fault requirements, starting in the thirteenth century in Europe. Christian theology and canon law considered the person's fault to be the prime factor in the relationships between man and God. Christian theology attached legal significance to terms derived from the concept of fault, such as regret, intent, awareness, and volition. Canon law accepted fault at two basic levels: intent and negligence. To impose criminal liability, intent and negligence were required, separately, in addition to the factual element.[49]

The burden to prove that neither intent nor negligence were present during the commission of the offense was on the offender.[50] If intent could not be refuted, the

[46] Lawrence Ginnel, Brehon Law 184–189 (1844); John Richard Green, History of the English People (1896); Henry Sumner Maine, Early History of Institutions lec. 1–2 (7th ed., 1966).

[47] Ernest F. Henderson, Select Historical Documents of the Middle Ages 176–188 (1912); Heinrich Gottfried Phillip Gengler, Germanische Rechtsdenkmäler: Leges, Capitularia, Formulae 267 (1875, 1966).

[48] Benjamin Thorpe, Ancient Laws and Institutes of England (1840, 2004).

[49] Codex Juris Canonici (hereinafter "**CJC**"), sec. 1321(1) provides:

> (1) Nemo punitur, nisi externa legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa.

Codex Canonum Ecclesiarum Orientalium (hereinafter "**CCEO**"), sec. 1414(1) provides:

> (1) Poenis is tantum subicitur, qui legem poenalem vel praeceptum poenale violavit aut deliberate aut ex graviter culpabili omissione debitae diligentiae aut ex graviter culpabili ignorantia legis vel praecepti

[50] CCEO, sec. 1414(2) provides:

> (2) Posita externa legis poenalis vel praecepti poenalis violatione praesumitur eam deliberate factam esse, donec contrarium probetur; in ceteris legibus vel praeceptis id praesumitur tantummodo, si lex vel praeceptum iterum post monitionem poenalem violatur.

punishment was severe compared to negligence.[51] These basic fault requirements were complemented in canon law by factual mistake,[52] duress,[53] self-defense,[54] intoxication,[55] insanity,[56] and legal mistake.[57]

Christian theology had a significant effect on English law. According to ancient English law, offenders found guilty of homicide were executed irrespective of the reasons of the homicide, including mistake and negligence. This approach contradicted basic tenets of Christian theology, therefore the Church opposed it, whereas the English courts insisted on conducting criminal trials under the traditional law. In the thirteenth century, the combined rise in the power of the Church and of the English monarchy made it possible to change the legal situation.

Thus, although the courts in England were sentencing to death offenders convicted of homicide, according to traditional English law, the king could use his power to pardon selected offenders.[58] The king used his power to grant pardons in two main categories of cases: when the homicide was not accompanied by malice[59] and when it was in self-defense.[60] In some cases, the king used his power also in cases of homicide by negligence, because negligence was not considered a solid basis of criminal liability.[61]

At this time, in English law, fault was not considered the crucial element in criminal liability, but it functioned as key factor in sentencing considerations.[62] During the thirteenth century, the influence of Roman law in most European legal systems increased greatly owing to the rise of the universities, where the Roman law had been taught since the eleventh century. Legal scholars from the continent brought the general concepts of Roman law to England. These concepts had been

[51] CJC, sec. 1326(1)(3) provides:

> (3) reum, qui, cum poena in delictum culposum constituta sit, eventum praevidit et nihilominus cautiones ad eum vitandum omisit, quas diligens quilibet adhibuisset.

[52] CJC, sec. 1323(2), (7).

[53] CJC, sec. 1323(3), (4).

[54] CJC, sec. 1323(5).

[55] CJC, sec. 1324(1), (2).

[56] Ibid.

[57] CJC, sec. 1324(1)(9) provides:

> (9) ab eo, qui sine culpa ignoravit poenam legi vel praecepto esse adnexam.

[58] Sayre, *supra* note 14, at p. 980; 6 Edw. I, c.9 (1278).

[59] Selden Society, Select Pleas of the Crown, Vol. I: A.D. 1200–1225 No. 144 (Frederic William Maitland, 1888).

[60] Ibid. No. 70.

[61] John H. Wigmore, *Responsibility for Tortious Acts III*, 7 Harv. L. Rev. 441, 442 (1894).

[62] Frederick Pollock and Frederic William Maitland, The History of English Law vol. 2 471 (2nd ed., 1923).

developed in European universities into general doctrines, suitable for a broad range of cases.[63]

One of these was the concept of fault. The requirements of Roman law with respect to fault in particular cases were generalized in European universities into a general requirement of fault in criminal law. Based on this generalization of Roman law, the concept of fault (*culpa*) was accepted in most legal systems. Furthermore, derivative principles were developed (e.g., *nullum crimen sine culpa* and *non facit reum nisi mens rea*), together with attempts to integrate the new developments with traditional local law[64] in order to gain legitimacy for the new requirement of fault.[65]

The third stage of development is characterized by the development of a fundamental, general, and thorough principle of fault in criminal law, both with respect to the mental element requirement and to the general defenses. During this stage, general doctrines of *mens rea* and general defenses were developed. In the seventeenth century, these doctrines were considered to be binding legal rules that no court had jurisdiction to ignore. In England they were considered part of the English common law,[66] and since the fifteenth century recorded cases attest to the fact that these principles were considered binding.[67]

The principle of fault was implemented as a fundamental principle in criminal law in three main ways. The first was the establishment of the general requirement for the mental element, especially *mens rea*, as a condition for imposing criminal liability.[68] The second was the creation of new offenses that included explicit requirements of fault.[69] The third was the acceptance of general defenses based on mental aspects of the offender or the offense, e.g., insanity, infancy, duress, necessity, intoxication, and factual mistake.[70] Being able to use one of these defenses led to the acquittal of the offender.

Thus, two aspects of the principle of fault were accepted in the modern criminal law: one positive and one negative. The positive aspect (or positive fault elements) requires a mental element as an essential condition for the imposition of criminal liability. The negative aspect (or negative fault elements) requires the absence of any mental situation that negates the offender's fault (e.g., absence of insanity

[63] William Searle Holdsworth, History of English Law 50–54 (3rd ed., 1927).

[64] Leges Henrici Primi, c.5, art. 28.

[65] See, e.g., Henry de Bracton, De Legibus et Consuetudinibus Angliae 136b (1260; G. E. Woodbine ed., S. E. Thorne trans., 1968–1977); George E. Woodbine, Bracton De Legibus et Consuetudinibus Angliae (1942).

[66] Sir Edward Coke, Institutions of the Laws of England – Third Part 107 (6th ed., 1681, 1817, 2001).

[67] See, e.g., Y.B. Mich. 6 Edw. IV, f.7, pl.17 (1466); Y.B. Pasch. 13 Edw. IV, f.9, pl.5 (1473); Y.B. Hil. 13 Hen. VII, f.14, pl.5 (1498); Y.B. Trin. 21 Hen. VII, f.28, pl.5 (1506).

[68] See, e.g., Y.B. Mich. 13 Hen. IV, pl.20 (1411); Y.B. Trin. 9 Edw. IV, f.26b, pl.36 (1469); Hales v. Petit, (1563) 1 Plowd. 253, 259a, 75 Eng. Rep. 387.

[69] See, e.g., 12 Hen. VII, c.7 (1496); 4 Hen. VIII, c.2 (1512); 23 Hen. VIII, c.1 (1531); 1 Edw. VI, c.12 (1547).

[70] Sayre, *supra* note 14, at p. 1004–1016.

during the commission of the offense). Together, the positive and negative elements form the general principle of fault. The general defenses in criminal law are based on the negative fault elements.

The principle of fault involves both the legislators, who create the offenses, and the courts, which apply the law. The legislators are required to include the fault within the elements of the offense and the general part of the criminal law. The courts are required to avoid imposing criminal liability when fault is not adequately proven. Thus, internal aspects of free choice, as a supra-principle of criminal law,[71] relate to personal consciousness, and free choice is considered as such only if accompanied by proper fault.

The principle of fault includes four secondary principles. Two of them refer to the positive aspects of fault and two refer to its negative aspects. The positive aspects of the principle of fault comprise the secondary principles of cognition and volition; the negative aspects comprise the secondary principles of justification and exemption. Based on the structure of criminal law theory, specific legal provisions are derived from these secondary principles. The mental element requirements are derived from the positive aspects, and the general defenses from the negative aspects.

2.2 Negative Fault Elements

Under the principle of fault in criminal law, the insanity defense is part of the negative fault elements. It is necessary to understand the structure of these elements to be able to discuss the characteristics of the insanity defense in criminal law. As noted above, the principle of fault in criminal law involves the mental-internal aspects of criminal liability. The fault is an internal aspect that refers to the human mind rather than to external-objective characteristics. It takes place in the human mind, thought, and consciousness, and does not necessarily include overt external and objective acts. Nevertheless, for evidentiary purposes, some legal provisions may require certain objective actions to prove the internal fault, but these requirements are within the domain of evidentiary law.

Free choice, as a supra-principle in criminal law, requires awareness or informed choice.[72] A person can make a free choice between right and wrong only if he is capable of distinguishing between the two. Otherwise, the free choice has no significance. Understanding the opportunities and their social value is part of internal consciousness. For example, only when a person understands that he has two choices—to steal and not to steal—he understands that the choice is under his mental control and he understands the social meaning of theft. This is a

[71] See above at Sect. 2.1.1.

[72] Anthony John Patrick Kenny, Freewill and Responsibility (1978); Herbert L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law ch. 6 (1968).

fundamental condition for free choice to be present. The principle of fault implements the internal aspects of free choice within the criminal law.

The internal examination of the human mind as part of the applications of the principle of fault includes two cumulative aspects: the positive aspect, which refers to the involvement of the offender's consciousness in the commission of the offense, and the negative aspect, which refers to the possibility that the offender was coerced into committing the offense. The reasons for such coercion may be internal (referring to the *in personam* characteristics of the offender) or external (referring to the *in rem* characteristics of the offense).

2.2.1 The Secondary Principles: Positive Fault Elements

The positive aspect of the principle of fault focuses on the part of the offender's consciousness in the commission of the offense. For legal purposes, the human consciousness consists of cognition and volition, which match two of the secondary principles of the principle of fault. Cognition is the individual's awareness of the factual reality. In some countries, awareness is called "knowledge," but in this context there is no substantive difference between awareness and knowledge, which may relate to data from the present or the past, but not from the future.[73] A person may assess or predict what will be in the future, but not know or be aware of it. Prophecy skills are not required for criminal liability. Cognition in criminal law refers to a binary situation: the offender is either aware to fact X or not. Partial awareness has not been accepted in criminal law, and it is classified as unawareness.

Volition has to do with the individual's will, and it is not subject to factual reality. An individual may want unrealistic events to occur or to have occurred, in past, the present, and the future. Volition is not binary because there are different levels of will. The three basic levels are positive (P wants X), neutral (P is indifferent toward X), and negative (P does not want X). There also may be intermediate levels of volition. For example, between the neutral and negative levels there may be the rashness level (P does not want X, but takes unreasonable risk towards it). If P would absolutely have not wanted X, he would not have taken any reasonable risk towards it.

Thus, a driver is driving a car behind a very slow truck. The car driver is in a hurry, but the truck is very slow. The car driver wants to detour the car, he makes the detour through crossing continuous line and hits a motorcycle rider who passed by. The hit caused the motorcycle rider death. The car driver did not want to cause the motorcycle rider's death by purpose, but taking the unreasonable risk may prove an intermediate level of volition. If the car driver absolutely would not have wanted

[73] G.R. Sullivan, *Knowledge, Belief, and Culpability*, Criminal Law Theory – Doctrines of the General Part 207, 214 (Stephen Shute and A.P. Simester eds., 2005); Sunair Holidays, [1973] 2 All E.R. 1233, [1973] 1 W.L.R. 1105; Beckett v. Cohen, [1973] 1 All E.R. 120, [1973] 1 W.L.R. 1593.

to cause any death to anyone, he would not have taken the unreasonable risk by committing the dangerous detour.

Both cognitive and volitive aspects are combined to form the mental element requirement as derived from the positive aspect of fault in criminal law. In most modern countries, there are three main forms of mental element, which are differentiated based on the cognitive aspect. The three forms represent three layers of positive fault and they are:

(a) general intent;
(b) negligence; and-
(c) strict liability.

The highest layer of the mental element is that of general intent, which requires full cognition. The offender is required to be fully aware of the factual reality. This form involves examination of the offender's subjective mind. Negligence is cognitive omission, and the offender is not required to be aware of the factual element, although based on objective characteristics he could and should have had awareness of it. Strict liability is the lowest layer of the mental element; it replaces what was formerly known as absolute liability. Strict liability is a relative legal presumption of negligence based on the factual situation alone, which may be refuted by the offender.

Cognition relates the factual reality, as noted above. The relevant factual reality in criminal law is that which is reflected by the factual element components. From the perpetrator's point of view, only the conduct and circumstance components of the factual element exist in the present. The results components occur in the future. Because cognition is restricted to the present and to the past, it can relate only to conduct and circumstances.

Although results occur in the future, the possibility of their occurrence ensuing from the relevant conduct exists in the present, so that cognition can relate not only to conduct and circumstances, but also to the possibility of the occurrence of the results. For example, in the case of a homicide, A aims a gun at B and pulls the trigger. At this point he is aware of his conduct, of the existing circumstances, and of the possibility of B's death as a result of his conduct.

Volition is considered immaterial for both negligence and strict liability, and may be added only to the mental element requirement of general intent, which embraces all three basic levels of will. Because in most legal systems the default requirement for the mental element is general intent, negligence and strict liability offenses must specify explicitly the relevant requirement. The explicit requirement may be listed as part of the definition of the offense or included in the explicit legal tradition of interpretation.

If no explicit requirement of this type is mentioned, the offense is classified as a general intent offense, which is the default requirement. The relevant requirement may be met not only by the same form of mental element, but also by a higher level form. Thus, the mental element requirement of the offense is the minimal level of

mental element needed to impose criminal liability.[74] A lower level is insufficient for imposing criminal liability for the offense.

According to the modern structure of mental element requirement, each specific offense embodies the minimal requirements for the imposition of criminal liability, and the fulfillment of these requirements is adequate for the imposition of criminal liability. No additional psychological meanings are required. Thus, any individual who fulfils the minimal requirements of the relevant offense is considered to be an offender, and criminal liability may be imposed upon.

The offender under modern criminal law is not required to be immoral or evil, but only to fulfill all requirements of the offense. This way, the imposition of criminal liability is very technic and rational. This legal situation has two main aspects: structural and substantive. For instance, if the mental element of the specific offense requires only "awareness", no other component of mental element is required (structural aspect), and the required "awareness" is defined by criminal law regardless its meaning in psychology, philosophy, theology, etc. (substantive aspect).

The different layers of the mental element requirement have significant effect on the general defenses—the negative fault elements that are supplementary to the mental element requirements. Most exemptions in criminal law are a mirror image of the mental element requirement. It is therefore necessary to accurately define the positive fault elements, with all their layers.

Under modern criminal law of most legal systems, **general intent** (*mens rea*) expresses the basic type of mental element, since it embodies the idea of culpability most effectively. This is the only mental element which enables the combination of both cognition and volition. The general intent requirement expresses the internal-subjective relation of the offender to the physical commission of the offense.[75] In most legal systems the general intent requirement functions as the default option of the mental element requirement.

Therefore, unless explicitly negligence or strict liability are required as mental elements of the specific offense, general intent would be the required mental element. This default option is also known as the *presumption of mens rea*.[76]

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[74] See, e.g., article 2.02(5) of The American Law Institute, Model Penal Code – Official Draft and Explanatory Notes 22 (1962, 1985), which provides:

> When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

[75] Jerome Hall, General Principles of Criminal Law 70–77 (2nd ed., 1960, 2005); David Ormerod, Smith & Hogan Criminal Law 91–92 (11th ed., 2005); G., [2003] U.K.H.L. 50, [2004] 1 A.C. 1034, [2003] 3 W.L.R. 1060, [2003] 4 All E.R. 765, [2004] 1 Cr. App. Rep. 21, (2003) 167 J.P. 621, [2004] Crim. L. R. 369.

[76] Sweet v. Parsley, [1970] A.C. 132, [1969] 1 All E.R. 347, [1969] 2 W.L.R. 470, 133 J.P. 188, 53 Cr. App. Rep. 221, 209 E.G. 703, [1969] E.G.D. 123.

Accordingly, all offenses are presumed to require general intent, unless explicitly deviated. Since general intent is the highest level of known mental element requirement, this presumption is very significant. Consequently, indeed, most offenses in criminal law do require general intent and not negligence or strict liability. All mental elements components, including general intent components, are not independent or stand alone for themselves.

For instance, dominant component of general intent is awareness. If the requirement from the offender is to be aware, the question would be: "aware of what?", since awareness cannot stand alone. Otherwise, it would be meaningless. Consequently, all mental elements components must relate to facts or to any factual reality. The relevant factual aspect for criminal liability is, of course, the factual element components (conduct, circumstances and results). Of course, factual reality contains much more facts than these components of factual element, but all other facts are irrelevant for the imposition of criminal liability.

For example, in rape the relevant facts are "having sexual intercourse with a woman without consent".[77] The rapist is required to be aware of these facts. If the offender was or was not aware of other facts as well (e.g., the color of the woman's eyes, her pregnancy, her suffer, etc.), it is immaterial for the imposition of criminal liability. Thus, for the question of imposition of criminal liability, the object of the mental elements requirement is nothing but the factual element components. Of course, this object is much narrower than the whole factual reality, but the factual element represents the decision of the society on what is relevant for criminal liability and what is not.

However, the other facts and the mental relation to them may affect the punishment, although insignificant for the imposition of criminal liability. For instance, rapist who raped the victim in a very cruel way would be convicted in rape, whether he was cruel or not. However, his punishment is very likely to be much harsher than a more gentle rapist. Identifying the factual element components as the object of general intent components is the basis for the structure of general intent.

General intent has two layers of requirement. One is cognition and one is volition. The layer of cognition consists of awareness. Some legal systems use the term "knowledge" to express the layer of cognition, but it seems that awareness is more accurate. However, both awareness and knowledge function the same way and mean the same meaning in this context. A person is capable of being aware only to facts which occurred in the past or are occurring at present, but is not capable of being aware of future facts.

For instance, a person can be aware of the fact that A ate his ice-cream two minutes ago and he can be aware of the fact that B is eating his ice-cream right now. C said that he intend to eat his ice-cream, therefore most persons can predict it, foresee it or estimate the probability it will happen, but no person is capable of being aware of it, simply because it did not occur yet. If the criminal law would

[77] See, e.g., State v. Dubina, 164 Conn. 95, 318 A.2d 95 (1972); State v. Bono, 128 N.J. Super. 254, 319 A.2d 762 (1974); State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

have required offenders to be aware of future facts, it would have required, in fact, prophecy skills. The offender's point of view regarding time is the point the conduct is actually performed, in this context.

Therefore, the conduct component occurs always at present from the offender point of view. Consequently, awareness is relevant component of general intent in relation to conduct. Circumstances are defined as factual data that describes the conduct, but do not derive from it. In order to describe the current conduct, circumstances must exist at present as well. For instance, the circumstances "with a woman" in the specific offense of rape, described above, must exist simultaneously with the conduct "having sexual intercourse". The raped woman should be a woman during the commission of the offense for the circumstances to be fulfilled.

Consequently, awareness is relevant component of general intent in relation to circumstances as well. However, things are different in relations to the results. Results are defined as factual component that derives from the conduct. In order to derive from the conduct, results must occur later than the occurrence of the conduct. Otherwise, the conduct would not be the cause for the results. For instance, B dies at 11:00:00, and A shoots him at 11:00:10. In this case, it is obvious that the conduct (the shot) is not the cause of the other factual event (B's death), which does not functions as "results". From the offender's point of view, since the results occur later than the conduct and since the offender's point of view regarding time is the point the conduct is actually performed, the results occur in the future.

Therefore, since results do not occur at present, awareness is not relevant through results. The offender is not supposed to be aware of the results, which have still not occurred from his point of view. However, although the offender is not capable of being aware of the future results, he is capable of predicting them and assessing their probability of occurrence. These capabilities are existed along with the actual performance of the conduct.

For example, A shoots B. At the point the shot is performed the B's death has not occurred yet, but along with performing the shot, the shooter is aware of the possibility of the occurrence of B's death as a result of the shot. Consequently, awareness is relevant component of general intent in relation to the possibility of the result's occurrence, and not in relation to the results themselves. The awareness of this possibility is not required to relate to the reasonability or probability of the result's occurrence. If the offender is aware of the existence of the possibility, whether of high or low probability, that the results occur from the conduct, this component of general intent is fulfilled.[78]

The additional layer of general intent is the layer of volition. This layer is additional to the cognition, and based upon cognition. Volition never comes alone, but always as an additional component to the awareness. Volition relates to the offender's will towards the results of the factual event. In relatively rare offenses, volition may relate to motives and purposes, beyond the specific factual

[78] This component of awareness functions also as the legal causal connection in general intent offenses, but this function has no additional significance in this context.

event, and it is expressed by "specific intent".[79] The main question regarding volition is, separately from the offender's awareness of the possibility the results occur from the conduct, has the offender wanted the results to occur. Since these results occur in the future from the offender's point of view, they are the only reasonable object of volition. From the offender point of view regarding time, the occurrence of both circumstances and conduct has nothing to do with the will.

The raped woman is a woman before, during and after the rape, regardless the rapist will. The sexual intercourse is such at that point of time, regardless the rapist will. If the offender argues that the conduct occurred against his will, i.e. the offender did not control it, this argument is related to the general defense of loss of self-control. Consequently, towards conduct and circumstances, only awareness is required, and no volition component is required in addition.

In the factual reality there are very many levels of will. However, the criminal law accepted only three of them:

(a) intent (and specific intent);
(b) indifference; and-
(c) rashness.

The first represents positive will (the offender wanted the results to occur), the second represents nullity (the offender was indifferent to the occurrence of the results), and the third is negative will (the offender did not want the results to occur, but has taken unreasonable risk which caused them to occur).

For example, in homicide offenses, at the moment in which the conduct is committed, if the offender-

(a) wants the victim's death, it is intent (or specific intent);
(b) is indifferent as to the victim's death, it is indifference;
(c) does not want the victim's death, but undertakes unreasonable risk in this regard, it is rashness.

Intent is the highest level of will accepted by criminal law. Intended homicide is considered murder in most countries. Indifference is intermediate level, and rashness is the lowest level of will. Both indifference and rashness are known as "recklessness". Reckless homicide is considered manslaughter in most countries. Consequently, if the specific offense requires recklessness, this requirement may be fulfilled through proof of intent, since higher level of will covers lower levels. However, if the specific offense requires intent or specific intent, this requirement may be fulfilled only through intent or specific intent.

Summing up the structure of general intent is much easier if the offenses are divided into conduct-offenses and results-offenses. Conduct-offenses are offenses

[79] "Specific intent" is sometimes mistakenly referred to "intent" in order to differ it from "general intent", which is generally used to express general intent.

which their factual element requires no results, whereas the factual element of results-offenses requires.[80] This division eases the understanding of the general intent structure, since volition is required only in relation to the results. Therefore, results require both cognition and volition, whereas conduct and circumstances require only cognition. Thus, in conduct-offenses, which their factual element requirement contains conduct and circumstances, the general intent requirement contains awareness to these components.

In results-offenses, which their factual element requirement contains conduct, circumstances and results, the general intent requirement contains awareness to the conduct, to the circumstances and to the possibility of the occurrence of the results. In addition, the general intent requirement contains in relation to the results intent or recklessness, according to the particular definition of the specific offense. This general structure of general intent is a template which contains terms from the mental terminology (awareness, intent, recklessness, etc.).

Negligence is sometimes used as requirement of mental element and as behavioral standard. It has been recognized as behavioral standard since the ancient ages. It has already been mentioned in the Eshnunna laws of the twentieth century BC,[81] in the Roman law,[82] in the Canonic law, and in the early English common law.[83] However, negligence has been related to then as a behavioral standard rather than as a type of mental element in criminal law. That behavioral standard included a dangerous behavior, which lacks considering all relevant considerations for acting the way the individual did.

Only since the seventeenth century negligence has been related to as type of mental element in criminal law. In 1664 the English court ruled that negligence is not adequate for convicting in manslaughter, but it requires at least recklessness.[84] This ruling gave birth to negligence as type of mental element in criminal law. During the nineteenth century the negligence has been related to as an exception for the general requirement of general intent.[85] Accordingly, it should have been required explicitly and construed strictly.

The particular offense should have required explicitly, by its definition, negligence for it to be adequate for imposing criminal liability. In the nineteenth century negligence offenses were still quite rare. The more common use of negligence in criminal law became as transportation, by horses and automobiles, developed.

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[80] Sir Gerald Gordon, The Criminal Law of Scotland 61 (1st ed., 1967); Treacy v. Director of Public Prosecutions, [1971] A.C. 537, 559, [1971] 1 All E.R. 110, [1971] 2 W.L.R. 112, 55 Cr. App. Rep. 113, 135 J.P. 112.

[81] See Reuven Yaron, The Laws of Eshnunna 264 (2nd ed., 1988).

[82] Collatio Mosaicarum et Romanarum Legum, 1.6.1-4, 1.11.3-4; Digesta, 48.8.1.3, 48.19.5.2; Ulpian, 7 de off. Proconsulis. Pauli Sententiae, 1 manual: "magna neglegentia culpa est; magna culpa dolus est".

[83] Henry de Bracton, De Legibus et Consuetudinibus Angliae 278 (1260; G. E. Woodbine ed., S. E. Thorne trans., 1968–1977).

[84] Hull, (1664) Kel. 40, 84 Eng. Rep. 1072, 1073.

[85] Williamson, (1807) 3 Car. & P. 635, 172 Eng. Rep. 579.

Death cases on roads became more common, and manslaughter was not appropriate for these cases. A lower level of homicide was required, and negligent homicide was considered appropriate.[86]

When negligence came into common use, the confusion has begun. Negligence has been interpreted as requiring unreasonable conduct, and that caused confusion with recklessness of the lower level (rashness), which required taking unreasonable risk. That confusion caused creation of unnecessary terms of "gross negligence" and "wicked negligence".[87] Many misleading rulings were given on that basis in English law,[88] until the House of Lords made the distinction clear, not before 2003.[89] The American law developed negligence as mental element in criminal law parallel to and inspired by the English common law.[90]

The negligence has been accepted as an exception to general intent during the nineteenth century, but more accurately than in English law.[91] The main distinction between recklessness and negligence has been developed towards the cognitive aspect of recklessness. Whereas recklessness requires cognitive aspect of awareness, as part of general intent requirement, negligence requires none.[92] Both reckless and negligent offenders are required to take unreasonable risks. However, the reckless offender is required to be aware of the factual element components, whereas the negligent offender is not required to.[93] The negligence functions as omission of awareness, and it creates social standard of conduct.

The individual is required to take only reasonable risks.[94] Reasonable risks are measured objectively through the perspective of an abstract reasonable person. The reasonable person is aware of his factual behavior and takes only reasonable risks.[95] Of course, the reasonability is determined by the court, and this is done

[86] Knight, (1828) 1 L.C.C. 168, 168 Eng. Rep. 1000; Grout, (1834) 6 Car. & P. 629, 172 Eng. Rep. 1394; Dalloway, (1847) 2 Cox C.C. 273.

[87] Finney, (1874) 12 Cox C.C. 625.

[88] Bateman, [1925] All E.R. Rep. 45, 94 L.J.K.B. 791, 133 L.T. 730, 89 J.P. 162, 41 T.L.R. 557, 69 Sol. Jo. 622, 28 Cox. C.C. 33, 19 Cr. App. Rep. 8; Leach, [1937] 1 All E.R. 319; Caldwell, [1982] A.C. 341, [1981] 1 All E.R. 961, [1981] 2 W.L.R. 509, 73 Cr. App. Rep. 13, 145 J.P. 211.

[89] G., [2003] U.K.H.L. 50, [2003] 4 All E.R. 765, [2004] 1 Cr. App. Rep. 237, 167 J.P. 621, [2004] Crim. L.R. 369, [2004] 1 A.C. 1034.

[90] Jerome Hall, General Principles of Criminal Law 126 (2nd ed., 1960, 2005).

[91] Commonwealth v. Thompson, 6 Mass. 134, 6 Tyng 134 (1809); United States v. Freeman, 25 Fed. Cas. 1208 (1827); Rice v. State, 8 Mo. 403 (1844); United States v. Warner, 28 Fed. Cas. 404, 6 W.L.J. 255, 4 McLean 463 (1848); Ann v. State, 30 Tenn. 159, 11 Hum. 159 (1850); State v. Schulz, 55 Ia. 628 (1881).

[92] Lee v. State, 41 Tenn. 62, 1 Cold. 62 (1860); Chrystal v. Commonwealth, 72 Ky. 669, 9 Bush. 669 (1873).

[93] Commonwealth v. Pierce, 138 Mass. 165 (1884); Abrams v. United States, 250 U.S. 616, 63 L. Ed. 1173, 40 S.Ct. 17 (1919).

[94] Commonwealth v. Walensky, 316 Mass. 383, 55 N.E.2d 902 (1944).

[95] See, e.g., People v. Haney, 30 N.Y.2d 328, 333 N.Y.S.2d 403, 284 N.E.2d 564 (1972); Leet v. State, 595 So.2d 959 (1991); Minor v. State, 326 Md. 436, 605 A.2d 138 (1992); United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999).

retrospectively in relation to the particular case. The modern development of negligence in American law is expressed in the American Law Institute's Model Penal Code as inspired by the European-Continental modern understandings of negligence.

Accordingly, negligence is a type of mental element in criminal law. It relates to the factual element components, as any other type of mental element. It requires unawareness to the factual element components, whereas the reasonable person could and should have been aware of them, and taking of unreasonable risk in regard to the results of the offense. This development has been embraced by American courts.[96] On that basis the question is how can negligence function as mental element in criminal law, if the offender is not even required to be aware of his conduct.

Some scholars did call to exclude it from criminal law and leave it for tort law or other civil proceedings.[97] However, the justification for negligence as mental element is concentrated on its function as omission of awareness. The very same way as act and omission are considered identical for the imposition of criminal liability, as discussed above in relation to the factual element,[98] so may both awareness and omission of awareness be considered basis for mental element requirement.

Negligence is not parallel to inaction, in this analogy to the factual element, but to omission. If a person was just not aware of the factual element components, and nothing besides that, he is not considered negligent, but innocent. Omission to be aware means, that the person was not aware although reasonable person could and should have been. The individual is considered not to be using his existing capabilities of forming awareness. The individual was not aware, although he had the capabilities to be, and therefore had the duty to as well (*non scire quod scire debemus et possumus culpa est*).

Negligence does not incriminate persons who are incapable of forming awareness, but only those who failed to use their existing capabilities to form awareness. Negligence does not incriminate the blind person for not seeing, but only persons who have the capability of seeing, but they failed to use this capability. Wrong decisions are part of the human daily life and they are quite common, therefore negligence does not struggle against such situations. Taking risks is also part of human life, and not only negligence does not struggle against it, the society encourage risk taking in very many situations.

Negligence struggles only against taking unreasonable risks. If people do not take any risks at all, the human development is utterly stopped. If no risk was taken,

[96] See, e.g., State v. Foster, 91 Wash.2d 466, 589 P.2d 789 (1979); State v. Wilchinski, 242 Conn. 211, 700 A.2d 1 (1997); United States v. Dominguez-Ochoa, 386 F.3d 639 (2004).

[97] See, e.g., Jerome Hall, *Negligent Behaviour Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963); Robert P. Fine and Gary M. Cohen, *Is Criminal Negligence a Defensible Basis for Criminal Liability?*, 16 Buff. L. Rev. 749 (1966).

[98] Above at Sect. 2.1.1.

our ancestors would have been still staring the burning branch after being stroke by lightning, and afraid of taking the risk of getting closer to it, grab it, and use it for our needs. People are constantly pushed by the society to take risks, but reasonable risks. The question is, how can modern society identify the unreasonable risk and distinguish it from the reasonable risks, which are legitimate.

For instance, scientists propose an advanced device that would significantly ease our daily lives. It is comfortable, fast, elegant and accessible. However, using it may cause death of about 30,000 people per year in the United States alone. Would it be considered reasonable risk to use this device or unreasonable? It may be thought that 30,000 victims each year is enormous number, and that makes the use of this device completely unreasonable. However, it is used to call that device *"car"*.[99] Driving a car is not considered unreasonable in most countries in the world, today.

However, in the late nineteenth century it was. So is the situation with trains, planes, ships, and many other of our daily instruments. The reasonability of the risk is relative by its nature, and it is relatively determined in respect to time, place, society, culture and other circumstances. Different courts in different countries are determining different reasonable persons in this context of negligence. The reasonable person must be measured not only as general abstract person, but it should be adapted to the relevant circumstances of the specific offender.

For example, it is not enough to compare medical malpractice of physician to the behavior of an abstract reasonable person. This behavior should be compared to that of reasonable physician, of the same expertise, of the same experience, of the same circumstances of treatment (emergency treatment or other), the same sources etc. This may focus the standard of reasonability, and make it more subjective standard rather than pure objective. Most negligence offenses are results-offenses, since the society prefer to use negligence to protect from factual harms involved in unreasonable risk takings. However, negligence may be required for conduct-offenses as well.

The general structure of negligence includes no volitive aspect, but only cognitive. Since volition is supported by cognition, and since negligence does not require awareness, it cannot require components of volition. The cognitive aspect of negligence consists of omission of awareness in relation to all factual element components. The negligence requirements in relation to conduct and circumstances are identical. Both require unawareness of the component (conduct/circumstances) in spite of the capability to form awareness, when reasonable person could and should have been aware of that component.

The reasonability in these components of negligence is examined in relation to the capability and duty to form awareness, although actually no awareness has been formed by the offender. The negligence requirement in relation to the results requires unawareness of possibility of the results' occurrence in spite of the capability to form awareness, when reasonable person could and should have

[99] For car accidents statistics in the United States see, e.g., http://www.cdc.gov/motorvehiclesafety/ (last visited April 21, 2015).

been aware of that possibility as unreasonable risk. The reasonability in this component is focused on identifying the occurrence of the results as a possibility of unreasonable risk. It means that the risk taking of the offender in the specific event, under the relevant circumstances, is considered unreasonable.

The modern structure of negligence continues the minimal concept of criminal law. It contains both inner and external aspects. Inward, negligence is the minimal requirement of mental element for each of the factual element components. Consequently, if negligence is proven in relation to the circumstances and results, but in relation to the conduct awareness is proven, that satisfies the requirement of negligence. It means that for each of the factual element components at least negligence is required but not exclusively negligence. Outwards, negligence offenses' mental element requirement is satisfied through at least negligence, but not exclusively. It means that criminal liability for negligence offenses may be imposed through proving general intent as well as negligence.

For negligence is still considered an exception for the general requirement of general intent, negligence has been required as an adequate mental element of relatively lenient offenses. In some legal systems around the world, negligence has even been restricted *ex ante* to lenient offenses.[100] This general structure of negligence is a template which contains terms from the mental terminology (e.g., reasonability).

In general, **strict liability** has been accepted as form of mental element requirement in criminal law as a development from the absolute liability. Since the eighteenth century for some particular offenses it has been determined by English common law that they require neither general intent nor negligence. These particular offenses were related to as public welfare offenses.[101] These offenses were inspired by tort law, that accepted absolute liability as legitimate.

Consequently, these particular offenses were criminal offenses of absolute liability, and imposition of criminal liability for them required proof of the factual element alone.[102] These absolute liability offenses were considered exceptional for no mental element is required. In some cases the parliament intervened and required mental element,[103] and in some other cases the court rulings added mental element requirements.[104] By the mid-nineteenth century English courts began to consider efficiency considerations as part of criminal law in various contexts. That gave rise to the development of convictions on the basis of public inconvenience.

[100] E.g., in France. See article 121-3 of the French Penal Code.

[101] Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 56 (1933).

[102] See, e.g., Nutt, (1728) 1 Barn. K.B. 306, 94 Eng. Rep. 208; Dodd, (1736) Sess. Cas. 135, 93 Eng. Rep. 136; Almon, (1770) 5 Burr. 2686, 98 Eng. Rep. 411; Walter, (1799) 3 Esp. 21, 170 Eng. Rep. 524.

[103] See, e.g., 6 & 7 Vict. c.96.

[104] Dixon, (1814) 3 M. & S. 11, 105 Eng. Rep. 516; Vantandillo, (1815) 4 M. & S. 73, 105 Eng. Rep. 762; Burnett, (1815) 4 M. & S. 272, 105 Eng. Rep. 835.

Offenders were indicted in particular offenses, and they were convicted although no mental element was proven, due to the public inconvenience caused by the commission of the offense.[105] These convictions created, in fact, an upper threshold of negligence, a kind of increased negligence. Accordingly, the individual must be strict and make sure that no offense is committed. This standard of behavior is higher than in negligence, which requires just behaving reasonably.

In these offenses, it is required more than reasonability, but to make sure of no offense is committed whatsoever. Such offenses have clear preference of the public welfare over the strict justice with the potential offender. Since these offenses were not considered to be grave and severe, they were widened "for the good of all".[106] This development was considered necessary due to the legal and social developments of the first industrial revolution. For instance, the increasing number of workers in the cities brought the employers to decrease the worker's social conditions.

The parliament intervened through social welfare legislation, and the efficient enforcement of this legislation was through absolute liability offenses.[107] It was insignificant whether the employer knew or not what are the proper social conditions for the workers, he must make sure that no violation of these conditions occurs.[108] In the twentieth century this type of criminal liability has been spread to other spheres of law, including traffic law.[109] The American criminal law accepted absolute liability as basis for criminal liability in the mid-nineteenth century,[110] while ignoring previous rulings that did not accept it.[111]

[105] Woodrow, (1846) 15 M. & W. 404, 153 Eng. Rep. 907.

[106] Stephens, [1866] 1 Q.B. 702; Fitzpatrick v. Kelly, [1873] 8 Q.B. 337; Dyke v. Gower, [1892] 1 Q.B. 220; Blaker v. Tillstone, [1894] 1 Q.B. 345; Spiers & Pond v. Bennett, [1896] 2 Q.B. 65; Hobbs v. Winchester Corporation, [1910] 2 K.B. 471; Provincial Motor Cab Company Ltd. v. Dunning, [1909] 2 K.B. 599, 602.

[107] W. G. Carson, *Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation*, 33 Mod. L. Rev. 396 (1970); W. G. Carson, *The Conventionalisation of Early Factory Crime*, 7 Int'l J. of Sociology of Law 37 (1979).

[108] Austin Turk, Criminality and Legal Order (1969).

[109] Nicola Lacey, Celia Wells and Oliver Quick, Reconstructing Criminal Law 638–639 (3rd ed., 2003, 2006).

[110] Barnes v. State, 19 Conn. 398 (1849); Commonwealth v. Boynton, 84 Mass. 160, 2 Allen 160 (1861); Commonwealth v. Goodman, 97 Mass. 117 (1867); Farmer v. People, 77 Ill. 322 (1875); State v. Sasse, 6 S.D. 212, 60 N.W. 853 (1894); State v. Cain, 9 W. Va. 559 (1874); Redmond v. State, 36 Ark. 58 (1880); State v. Clottu, 33 Ind. 409 (1870); State v. Lawrence, 97 N.C. 492, 2 S.E. 367 (1887).

[111] Myers v. State, 1 Conn. 502 (1816); Birney v. State, 8 Ohio Rep. 230 (1837); Miller v. State, 3 Ohio St. Rep. 475 (1854); Hunter v. State, 30 Tenn. 160, 1 Head 160 (1858); Stein v. State, 37 Ala. 123 (1861).

This acceptance was restricted only to petty offenses, that their violation was punished through fines, and not very severe fines. Similar acceptance occurred at the same time in the European Continental legal systems.[112] Consequently, absolute liability in criminal law became global phenomenon. However, at the meanwhile the fault element in criminal law become much more important due to internal developments in criminal law, and the general intent became the major and dominant requirement for mental element in criminal law.

Thus, the criminal law should have made changes in the absolute liability for it to meet the modern understandings towards fault. That was the trigger for moving from absolute liability to strict liability. The core of the change lies in the move from absolute legal presumption (*praesumptio juris et de jure*) to relative legal presumption (*praesumptio juris tantum*), so that the offender has the opportunity to refute the criminal liability. The presumption was presumption of negligence, either refutable or not.[113] The move from absolute liability towards strict liability eased the acceptance of the presumed negligence as another, third, form of mental element in criminal law.

Since that wide acceptance of strict liability in the world, legal systems justified it both in the perspective of fault in criminal law[114] and constitutionally. The European court for human rights justified using strict liability in criminal law in 1998.[115] Accordingly, the strict liability was considered as not contradicting the presumption of innocence, protected by the 1950 European Human Rights Covenant,[116] and that ruling has been embraced in Europe and Britain.[117] The federal

[112] John R. Spencer and Antje Pedain, *Approaches to Strict and Constructive Liability in Continental Criminal Law*, Appraising Strict Liability 237 (A. P. Simester ed., 2005).

[113] Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong, [1985] 1 A.C. 1, [1984] 2 All E.R. 503, [1984] 3 W.L.R. 437, 80 Cr. App. Rep. 194, 26 Build L.R. 159.

[114] G., [2003] U.K.H.L. 50, [2003] 4 All E.R. 765, [2004] 1 Cr. App. Rep. 237, 167 J.P. 621, [2004] Crim. L.R. 369; Kumar, [2004] E.W.C.A. Crim. 3207, [2005] 1 Cr. App. Rep. 566, [2005] Crim. L.R. 470; Matudi, [2004] E.W.C.A. Crim. 697.

[115] Salibaku v. France, (1998) E.H.R.R. 379.

[116] 1950 European Human Rights Covenant, sec. 6(2) provides:

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[117] G., [2008] U.K.H.L. 37, [2009] A.C. 92; Barnfather v. Islington London Borough Council, [2003] E.W.H.C. 418 (Admin), [2003] 1 W.L.R. 2318, [2003] E.L.R. 263; G. R. Sullivan, *Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights*, Appraising Strict Liability 195 (A. P. Simester ed., 2005).

supreme court of the United States ruled consistently that strict liability does not contradict the US constitution.[118] So did the supreme courts in the states.[119]

However, it was recommended to restrict the usage of these offenses to the necessary minimum, and prefer using general intent or negligence offenses. The strict liability construction in criminal law is concentrated on the negligence relative presumption and the ways to refute it. The presumption defines that if all components of the factual element requirement in the offense are proven, it is presumed that the offender was at least negligent. Consequently, for the imposition of criminal liability in strict liability offenses, the prosecution does not have to prove the mental state of the offender, but only the fulfillment of the factual element. The mental state of the offender is learned from the conduct.

At this point, the strict liability is similar to the absolute liability. However, contradicted to absolute liability, strict liability may be refuted by the offender, since it is based upon relative legal presumption. For the offender to refute strict liability, there should be proven accumulatively two conditions:

(a) No general intent or negligence were actually existed in the offender; and-
(b) All reasonable measures to prevent the offense were taken.

The first condition deals with the actual mental state of the offender. According to the presumption, the commission of the factual element presumes that the offender is at least negligent. That means that the offender's mental state is of negligence or general intent. Thus, at first, the conclusion of the presumption should be refuted so that the presumption is proven as incorrect at this case. The offender should prove that he was not aware to the relevant facts, and that no other reasonable person could have been aware of them under the certain circumstances of the case.

This proof resembles refuting general intent in general intent offenses and negligence in negligence offenses. However, strict liability offenses are not general intent or negligence offenses, for refuting general intent and negligence is not adequate for preventing imposition of criminal liability. The social and behavioral purpose of these offenses is to make the individuals conduct strictly and make sure that the offense is not committed. That should be proven as well. Consequently, the

[118] Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957); Texaco Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982); Carter v. United States, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); Alan C. Michaels, *Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience*, Appraising Strict Liability 218, 222–223 (A. P. Simester ed., 2005).

[119] State v. Stepniewski, 105 Wis.2d 261, 314 N.W.2d 98 (1982); State v. McDowell, 312 N.W.2d 301 (N.D. 1981); State v. Campbell, 536 P.2d 105 (Alaska 1975); Kimoktoak v. State, 584 P.2d 25 (Alaska 1978); Hentzner v. State, 613 P.2d 821 (Alaska 1980); State v. Brown, 389 So.2d 48 (La. 1980).

offender should prove that he has taken all reasonable measure to prevent the offense.[120]

The difference between strict liability and negligence is sharp. To refute negligence it is adequate to prove the offender has taken a reasonable measure, but to refute strict liability it is required to prove that all reasonable measure were actually taken. In order to refute the negligence presumption of strict liability the offender should positively prove each of these two conditions by a preponderance of the evidence, as in civil law cases. The offender is not required to prove these conditions beyond reasonable doubt, but in general it is not sufficient to only raise reasonable doubt. This burden of proof is higher than the general burden of the offender.

The possibility of the offender to refute the presumption becomes part of the strict liability requirement since it relates to the offender's mental state. The modern structure of strict liability continues the concept of minimal requirement. It contains both inner and external aspects. Inward, strict liability is the minimal requirement of mental element for each of the factual element components.

Consequently, if strict liability is proven in relation to the circumstances and results, but in relation to the conduct negligence is proven, that satisfies the requirement of strict liability. It means that for each of the factual element components at least strict liability is required but not exclusively strict liability. Outwards, strict liability offenses' mental element requirement is satisfied through at least strict liability, but not exclusively. It means that criminal liability for strict liability offenses may be imposed through proving general intent and negligence as well as strict liability.

For strict liability is still considered an exception for the general requirement of general intent, strict liability has been required as an adequate mental element of relatively lenient offenses. In some legal systems around the world, strict liability has been restricted *ex ante* or *ex post* to lenient offenses.[121] This general structure of strict liability is a template which contains terms from the mental terminology.

The three layers, general intent, negligence, and strict liability (together with the "no-fault" layer, in case none of the requirements are met by the offender's mental state), form the positive fault elements, i.e., the mental element requirement.

2.2.2 The Secondary Principles: Negative Fault Elements

The negative aspect of the principle of fault focuses on the possibility that the offender's involvement in the commission of the offense was coerced. The reasons

[120] B. v. Director of Public Prosecutions, [2000] 2 A.C. 428, [2000] 1 All E.R. 833, [2000] 2 W.L.R. 452, [2000] 2 Cr. App. Rep. 65, [2000] Crim. L.R. 403; Richards, [2004] E.W.C.A. Crim. 192.

[121] *In re* Welfare of C.R.M., 611 N.W.2d 802 (Minn. 2000); State v. Strong, 294 N.W.2d 319 (Minn. 1980); Thompson v. State, 44 S.W.3d 171 (Tex. App. 2001); State v. Anderson, 141 Wash.2d 357, 5 P.3d 1247 (2000).

for such coercion may be internal (referring to the *in personam* characteristics of the offender) or external (referring to the *in rem* characteristics of the offense). Thus, negative fault elements are general defenses, in which the court is bound to consider when imposing criminal liability upon the offender, if claimed. General defenses in criminal law are complementary to the mental element requirement. Both deal with the offender's fault concerning the commission of the offense.[122]

For instance, awareness is part of mental element requirement (general intent), and insanity is a general defense. Therefore, in general intent offenses the offender must be aware and must not be insane. Thus, the fault requirement in criminal law consists on both mental element requirement and general defenses. The general defenses were developed in the ancient world in order to prevent injustice in certain types of cases. For instance, a person who killed another out of self-defense was not criminally liable for the homicide, since he lacked the required fault to cause death.

Authentic factual mistake of the offender as to the commission of intentional offense was considered then as negating the required fault for imposition of criminal liability.[123] In the modern era the general defenses became wider and more conclusive. However, the common factor of all general defenses remained the same one. All general defenses in criminal law are part of the negative aspect of the fault requirement, as they are meant to negate the offender's fault.

The deep abstract question behind the general defenses is whether the commission of the offense was not imposed upon the offender. Thus, when a person really acts in self-defense, it is considered as imposed on him. For saving his life, which is considered a legitimate purpose, that person had no choice, but act in self-defense. Of course, such person could have given up his life, but that is not considered to be legitimate requirement, as it goes against the natural instinct of every living creature.

All general defenses may be divided into two main types: *in personam* and *in rem* defenses.[124] *In personam* defenses are general defenses which are related to the personal characteristics of the offender (exempts), whereas *in rem* are related to the characteristics of the factual event (justifications). The personal characteristics of the offender may negate the fault towards the commission of the offense, regardless the factual characteristics of the event or the exact identity of the particular offense. In *in personam* defenses the personal characteristics of the offender are adequate to prevent imposition of criminal liability in any offense.

For instance, a child under the age of legal maturity is not criminally liable for any offense factually committed by him. So is the situation for insane individuals

[122] The mental element requirement is the positive aspect of fault (what should be in the offender's mind during the commission of the offense), whereas the general defenses are the negative aspect of fault (what should not be in the offender's mind during the commission of the offense).

[123] Reuven Yaron, The Laws of Eshnunna 265, 283 (2nd ed., 1988).

[124] Compare Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 Law & Contemp. Probs. 89 (1986); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984); George P. Fletcher, Rethinking Criminal Law 759–817 (1978, 2000).

who committed the offense during the time they were considered insane. The exact identity of the particular offense committed by the individual is completely insignificant for the question of imposition of criminal liability. It, perhaps, may be relevant for further steps of treatment or rehabilitation triggered by the commission of the offense, but not for the imposition of criminal liability. The personal *in personam* defenses, as general defenses, are completed by the impersonal *in rem* defenses.

In rem defenses are impersonal general defenses. As such they are not depended on the identity of the offender, but only on the factual event actually occurred. The personal characteristics of the individual are insignificant for the *in rem* defenses. For instance, an individual is attacked by another person up to real danger to his life. The only way to be out of this danger was through pushing the attacker away. Pushing away a person is considered assault unless done under consent. In this case, the pushing person would argue for self-defense, regardless his identity, the attacker identity or any other personal attributes of them, since self-defense relates only to the factual event itself.

Since *in rem* defenses are impersonal, they have in addition a prospective value. Not only is the individual not criminally liable if acted under *in rem* defense, but also he should have been acting this way. *In rem* defenses define not only types of general defenses, but also the proper behavior.[125] Thus, individuals should defend themselves under the conditions of self-defense, even though that may apparently seem as commission of an offense. This is not true for *in personam* defenses. An infant under the maturity age is not supposed to commit offenses, although no criminal liability would be imposed. So are not insane individuals.

The prospective behavioral value of the *in rem* defenses expresses the social values of the relevant society. If self-defense, for instance, is accepted as legitimate *in rem* defense, it means that society prefers individuals to protect themselves when the authorities are unable to protect them. Society prefers to reduce the state's monopoly on power through legitimizing self-assistance rather than leave individuals vulnerable and helpless. Society does not enforce individuals to act in manner of self-defense, but if they do so, it does not consider them criminally liable for the offense committed through that self-defense.

Both *in personam* defenses and *in rem* defenses are general defenses.[126] The phrase "genera defenses" relates to defenses that may be attributed to any offense and not to particular and certain group of offenses. For instance, infancy may be

[125] Compare Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. Rev. 266 (1975); Paul H. Robinson, *Testing Competing Theories of Justification*, 76 N.C. L. Rev. 1095 (1998); George P. Fletcher, *The Nature of Justification*, Action and Value in Criminal Law 175 (Stephen Shute, John Gardner and Jeremy Horder eds., 2003).

[126] Hui Chi-ming, [1992] 1 A.C. 34, [1991] 3 All E.R. 897, [1991] 3 W.L.R. 495, 94 Cr. App. Rep. 236; Rowley, [1948] 1 All E.R. 570, 46 L.G.R. 224, 112 J.P. 207, 32 Cr. App. Rep. 167; Director of Public Prosecutions v. Shannon, [1975] A.C. 717, [1974] 2 All E.R. 1009, [1974] 3 W.L.R. 155, 59 Cr. App. Rep. 250, 138 J.P. 587; Surujpaul, [1958] 3 All E.R. 300, [1958] 1 W.L.R. 1050, 42 Cr.

attributed to any offense, as long as it has been committed by an infant. On the contrary, there are some specific defenses, which may be attributed only to specific offenses or specific type of offenses. For instance, in some countries in the offense of statutory rape, it is a defense for the offender if the gap of ages is under 3 years. This defense is unique for statutory rape, and it is irrelevant for any other offense. *In personam* defenses and *in rem* defenses are classified as general defenses.

As defense arguments, general defenses should be positively argued by the defense. If the defense chooses not to raise these arguments, they are not discussed in court, even though all participants of the trial understand that such an argument may be relevant. It is not enough to argue the general defense, but its elements should be proven by the offender. In some legal systems it should be proven through raising reasonable doubt that the elements of the defense have been actually existed in the case, and in other legal systems they should be proven by a preponderance of the evidence. Accordingly, the prosecution has the opportunity to refute the general defense.

General defenses of the *in personam* defense type include infancy, automatism (loss of self-control), insanity, intoxication, factual mistake, legal mistake and substantive immunity. General defenses of the *in rem* defense type include self-defense (including defense of dwelling), necessity, duress, superior orders, and *de minimis* defense. All these general defenses may negate the offender's fault.

2.2.3 The Absolute Legal Presumption Framework of General Defenses

The secondary principles of the principle of fault are at the basis of the general defenses in criminal law, including the insanity defense. As negative fault elements, general defenses operate by negating the offender's fault, and consequently his criminal liability. Thus, no criminal liability can be imposed unless all the relevant requirements of the mental element are met, and even if only one general defense can be applied, while all mental element requirements have been fulfilled beyond any reasonable doubt, criminal liability still cannot be imposed.

Whereas mental element requirements are cumulative, general defenses are not. It is not necessary to prove all general defenses in order to prevent imposition of criminal liability: one defense is sufficient. Therefore, it is enough to refute one component of the mental element requirement (or apply one of the general defenses) in order to prevent imposition of criminal liability. By contrast, the prosecution must prove all mental element requirements and refute all relevant general defenses.

Proving facts relating to the mental state of the offender is not always simple, but it is vital. To make evidence of both positive and negative fault elements accessible

App. Rep. 266; Anthony, [1965] 2 Q.B. 189, [1965] 1 All E.R. 440, [1965] 2 W.L.R. 748, 49 Cr. App. Rep. 104, 129 J.P. 168; Humphreys, [1965] 3 All E.R. 689, 130 J.P. 45.

to both parties, most legal systems resort to legal presumptions that implement these elements.[127] Thus, in most legal systems the provisions constituting the general defenses form a framework of absolute legal presumptions (*praesumptio juris et de jure*). An absolute legal presumption is irrefutable if all of its elements are proven.[128] The cumulative result of the application of the general defenses is the negation of the offender's fault, and therefore prevention of the imposition of criminal liability.

Although the offender's fault is proven by positive evidence, as long as the absolute legal presumption prevails, the offender's fault is considered to be repudiated. Thus, if the presumption of insanity is proven,[129] the absolute and irrefutable conclusion is that the offender has committed the offense with no fault, with the practical result that no criminal liability can be imposed on him. Even if the prosecution presents indisputable evidence to the court that the offender meets the requirements of the fault despite the presumption of insanity, it does not change the outcome.

Thus, the absolute legal presumption of the general defenses is a powerful legal instrument in proving the offender's fault. All general defenses, including the insanity defense, are part of this framework, which makes it easier to apply the negative fault elements. Absolute presumptions, however, may be over-inclusive. When the fault of the insane offender has been consolidated, and all the elements of the presumption of insanity are present, the presumption of insanity is over-inclusive.

The rationale for determining an absolute legal presumption framework with regard to general defenses is similar to the rationale employed for the mental element. Most of these presumptions have been derived from the long-standing human experience, and are based on considerations of efficiency and on wider social considerations. For example, the presumption of infancy derives from the human experience regarding the ability to consolidate fault at certain ages, from the social determination that from certain age onward it is appropriate to be subject to criminal liability, and from the efficiency of setting a certain biological or mental age as a barrier against criminal liability. The situation is the same in the case of insanity.

Furthermore, as far as the general defenses are concerned, the presumptions framework is also intended to balance the presumption framework of the mental element, one facilitating the proof of mental element for the prosecution, the other facilitating the proof of general defenses for the offender. The efficiency of this framework also has to do with obviating the need for the judicial system to accurately determine the offender's fault.

[127] Most common examples referring to the mental element requirements are indirect intent, transferred malice and willful blindness.

[128] Evans v. Bartlam, [1937] A.C. 473, 479, [1937] 2 All E.R. 646.

[129] For the presumption of insanity see above at Sect. 1.3.1.

Most of the time, but not always, the absolute legal presumption concerning the general defenses works in favor of the offenders. For example, when the offender is an infant but has the mental capability to consolidate the fault, the presumption works in his favor. When, however, the offender is biologically past infancy but is mentally retarded, and the legal system determines infancy in biological terms, the presumption does not work in favor of the offender, who must refute the fault proven by the mental element. This is the situation with all other general defenses, including insanity. Nevertheless, the fact that one presumption is not relevant does not prevent using another presumption in favor of the offender.

For example, the offender may claim insanity, and his claim may be rejected. The rejection does not affect the infancy defense, if such defense is claimed in addition to the insanity defense, if the offender is diagnosed as mentally retarded and if the local legal system measures infancy in mental terms. Indeed, no connection is required between the defenses. The insanity defense does not prevent resorting to self-defense, regardless the offender's mental state when the offense was committed.

General defenses are divided into exemptions and justifications, matching the secondary principles of the principle of fault. When the relevant general defense refers to the personal state of the offender (*in personam*), it is classified as an exemption; when it refers to data related to the offense or to impersonal characteristics (*in rem*), it is classified as a justification. This classification has practical consequences in various contexts. For example, in complicity cases, exemptions are relevant only to the accomplice who consolidates them, whereas justifications are relevant to all accomplices.

For example, A and B are joint-perpetrators of murder. A claims insanity and is acquitted. Because A's insanity is classified as a personal characteristic, it does not affect B's criminal liability. But if A claims self-defense it may affect B's criminal liability because in this case B is a joint-perpetrator of legitimate self-defense and not of murder. This is not an innovative approach but the mere implementation of the rule of personal and impersonal characteristics.[130] Classification of the reason

[130] United States v. Azadian, 436 F.2d 81 (9th Cir. 1971); Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968); State v. Hayes, 105 Mo. 76, 16 S.W. 514 (1891); Hui Chi-ming, [1992] 1 A.C. 34, [1991] 3 All E.R. 897, [1991] 3 W.L.R. 495, 94 Cr. App. Rep. 236; Rowley, [1948] 1 All E.R. 570, 46 L.G.R. 224, 112 J.P. 207, 32 Cr. App. Rep. 167; Director of Public Prosecutions v. Shannon, [1975] A.C. 717, [1974] 2 All E.R. 1009, [1974] 3 W.L.R. 155, 59 Cr. App. Rep. 250, 138 J.P. 587; Surujpaul, [1958] 3 All E.R. 300, [1958] 1 W.L.R. 1050, 42 Cr. App. Rep. 266; Anthony, [1965] 2 Q.B. 189, [1965] 1 All E.R. 440, [1965] 2 W.L.R. 748, 49 Cr. App. Rep. 104, 129 J.P. 168; Humphreys, [1965] 3 All E.R. 689, 130 J.P. 45. Compare: State v. Graham, 190 La. 669, 182 So. 711 (1938); Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979); Commonwealth v. Phillips, 16 Mass. 423 (1820); State v. Duncan, 28 N.C. 98 (1845); State v. Ward, 284 Md. 189, 396 A.2d 1041 (1978); Bowen v. State, 25 Fla. 645, 6 So. 459 (1889); Ray v. State, 13 Neb. 55, 13 N.W. 2 (1882). See more: McCall v. State, 120 Fla. 707, 163 So. 38 (1935); Rooney v. United States, 203 F. 928 (9th Cir. 1913); Christie v. Commonwealth, 193 Ky. 799, 237 S.W. 660 (1922); State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951).

Table 2.1 Division of general defenses into exemptions and justifications

Exemptions	Justifications
•Infancy	•Self-defense
•Automatism	•Dwelling defense
•Insanity	•Necessity
•Intoxication	•Duress
•Personal immunity	•Superior orders
•Factual mistake	•*De minimis*
•Legal mistake	

for imposing criminal liability on one party may affect the criminal liability of other parties.

The mechanism by which general defenses are created varies with each legal system because of different social attitudes toward the relevant issues, but the general framework is similar. For example, the presence of self-defense as general defense in one legal system does not guarantee that it is available in another legal system to the same extent and under the same conditions, but most legal systems share the core of self-defense as a general defense in criminal law. The situation is similar with regard to insanity. The division of general defenses into exemptions and justifications is shown in Table 2.1.

2.2.4 Between the Mental Element Requirement and General Defenses

The mental element requirement and the general defenses are aspects of the same principle of fault. But what is the relation between them? For example, are general defenses relevant in strict liability offenses, where no awareness is required? As noted above, the mental element requirement and general defenses are the positive and negative aspects of the principle of fault in criminal law.[131] These aspects reflect the fault as one consolidated term, and therefore, whenever the offense requires fault of any kind, both the mental element and the general defenses are relevant.

All types of mental elements require fault. The fault may vary for the different types of mental element, and the general defenses represent the negative aspects of each type of fault. Therefore, all general defenses are relevant for all individual offenses of every type of mental element required.

In general intent (*mens rea*) offenses, the fault is contained in the offender's awareness, and in result offenses, also in the offender's will.[132] The general defenses claimed with regard to general intent offenses are envisioned to negate the fault derived from the offender's awareness and will. Thus, in the case of a

[131] See above at Sects. 2.2.1 and 2.2.2.

[132] See above at Sect. 2.2.1.

general intent offense, the insanity defense is envisioned to negate the offender's fault based on the presumption that an offender in a state of insanity is incapable of consolidating the required fault manifest in awareness and will. Because general defenses are absolute legal presumptions, the insanity defense negates the offender's fault even if both awareness and will were consolidated in the case of the offender.

In negligence offenses, the fault is manifest in the offender's omission of consciousness. This fault involves the offender's inability to consolidate awareness in certain situations, although he is capable of doing so in general, and therefore had the duty to do so (*non scire quod scire debemus et possumus culpa est*). General defenses for these types of offenses are intended to negate the offender's fault manifest in the negligence. Thus, insanity in negligence offenses negates the offender's fault of not consolidating awareness when required, although a reasonable person would have done so.

In strict liability offenses, the fault is manifest in not taking all required reasonable measures to prevent the commission of the offense. Therefore, substantively the fault is not different from that of negligence. Thus, general defenses in strict liability offenses are intended to negate any fault of the offender, despite the fact that he failed to take all reasonable measures to prevent the commission of the offense.

General defenses are therefore relevant for all offenses (general intent offenses, negligence offenses, and strict liability offenses), regardless of the type of mental element required for them. The fault negated by the defenses need not be of certain type. As a result, the insanity defense can negate the fault in any given offense.

2.2.5 General Defenses and Other Defenses in Criminal Law

Most legal systems accept other defenses in criminal law, in addition to general defenses. Some of them are part of substantive criminal law, others are part of the criminal procedure. The distinction between general and other defenses has practical significance in various respects, especially as far as the burden of proof is concerned. The distinction between the two derives from their different structure and the way in which they follow from the principle of fault in criminal law. The general defenses have four main characteristics:

(1) Substantivity;
(2) Generality;
(3) Derivation connection to fault; and-
(4) Structure of absolute legal presumption.

These characteristics are discussed below.

Substantivity refers to the general defenses as part of the substantive criminal law, not of the criminal procedural law. The distinction between substantive and procedural law dictates this characteristic. If substantive law is the "what,"

procedural law is the "how." The purpose of procedural law is to implement the substantive law; substantive law determines the core. Procedural defenses are not considered general defenses in this context. For example, "no case to answer," procedural immunity, procedural obsolesce, etc. are not general defenses.

Generality is the most significant characteristic of general defenses. It refers to the general defenses not as part of a particular legal norm but as part of the general law, and therefore is applicable for all possible offenses. The insanity defense may be claimed with respect to any given offense, regardless of its classification. It may be claimed in cases of murder, rape, theft, tax evasion, etc. So are infancy, automatism, intoxication, and so on. This is what makes them *general* defenses.

For certain offenses there are unique defenses. For example, in most legal systems there are particular defenses for the offense of statutory rape.[133] Thus, if the ages of the persons involved were close, and if the sexual intercourse was part of their intimate relationship, these may be grounds for acquitting the offender. This defense is entirely irrelevant in cases of murder, theft, assault, and other offenses, and it is unique to statutory rape[134]; therefore, it falls outside the scope of general defenses. In most legal systems, general defenses are situated within the general part of the penal code, but this is not an essential for their classification.

Derivation connection to fault refers to the substantive content of general defenses. All general defenses refer to one element, which is the fault. General defenses address the negative aspect of fault, and their content is determined accordingly. These defenses do not refer to procedural aspects of the criminal process or to various elements of criminal law, only to the offender's fault. Thus, because insanity negates the offender's cognition or volition, it consolidates the derivation connection to the fault, which makes it a general defense.

The structure of the absolute legal presumption refers to the evidentiary structure of general defenses, as discussed above.[135] This structure balances that of the mental element, as both are aspects of the same principle of fault. These four characteristics are responsible for the distinction between general and other defenses.

2.2.6 The General Presumption for the Absence of General Defenses

The evidentiary structure of absolute legal presumptions is designed to facilitate proving mental states that are difficult to prove. The legal situation relates to both

[133] See, e.g., in Britain: Sexual Offenses Act, 2003, ch. 42, sec. 9.

[134] See more in Gabriel Hallevy, *Victim's Complicity in Criminal Law*, 2 Int'l J. Punishment & Sentencing 72 (2006).

[135] See above at Sect. 2.2.3.

the mental element and general defenses. Because of the presumption of innocence, which is accepted in most legal systems,[136] the duty of the prosecution is to prove all elements of the offense beyond reasonable doubt. Therefore, the mental element components are presumed not to exist, unless positively proven beyond reasonable doubt. This legal situation is necessary for the positive elements of criminal liability.

For the negative aspects of fault, however, this requirement would create too difficult a burden of proof for the prosecution, which would have to prove beyond reasonable doubt the non-existence of all general defenses at every trial, even if the offender and the court did not raise them. In other words, it would be the obligation of the prosecution in any criminal trial to prove that the offender was sane, not acting under automatism, not an infant, not acting under circumstance of self-defense, not under personal immunity, etc. Such a requirement would make criminal trials too cumbersome, forced to focus on irrelevant matters rather than on the relevant facts and legal provisions.

Therefore, most legal systems prefer to accept a general presumption for the absence of general defenses. Thus, unless a claim for general defenses is raised by anyone (prosecution, offender, or court), it is presumed that no general defense applies to the offense committed. For example, the offender may be insane but prefer to stand trial because he believes that the factual element of the offense has not been consolidated. Therefore, the offender does not raise the insanity defense, and neither does the court or the prosecution; consequently, it is presumed that the offense has been committed by a sane offender.

This situation applies to all general defenses. If the prosecution has proven all elements of the offense, and no general defense was raised by anyone, the prosecution is considered to have proven all necessary requirements of the offender's criminal liability. Only if a claim of general defense was raised by any of the parties, including the court, is the prosecution required to negate it. Various legal systems have chosen different burdens of proofs for countering this presumption. In most legal systems, the offender must raise at least a reasonable doubt to counter the presumption.[137]

By nature, the presumption is not absolute but relative and rebuttable (*praesumptio juris tantum*). In other words, it is presumed that the offense has been committed under circumstances in which the general defenses do not apply, unless one of the parties raises the claim that one or more general defenses are relevant in this case. The presumption is refuted if the absolute legal presumption of the relevant general defense is proven as required by the local legal system. This solution is considered legally efficient. Nevertheless, because some offenders may

[136] Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895); Vasquez, [1994] 3 All E.R. 674, [1994] 1 W.L.R. 1304, [1994] Crim. L.R. 845; Revitt v. Director of Public Prosecutions, [2006] E.W.H.C. 2266 (Admin), [2007] Crim. L.R. 238, [2006] 170 J.P. 729, [2007] 1 Cr. App. Rep. 266; article 6(2) of the European Convention on Human Rights.

[137] More, [1987] 3 All E.R. 825, [1987] 1 W.L.R. 1578, 86 Crim. App. Rep. 249, [1988] Crim. L.R. 176; George P. Fletcher, Basic Concepts of Criminal Law 94–99 (1998).

be entitled to various general defenses, if the claim is not raised, by mistake or as a result of ignorance, it is not examined at all, a situation that is more common if the offender is not represented, or not represented properly.

2.3 *In Personam* General Defenses in Modern Criminal Law

The insanity defense is part of *in personam* general defenses. This group of defenses shares some characteristics, which we can use to describe the insanity defense accurately.

2.3.1 The Rationale of *In Personam* General Defenses as Negative Fault Elements

In personam general defenses are part of negative fault elements in criminal law, and they are mostly known as exemptions. Exemptions exempt the offender from criminal liability because of internal reasons or personal characteristics of the offender. Exemptions are valid regardless of the factual characteristics of the offense. For example, insanity is valid as general defense regardless of the type of the offense at hand. The personal characteristics are considered to prevent the offender from consolidating the fault required to commit an offense out of free choice.

Personal characteristics may be either permanent or temporary, and either independent or dependent in the presence of certain circumstances. Temporary insanity may endure for a very short period, whereas infancy and permanent insanity may endure for a long time. The offender's personal characteristics may be difficult to prove, therefore *in personam* general defenses are part of the framework of absolute legal presumptions.[138] Thus, an offender may be exempt from criminal liability, although the required personal characteristics do not exist *de facto*, as long as the terms of the relevant legal presumption are met.

For example, if the offender is under the biological age of criminal liability, he is exempt from criminal liability on personal grounds even if *de facto* he consolidated the required fault. The presumption is that if the relevant conditions are met the fault is nullified. The personal characteristics refer, in general, to the offender's personality, functionality, age, mental functioning, public functions, etc., unrelated to the impersonal characteristics of the offense. Thus, the insanity defense is classified as an *in personam* general defense because the offender is incapable of consolidating the required fault owing to mental deficiency. The same applies to the infant because of biological or mental age, to the intoxicated offender because of chemical reactions in his body, and so on.

[138] See above at Sect. 2.2.3.

In the past, general defenses were understood socially as forgiveness of the offender due to his personal situation.[139] In English common law, justifications led to full acquittal whereas exemptions resulted at most in an amnesty granted by the King. This distinction was abolished in 1838 by statute.[140] According to the old attitude, society forgives criminal liability for having certain personal characteristics. This attitude is inconsistent with modern criminal law, which upholds the principle of fault. When the fault requirement is not consolidated, criminal liability is not forgiven *ex post* but it not imposed *ex ante*, because no criminal liability can be imposed without fault (*nullum crimen sine culpa*).

Exemptions do not reflect social forgiveness but the absence of fault. Because fault is required for criminal liability, exemptions prevent its imposition *ex ante*. Forgiveness is not part of the rules of criminal liability but of the sentencing process, including the amnesty jurisdiction. Thus, criminal liability is not imposed on insane persons not because society forgave them for the commission of the offense, but because they failed to consolidate the required fault, and therefore failed to make a free choice between what is permitted and prohibited.

The modern approach to exemptions in criminal law may result in some prospective difficulties. Incorporating exemptions into modern criminal law may encourage potential offenders to commit offenses, if the relevant personal characteristics are present. Infants, insane persons, etc. may be encouraged to commit offenses, knowing that no criminal liability can be imposed on them. Although this may be the case for some exemptions, most general defenses include a fault-transformation function, described below,[141] that reduces the probability of misuse of these general defenses.

The modern attitude toward exemptions includes the understanding that it is pointless to deter through criminal liability an offender who is under internal coercion. Exemptions reflect the offender's internal coercion to commit the offense, so that the offender lacks the mental capabilities required to prevent the commission of the offense. The internal coercion can manifest as a negation of the offender's cognition, volition, or both. The internal coercion prevents the offender from erecting internal barriers against committing the offense. Therefore, in these cases criminal liability has no educational value for the offender, and in most legal systems it is considered pointless.

Consequently, imposing criminal liability on insane persons would not necessarily prevent the next commission of an offense, as long as the offender does not understand his behavior (cognition) or is not able to control it (volition).

[139] George P. Fletcher, Rethinking Criminal Law 807–810 (1978, 2000).

[140] 9 Geo. IV, c.43 (1838); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. Rev. 266, 275–276 (1975).

[141] Below at Chap. 4.

Exemptions function as personal characteristics for all criminal law provisions that require personal characteristics, as exemplified by the rule of personal and impersonal characteristics.[142] Most complicity events include common characteristics of the parties, but there is a question about the relevance of these characteristics to the criminal liability of all the parties. For example, if one party is exempt from criminal liability owing to general defense, would the other accomplices be exempt as well? To answer this type of question, it is necessary to distinguish between impersonal and personal characteristics.

Impersonal characteristics relate to the offense (*in rem*), whereas personal characteristics relate to the offender (*in personam*). Impersonal characteristics focus on the offense as a criminal event. If the offense is defined in such a way that only a specific type of offender can be involved, characteristics of the offense are still impersonal although they relate to the general identity of the offender. If the characteristics relate directly to the offenders and not to the event as a criminal offense, they are personal. Consequently, the same factual characteristics may function as impersonal for one offense and personal for another.

For example, the status of the offender as a married person functions as an impersonal characteristic in the offense of bigamy, but it functions as a personal characteristic in the offense of theft. If the delinquent event is bigamy, the offender must be married, and therefore the offender's marital status is part of the factual definition of the offense and it functions as part of the circumstances that comprise the factual element requirement. But theft requires no specific marital status of the offender, therefore the offender's marital status functions as a personal characteristic.

The rule of personal and impersonal characteristics relates to the relevance of factual characteristics for the criminal liability of all parties for the given offense.[143] For example, A, an unmarried person, conspires with B, a married person, for B to get married again. They execute their plan. Because in the case of this specific offense marital status is classified as an impersonal characteristic, both A and B are criminally liable for bigamy, although A has never been married. Because the marital status of B is an impersonal characteristic of the offense (*in rem*), it is relevant to all other parties, including joint-perpetrators, inciters, and accessories.

The rule does not state, however, that impersonal characteristics present in *one party* are relevant to all other parties, but only that impersonal characteristics

[142] See in general Gabriel Hallevy, The Matrix of Derivative Criminal Liability 248–258 (2012).

[143] The rule of personal and impersonal characteristics may be stated as follows: Impersonal characteristics of the perpetrator are relevant to all other parties, whereas personal characteristics of one party are relevant only to that party.

present in the *actual perpetrator* are relevant. For these characteristics to be part of the commission of the offense, it is necessary that they be present in the perpetrator.[144] For example, A, a married person, incites B, an unmarried person, to marry C. Although marital status in bigamy is an impersonal characteristic, this description is not of a delinquent event. The perpetrator is an unmarried person, therefore the entire event cannot be considered bigamy although the inciter is married.

When the relevant characteristics are classified as personal, it is immaterial what exact function the relevant party fulfills because these characteristics are relevant only to that party in which they are present.[145] For instance, A and B conspire to rob a bank and execute their plan. A is 7 years old and B is 30. A uses the infancy general defense and is acquitted. As the offense of robbery requires no specific age, the age of the party is a personal characteristic, and in this instance the infancy general defense is relevant to A, who is an infant, but not to B, who is an adult, although A is one of the perpetrators of the robbery. All *in personam* general defenses are considered personal characteristics.

Incorporating *in personam* general defenses into criminal law prevents the imposition of criminal liability on certain individuals, but does not necessarily prevent society from providing treatment for the offender, as noted above in the context of insanity.[146] This type of treatment is common to various cases of exemption from criminal liability on the ground of *in personam* general defenses. The insane offender is referred to medical treatment, the infant is referred to social and psychological treatment, the intoxicated offender is sent to drug and alcohol rehabilitation, etc.

The main objective of the treatment is social rather than personal. Treatment is intended to reduce the probability of reoffending rather than to care for the person of the offender. This type of treatment is considered relevant in cases of exemption

[144] Hui Chi-ming, [1992] 1 A.C. 34, [1991] 3 All E.R. 897, [1991] 3 W.L.R. 495, 94 Cr. App. Rep. 236; Rowley, [1948] 1 All E.R. 570, 46 L.G.R. 224, 112 J.P. 207, 32 Cr. App. Rep. 167; Director of Public Prosecutions v. Shannon, [1975] A.C. 717, [1974] 2 All E.R. 1009, [1974] 3 W.L.R. 155, 59 Cr. App. Rep. 250, 138 J.P. 587; Surujpaul, [1958] 3 All E.R. 300, [1958] 1 W.L.R. 1050, 42 Cr. App. Rep. 266; Anthony, [1965] 2 Q.B. 189, [1965] 1 All E.R. 440, [1965] 2 W.L.R. 748, 49 Cr. App. Rep. 104, 129 J.P. 168; Humphreys, [1965] 3 All E.R. 689, 130 J.P. 45.

[145] Article 28 of the German penal code provides:

> (1) Fehlen besondere persönliche Merkmale (§ 14 Abs. 1), welche die Strafbarkeit des Täters begründen, beim Teilnehmer (Anstifter oder Gehilfe), so ist dessen Strafe nach § 49 Abs. 1 zu mildern;
> (2) Bestimmt das Gesetz, daß besondere persönliche Merkmale die Strafe schärfen, mildern oder ausschließen, so gilt das nur für den Beteiligten (Täter oder Teilnehmer), bei dem sie vorliegen.

See more: RG 25, 266; RG 26, 3; RG 56, 171; RG 61, 268; RG 65, 102; RG 71, 72; RG 75, 289; OGH 1, 95; BGH 8, 205; BGH 22, 375; BGH 23, 39; BGH 23, 103.

[146] Above at Sect. 1.4.2.

but not of justification, because personal characteristics are irrelevant in the cases of justification.

2.3.2 *In Personam* General Defenses vs. Diminished Criminal Liability

In addition to *in personam* general defenses, most legal systems recognize opportunities for diminished criminal liability. When a general defense is accepted, no criminal liability is imposed on the offender; the general defense negates the elements required for the imposition of criminal liability, therefore no intermediate option can be considered. Thus, when a general defense is accepted, the legal result is not reduced punishment or conversion of the charge into a lesser one, but complete prevention of imposition of criminal liability.

To accept a general defense in a given case, the court must check whether all terms of the defense are consolidated. The terms are the outcome of various social and scientific developments that vary with place and time.[147] Only occasionally are the terms conclusive, and match optimally the assumptions on which these defenses are based. For example, the characteristics of a reasonable infant at a certain age do not necessarily reflect all infants at that age; some have more developed mental capabilities than others. This is the situation with all *in personam* general defenses, including insanity.

Different persons who suffer from the same mental deficiency may be affected by it differently. They may have impaired cognition, volition, both, or neither. To cope with extreme cases of mismatch between factual reality and the defense, most legal systems adopted two types of balances: diminished criminal liability and the diminished sentencing. The two types of balance are independent, so that the court may use one of them, both, or neither. The former balances the criminal liability, the latter the final punishment. But if the general defense is accepted, no balancing is required because neither criminal liability nor punishment can be imposed.[148]

Diminished criminal liability is manifest in the transformation of the original offense, so that the offender is charged with a lesser offense that falls within the scope of the factual element.[149] For example, murder may be transformed into manslaughter or negligent homicide.[150] This balance may be carried out by the prosecution, by amending the charge, or by the court, by handing down a conviction

[147] See above in the context of insanity at Sects. 1.1.1 and 1.1.2.

[148] Lawrence Taylor and Katharina Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 Cal. W. L. Rev. 269 (1983); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 Rutgers L. J. 671 (1988).

[149] Stephen J. Morse, *Diminished Capacity*, Action and Value in Criminal Law 239 (Stephen Shute, John Gardner and Jeremy Horder eds., 2003).

[150] People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949); People v. Goedecke, 65 Cal.2d 850, 56 Cal. Rptr. 625, 423 P.2d 777 (1967); State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997). In Britain, section 2(2) of the Homicide Act, 1957, c.11 provides:

of the relevant offense. The legislator may also impose specific terms for mandatory implementation of the balance, and in extreme cases offenders may not be exempt from criminal liability but be subject to diminished liability *ex ante*.

Reduced sentencing (a lesser punishment imposed on the offender) is required when the judicial discretion has been restricted *ex ante* by statute, but nevertheless a deviation is required. In some legal systems the restriction may be over-inclusive, and the court may not allow to impose punishment outside a specified range.[151] The restriction may also be concrete and refer to a particular offense, as in the case of mandatory punishment for certain offenses.

In these instances, the court faces a situation in which the prescribed punishment does not match the circumstances of the case, especially not the personal circumstances of the offender. For example, the court may reach the conclusion that were it not for the statutory restriction, it would have imposed a much lighter punishment. Balancing by means of diminished sentencing enables the court to impose lesser punishments despite statutory restriction. This type of balance may differ among various legal systems[152]; in some legal systems it may be inclusive and enable the court to use it in all cases, whereas in other legal systems it may be restricted to certain circumstances.

The difference between legal systems in this respect derives from different political attitudes toward the judicial function in the society. When judicial discretion is broad, such balance is generally not required, because the court may impose both criminal liability and punishment without external restrictions. When judicial discretion is limited, formal balances of this type are required.

2.3.3 Inclusion of *In Personam* General Defenses

One of the most intriguing questions about general defenses is how they are determined. Different societies at different times use different defenses in their criminal law. The shared characteristics of *in personam* general defenses worldwide are often quite few, if any. General defenses are determined based on a combination of three factors:

(1) legitimate normative sources;
(2) scientific and technological developments; and
(3) social developments.

These factors are discussed below.

On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

[151] Andrew Ashworth, Sentencing and Criminal Justice 33–35 (4th ed., 2005).

[152] Michael Allen, Textbook on Criminal Law 144–154 (9th ed., 2007).

The legitimate normative sources for *in personam* general defenses are part of the principle of legality in criminal law.[153] General defenses are part of the norms in criminal law, therefore they are subordinate to the principle of legality. Consequently, the legitimate norms of criminal law are also the legitimate norms that apply to general defenses. Thus, in legal systems in which the court is not allowed to create new norms in criminal law, it is not allowed to create new general defenses either. In these legal systems, the discretion of the court is restricted to the implementation of the defense in the given case.

Scientific and technological developments are significant for the creation and definition of new defenses. Because of these developments, the list of defenses is not a closed one, but it is dynamic. Insanity has been accepted as a general defense in criminal law, and its modern scope has been defined based on developments in psychiatry.[154] A significant example of the role played by scientific development in accepting new defenses or reshaping the existing ones is the debate surrounding the chromosome XYY defense in the 1960s and 1970s.

Geneticists discovered that women carry XX chromosomes, whereas men carry XY chromosomes. Statistical research has shown that about 3 % of men carry an extra male (Y) chromosome (the XYY syndrome). The personal characteristics of most of these men include a tendency toward violence and maladjustment to social frameworks. This phenomenon is not considered insanity, and not all men who have this mutation are violent.[155] Awareness of the issue began in 1961, when the first report on such men was published, but the link between the mutation and social behavior was not researched until 1965.

[153] Sections 2(1),(1A),(1B) of the Homicide Act, 1957, c.11 provide:

> [(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which-
>
> (a) arose from a recognised medical condition,
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are--
>
> (a) to understand the nature of D's conduct;
> (b) to form a rational judgment;
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.].

[154] See above at Sect. 1.1.2.

[155] Kenneth J. Burke, *The "XYY Syndrome": Genetics, Behavior and the Law*, 46 Denv. L. J. 261 (1969).

Initially, there was an attempt to consider XYY carriers as insane, but most scientists and courts rejected this approach.[156] It was clear, that if accepted as a general defense, the XYY syndrome would be an *in personam* general defense because the mutation affects the offender's personal characteristics. It was also clear that accepting such a defense was the consequence of scientific development in genetics. This was the case if society accepted it as general defense or merely as a legitimate factor in diminishing criminal liability or sentencing.

Whenever a new scientific or technological development affects our understanding of personal human characteristics, it may also affect criminal law, including the scope of *in personam* general defenses. New developments do not necessarily result in a widening of existing defenses or in the acceptance of new ones, but they may cause the rejection of existing defenses or minimize their scope. For example, when a new mental disease is discovered, it affects the range of the insanity defense, and when the symptoms of a known mental disease are found not to affect cognition or volition sufficiently, the given mental disease may be removed from the domain of the insanity defense.

Social developments form the widest basis for changing general defenses, and at times they balance the scientific developments. For example, developments in psychology may affect the determination of the minimum age for criminal liability as part of the infancy defense, but social developments may challenge this determination and make infants subject to criminal liability. Social developments incorporate insights from various spheres of society, including cultural insights.

A significant example of the effect of social developments concerns the suggestions to accept cultural defenses in multicultural western states.[157] The cultural defense emerged against the background of multi-cultural societies, where the majority culture determined the scope of criminal offenses and general defenses. Consequently, offenders of different culture than the majority may hold different views about right and wrong.

In the American ruling in the case of *Kimura* the issue arose concerning the criminal responsibility of a mother of Japanese origin living in the United States for the deaths of her two children.[158] When the mother was told about her husband's unfaithfulness to her, she tried to commit suicide together with her two children (act of "oyako-shinju" in Japan) by drowning in the Pacific Ocean. Her two children died but she managed to survive. She was accused of the double murder of her children but over 25,000 American citizens of Japanese origin sent written statements to the Attorney General in Los Angeles saying that, according to Japanese culture, suicide that results in two motherless children is far more serious

[156] Millard v. State, 8 Md. App. 419, 261 A.2d 227 (1970).

[157] Gabriel Hallevy, *The Impact of Defense Arguments Based on the Cultural Difference of the Accused in the Criminal Law of Immigrant Countries and Societies*, 5 J. of Migration & Refugee Issues 13 (2009).

[158] People v. Kimura, Defense Sentencing Report and Statement in Mitigation; and Application for Probation, Case No. A-091133 (1985); Alison Dundes Renteln, The Cultural Defense 25 (2004).

than suicide together with the children because the latter does not expose the children to suffering, need and disgrace. This argument was also supported by experts on Japanese culture.[159]

The Attorney General accepted the argument, and a plea bargain was made according to which the accused was given a 1 year prison sentence and she was placed under supervision for 5 years. This case is a typical case in which a defense argument is made in a criminal case, based on the cultural difference of a offender living in an immigrant country. In the western world the drowning of two helpless children by their mother is viewed as a serious crime, which should be very seriously condemned by society. When considering a person for whom the culture is the one with which he was brought up society's response is severe and unforgiving. Nevertheless, when considering a person whose approach to life was formulated on the basis of a different culture, the question is raised whether that person should be treated the same way.

In the modern era, the problem is even more severe than in the past, as immigrant societies are now more prevalent. In fact, in the modern era culturally homogeneous societies are becoming rarer than culturally-mixed societies due to the influx of immigrants, a situation created by the high mobility of modern man, the technological development of means of transport, in particular air transport, the extensive use of outsourcing by corporations in the field of employment, policies of open borders in many countries and international organizations (the European Union and its member countries, for example), mass refugee movements and the existence of a large number of immigrant countries.[160] The populations of many countries of the world are principally immigrant populations, such as the United States, Canada, Australia and New Zealand. In other countries there are large communities of immigrants, for example, in Britain, Germany and France.

The migration of people educated in one culture to a society with a different culture creates friction between the cultures. When the cultural difference is one that does not damage the receiver immigrant society, normally there are no difficult legal or judicial problems. However, when there is harm to protected values of the

[159] Alison Matsumoto, *A Plea for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 Journal of International Law and Practice 507 (1995); Ronald Markman and Dominick Bosco, Alone with the Devil (1989); Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 International Journal of the Sociology of Law 403 (1989).

[160] Laura Maria Agustin, *A Migrant World of Services*, Woman and Immigration Law – New Variations on Classical Feminist Themes 104 (Sarah van Walsum and Thomas Spijkerboer eds., 2007); Rutvica Andrijasevic, *Problematising Trafficking for the Sex Sector: A Case of Eastern European Women in the EU*, Woman and Immigration Law 86 (Sarah van Walsum and Thomas Spijkerboer eds., 2007); Isabel Crowhurst, *Socio-Political and Legal Representations of Migrant Women Sex Labourers in Italy: Between Discourse and Praxis*, Woman and Immigration Law 241 (Sarah van Walsum and Thomas Spijkerboer eds., 2007).

receiver society, criminal law becomes relevant, and the difficult question in this regard is how to cater for the offender's defense arguments based on cultural difference.[161]

There are numerous examples of this type of argument. A person educated in a society in which killing for family honor (killing of a woman by her father, brother or husband due to inappropriate sexual relations) is legitimate, and does not constitute a criminal offence in that society, commits a murder in the immigrant society to which he migrates. In the ruling in the Australian *Dincer* case, the Muslim father from Turkey argued provocation when charged for stabbing his 16 year old daughter to death with a knife after she had left home with a non-Muslim man.[162]

A person educated in a society where the use of drugs is accepted, but he migrates to a society in which the use of drugs is completely outlawed.[163] A person educated in a society where sexual contact with family members is accepted, but he migrates to a society in which such contact is forbidden, either within or outside the marital framework.[164] A person educated in a society where a high intake of alcohol is acceptable, but he moves to a society in which alcohol consumption is prohibited in certain circumstances (when driving, at work), or in general.[165]

These situations exist also when there is a cultural difference among random visitors (tourists, business people). For example, during 2007 around 230 British citizens were arrested in the United Arab Emirates due to inappropriate conduct, being intoxicated in a public place and other offences, including consumption of alcohol in public leisure places, kissing in public and conduct of a sexual nature in those places. These British citizens were in the UAE as tourists and business people, and not as immigrants. In this framework two other British citizens were tried and imprisoned after having sexual intercourse on a beach in Dubai.[166] However, the main cultural and legal problem lies with immigrants who become part of the permanent population of immigrant countries, and not with random tourists.

The principal question with this type of case is how the receiver immigrant society should, in a criminal law framework, relate to an accused who bases his defense arguments on his cultural difference from the predominant culture in which he is charged. Defense arguments in criminal law based on cultural difference

[161] Isaac Englard, *Law and Culture Heritage in Multicultural Societies*, Law in Multicultural Societies 1 (E. I. Cuomo ed., 1985).

[162] Dincer, (1983) 1 V.R. 461.

[163] Peter T. Furst, Hallucinogens and Culture (1976); M. Adrian, *Substance Abuse and Multiculturalism*, 31 Substance Abuse and Misuse 1459 (1996).

[164] Frederic P. Stroke, *The Incestuous Marriage: Relic of the Past*, 36 U. Colo. L. Rev. 473 (1964); Fons Strijbosch, *The Concept of Pela and Its Social Significance in the Community of Moluccan Immigrants in Netherlands*, 23 Journal of Legal Pluralism 177 (1985).

[165] Andrew Sherratt, *Alcohol and Its Alternatives: Symbol and Substance in Pre-industrial Cultures*, Consuming Habits: Drugs in History and Anthropology 11 (Jordan Goodman, Paul E. Lovejoy and Andrew Sherratt eds., 1995).

[166] IFP, November 14, 2008.

generally relate to the personal fault of the accused. Most of these arguments relate to the negative aspect of fault, of recognized defenses in criminal law.[167] When a person presents defense arguments based on cultural difference, in fact he argues in this context, that he had no awareness of the mental element requirement in the specific offence. In this context he is totally unaware that his conduct was prohibited or improper conduct.[168]

With particular criminal offences, where awareness of unlawful and similar circumstances is expressly required, the argument is more difficult if the accused was really not aware of the fact that his conduct was against the law yet, in fact, he committed a criminal offence according to the laws of the receiver country. This argument is generally a factually accurate argument, in light of the accused being an immigrant who has not yet internalized the behavioral code practiced in the immigrant society into which he has been absorbed. In this type of case it will be difficult for the prosecution to discharge the onus of proof placed on it, and to prove that the accused was aware of the criminality of his conduct, to a degree beyond all reasonable doubt.

With specific criminal offences in which there is an element of motive or intent, the prosecution is obliged to prove their existence in the mind of the accused during the commission of his conduct. When an immigrant behaves in a manner not due to criminal motives, but based on a cultural practice which he acquired in his original culture, the element of motive generally does not exist and criminal responsibility cannot be imposed on him.[169] Sometimes the motive may be relevant for defense arguments too, that rule out the existence of the awareness of the accused of his criminal conduct.[170] Nevertheless, when motive is not part of the definition of the specific criminal offence it is not relevant to criminal responsibility. Most criminal offences do not require proof of motive.

For example, in the Canadian Supreme Court case of *Jack*[171] two members of the Coast Salish Indian people were charged with violating a provincial Wildlife Act by hunting and killing a deer out of season.[172] The reason for the hunt was the need to burn deer meat as part of a religious ceremony. An anthropologist explained

[167] Andrew Ashworth, Principles of Criminal Law 202 (5th ed., 2006); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199 (1982).

[168] In United States v. Carbonell, 737 F.Supp. 187 (1990) the court held:

> While. . . actions cannot be condoned, he did not act with what one would usually consider criminal intent. . . .was motivated wholly by a sense of obligation toward a person from the same town as he, who was experiencing financial hardship in a foreign country.

[169] Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 Yale L. J. 645 (1917); M. Ploscowe, *An Examination of Some Dispositions Relating to Motives and Character in Modern European Penal Codes*, 21 J. of Crim. L. & Criminology 26 (1930).

[170] Martin Wasik, *Partial Excuses in the Criminal Law*, 45 Mod. L. Rev. 516 (1982).

[171] Jack, [1985] 2 S.C.R. 332.

[172] Kristin Chapin, *Indian Fishing Rights Activists in an Age of Controversy: The Case for an Individual Aboriginal Rights Defense*, 23 Environmental Law 971 (1993); Michael R. Anderson, *Law and the Protection of Cultural Communities*, 9 Law and Policy 125 (1987); Michael

the significance of the practice to the court: "This is a very ancient traditional practice among all Coast Salish people and the essence of the ceremony is to provide food for deceased relatives by burning it and the essence of the food is transmitted through the smoke to the essence of the deceased person". Failure to burn deer meat as is required may result in some form of divine retribution.

The court dismissed the appeal for two reasons. The first was that "the prohibition of hunting deer out of season by the Wildlife Act does not raise question of religious freedom or aboriginal religion". The second was that "the intention of the Appellants that the deer meat be used for the burning ceremony was their 'ultimate intention' or 'motive'. As such, it is irrelevant to legal responsibility for the commission of the offense".[173]

The defense arguments in modern criminal law are more extensive than in the past. In many of the world's legal systems the defense argument of an error in the law or ignorance of the law has been accepted. According to this argument, when a person did not know of the existence of a specific prohibition in a specific law, and his lack of knowledge was considered by that legal system as "reasonable" he would not be criminally responsible. The defense argument based on the cultural difference of the accused in this context is that the accused had no knowledge of the existence of the specific criminal prohibition, and that according to his behavioral code in the culture from which he came to that immigrant country, he did not even imagine such a prohibition.[174]

Generally, these defense arguments do not refer only to specific criminal offences, but to the general type of prohibitions which, from the cultural point of view of the accused, cannot at all constitute criminal offences. An immigrant who arrives in an immigrant country does not study the criminal law code of that country—instead he assumes that certain types of conduct are forbidden and others are permissible according to perception. The older the immigrant, the more he is "locked" into his outlook on life.

In the past, a division of offences into *mala in se* and *mala prohibita* was accepted. *Mala in se* offences were viewed as prohibitions that any person—regardless of his culture, origin, gender, religion or age—knows and understands to be forbidden. On the other hand, *mala prohibita* prohibitions require knowledge of the specific law so that a private individual can be aware of them.[175] One of the main difficulties of this differentiation was connected to cultural discrepancies.

Mylonas-Widdal, *Aboriginal Fishing Rights in New Zealand*, 37 International and Comparative Law Quarterly 386 (1988).

[173] Louise Mandell, *Native Culture on Trial*, Equality and Judicial Neutrality 358 (Sheila L. Martin and Kathleen E. Mahoney eds., 1987); Renteln, *supra* note 158, at 95.

[174] Kenneth Maddock, *Culture and Culpability: Notes towards a Belated Response*, Commission on Folk Law and Legal Pluralism Newsletter (1992); People v. Estep, 39 Colo. App. 132, 566 P.2d 706 (1977).

[175] *Note: The Distinction between Mala Prohibita and Mala in se in Criminal Law*, 30 Colum. L. Rev. 74 (1930); Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 414, 419 (1958).

Murder has, for many years, been considered by western society as a *mala in se* offence which does not require a specific law to prohibit it. However, the situation in countries that recognize killing for family honor, for instance, is different.[176]

On occasion, the cultural defense arguments refer to insanity.[177] In these situations the argument is that the conduct of the accused indicates a psychological shortcoming. Such an argument ignores cultural difference as a legitimate difference between societies of people, and allows the culture of the receiving society to view the customs of the accused immigrant as a demonstration of a psychological deficiency. This argument is not a real cultural defense argument, as psychological disorder is not a type of culture, although there are times when the cultural gap is so wide that the accused does not have any defense to criminal charge other than by means of such an argument.

The defense arguments in criminal law, based on the cultural difference of the accused compared with the dominant culture in that society, may also rely upon arguments of justification for his conduct[178]—in other words, arguments that relate to justifying the specific conduct of the accused.[179] This is the case with a self-defense argument. Self-defense that is acceptable in western countries generally refers to protected, shared values of life, liberty, body and property. However, one of the questions connected to self-defense is whether this includes personal honor, self-respect or family honor. When the self-defense is sufficiently extensive to include defense of honor, it may also justify criminal conduct of killing for family honor.[180]

This judicial framework of arguments relating to the mental element or to self-defense is a well known framework of defense argument in criminal law based on the cultural difference of the accused, who is an immigrant who has moved from a society with one culture to a society with a different culture.[181]

Courts in countries that receive immigrants deal with the above types of defense arguments in criminal cases, based on cultural difference, predominantly through rejection of the arguments. In practice, in terms of the rules imposing criminal

[176] Richard L. Gray, *Eliminating the (Absurd) Distinction between Malum in se and Malum Prohibitum Crimes*, 73 Wash. U. L. Q. 1369 (1995).

[177] See e.g., People v. Wu, 235 Cal. App. 3d 614, 286 Cal. Rptr. 868 (1991); State v. Ganal, 81 Haw. 358, 917 P.2d 370 (1996).

[178] Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 7 Southern California Review of Law and Women Studies 437 (1993).

[179] John C. Smith, Justification and Excuse in the Criminal Law (1989); Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. Crim. L. & Criminology 277 (1986); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 Rutgers L. J. 671 (1988).

[180] James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation of Culture in the Criminal Law*, 108 Yale L. J. 1845 (1999).

[181] Marc Ancel, Social Defense – A Modern Approach to Criminal Problems 71–87 (J. Wilson and Marc Ancel trans., 1965, 1998, 2001); Nathaniel Cantor, *Measures of Social Defense*, 22 Cornell L. Q. 17 (1936); J. M. Canals, *Classicism, Positivism and Social Defense*, 50 J. Crim. L. & Criminology 541 (1959).

responsibility in those countries, in most cases courts make no distinction between imposing criminal responsibility on an accused with a cultural difference from the culture of the dominant majority, and an accused whose culture is part of the culture of the dominant majority. In a small minority of instances the arguments are accepted and the accused is acquitted.

One of the coming of age ceremonies in Nigeria includes making deep incisions on children's faces using a razor. This is what a mother of Nigerian origin, who lived in London, did to her two sons aged 9 and 14, in the case of *Adesanya*. The defense argument of the mother, who was accused of assaulting minors, was that she adhered to the ancient Nigerian custom as an inseparable part of her culture, and the culture of her children. The English court rejected the argument.[182]

In fact, the English court did not accept the defense argument based on the mother's culture, and this is in accordance with its moral, social and cultural approach. The outcome of such a ruling is that the court imposes its own moral, social and cultural approach on the immigrant accused, despite the cultural difference between the accused and the court.

With regard to the aforementioned case of *Dincer*,[183] a Muslim father of Turkish extract stabbed his 16 year old daughter to death with a knife after she had sexual intercourse with a man, and he stood trial in Australia where he lived. The technical legal form for the defense argument based on his culture was the provocation argument according to which his daughter provoked him by her action, and he was obliged to respond by immediately killing her, as soon as he heard about it. The Australian court, in this case, employed the objective test of "the reasonable person", but ignored the fact that this test is culturally orientated, based on the dominant culture.[184]

In the Australian case of *Masciantonio*,[185] the appellant, an immigrant of Italian origin, murdered his son-in-law, who had a history of violence against his wife, the appellant's daughter. The appellant claimed that he was provoked by the violence of his son-in-law. The High Court of Australia held, in a 4-1 opinion, that ethnicity

[182] R. v. Adesanya, unreported (1974); J., [1999] 2 F.C.R. 345, [1999] 2 F.L.R. 678, [1999] Fam. Law 543:

> . . .the existence of the Nigerian custom was no defense to the charge brought

[183] *Dincer, supra* note 162.

[184] Renteln, *supra* note 158, at 36.

[185] Masciantonio, 129 A.L.R. 575 (1995).

is not to be taken into consideration when determining the level of self-control of the "ordinary man"[186] and followed its former ruling.[187]

A similar approach is also taken by courts in immigrant receiver countries with regard to parents preventing modern healthcare reaching their children because of religious beliefs that preclude modern medical treatment,[188] to the use of traditional methods and witch doctors for dealing with their children's health problems,[189] to the use of violence in their children's education,[190] and to violence in the family.[191]

In western countries where there are multicultural immigrant communities, the question of use of drugs by immigrants often arises, as certain communities of immigrants may be accustomed to using prohibited substances which are not considered drugs in their original culture but, in the countries to which they have migrated, are prohibited drugs in every respect.[192] For example, chewing the leaves of the Khat plant is considered a routine matter in some cultures of eastern Africa and the Arabian Peninsula[193] although, in many western, migrant-receiving countries, Khat is viewed as a prohibited substance. These countries include the United States, Britain, Canada and New Zealand. The common approach in those

[186] The High Court of Australia held in *Masciantonio*, *ibid*, in a 4-1 opinion:

> [t]he test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control required by the law. Since it is an objective test, the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age. However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions.

See more in Stanley Yeo, *Sex, Ethnicity, Power of Self-Control and Provocation Revisited*, 18 Sydney L. Rev. 304 (1996).

[187] See, e.g., Stingel, (1990) 171 C.L.R. 312, 97 A.L.R. 1.

[188] State v. Chong Sun France, 379 S.E.2d 701 (1989); Cheng v. Wheaton, 745 F.Supp. 819 (1990).

[189] Hermanson v. State, 570 So.2d 322 (1990); Hermanson v. State, 604 So.2d 775 (1992); Commonwealth v. Twitchell, 617 N.E.2d 609 (1993); Walker v. Superior Court, 47 Cal.3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988).

[190] See e.g., Cr. App. 4596/98 N. v. State, PD 54 (1) 145 (2000).

[191] Aisha Gill and Kaveri Sharma, *Response and Responsibility: Domestic Violence and Marriage migration in the UK*, Woman and Immigration Law 183 (Sarah van Walsum and Thomas Spijkerboer eds., 2007).

[192] Renteln, *supra* note 158, at 73; Virginia Berridge, *Drug Policy: Should the Law Take a Back Seat?*, Lancet 301 (1997); Richard Rudgley, The Alchemy of Culture: Intoxicants in Society (1993).

[193] Renteln, *supra* note 158, at 74.

countries is to reject the defense argument based on cultural difference in this context.[194]

Nevertheless, there have been a few cases in which the argument is accepted. For example, in Texas there was legal debate about indecent sexual acts with children, in the cultural context of *Krasniqi*.[195] In this regard there was a case of a Muslim couple who emigrated from Albania to the United States, and the father was seen touching his 4 year old daughter in public in a manner that was considered to be sexual in nature.[196] A criminal investigation was commenced against the father, and civil proceedings were started against both parents to keep them separated from their children.

The defense included the opinion of an expert from the University of Massachusetts who explained that, according to the Muslim culture in Albania, this was not an act of a sexual nature but a common display of parental affection. The father was acquitted in the criminal case but custody of the children was taken away from the parents. The foster parents legally adopted the children and changed their religion from Islam to Christianity.[197]

Despite a few cases that largely go to mitigation, the principal approach of courts dealing with defense arguments based on cultural difference is to reject the arguments and to ignore any cultural differentiation between accused. The main reason for this is the general attitude of the courts that, in so doing, they are obliged to apply existing law to all of the people who come before them, regardless of how much an immigrant has become absorbed in the immigrant receiver society. In accordance with this approach, an immigrant who moves to a new country is presumed to have integrated with the society that accepts him in cultural terms, and the criminal law will not allow him relief based on cultural difference. The ruling of the English court in the above *Adesanya* case expressed this approach explicitly.[198]

This statement reflects the court's approach to most criminal cases. When there is conflict between the culture of the immigrant accused and the majority culture, in situations in which, according to the majority culture, a criminal offence has been

[194] United States v. Koua Thao, 712 F.2d 369 (1983); United States v. Khang, 36 F.3d 77 (9th Cir. 1994).

[195] Krasniqi v. Dallas County Child Protective Services Unit of the Texas Department of Human Services, 809 S.W.2d 927 (1991).

[196] Compare e.g., State v. Kargar, 679 A.2d 81 (Me. 1996).

[197] Renteln, *supra* note 158, at 59.

[198] R. v. Adesanya, unreported (1974); J, [1999] 2 F.C.R. 345, [1999] 2 F.L.R. 678, [1999] Fam. Law 543:

> You and others who come to this country must realize that our laws must be obeyed. . . It cannot be stressed too strongly that any further offenses of this kind in pursuance of tribal traditions in Nigeria or other parts of Africa. . . can only result in prosecution. Because this is a test case. . . I am prepared to deal with you with the utmost leniency. But let no one else assume that they will be treated with mercy. Others have now been warned.

committed, notwithstanding that the immigrant's culture sees it as legitimate conduct. Modern law and international human rights recognize a person's right to cultural difference. This is the right to live in accordance with his culture, to act in accordance with the cultural customs with which the person is familiar, to maintain a social and community life based on his culture, and even to pass on his cultural heritage to his descendants.[199] The strongest statement of a right to culture is found in the International Covenant on Civil and Political Rights (I.C.C.P.R.).[200]

The main reason for universal recognition of a person's right to a cultural difference derives from the recognition of the centrality of the person's original culture in his process of socialization and in the formulation of his outlook on life. When a person acts according to his culture, and his conduct does not harm the society that received him, despite the fact that there is a cultural difference, this does not constitute a problem. The problem arises when maintaining a culture harms the receiving society through commission of criminal acts. In such situations the operation of the criminal law is vital, and the question arises as to whether or not a person's right to follow his culture can be limited when there is cultural conflict within the context of a criminal case.[201]

In terms of the courts' fundamental approach, some allowance may be made for the principle of fault within the framework of considering criminal responsibility and it seems there is room to accept mitigation arguments based on cultural motivation in a criminal case when this involves an immigrant with a culture that is significantly different from the culture of the majority in that society.[202]

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[199] Herbert Marcuse, *Repressive Tolerance*, A Critique of Pure Tolerance 81 (Robert Paul Wolf ed., 1969); Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, The Rights of People (James Crawford ed., 1988); Denis Goulet, *In Defense of Cultural Rights: Technology, Tradition and Conflicting Models of Rationality*, 3 Human Rights Quarterly 1 (1981); Susan Mendus, The Politics of Toleration in Modern Life (2000).

[200] Article 27 of the International Covenant on Civil and Political Rights (I.C.C.P.R.) provides:

> In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

[201] For the general limitations on cultural rights see e.g., Nigel Rodley, *Conceptual Problems in the Protection of Minorities: International Legal Developments*, 7 Human Rights Quarterly 48 (1995); Sebastian Poulter, *Foreign Customs and the English Criminal Law*, 24 International and Comparative Law Quarterly 136 (1975); Andreas Follesdal, *Minority Rights: A Liberal Contractualist Case*, Do We Need Minority Rights? 59 (Juha Raikka ed., 1996).

[202] Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 Cal. L. Rev. 1053 (1994); James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation of Culture in the Criminal Law*, 108 Yale L. J. 1845 (1999); Jackson T. J. Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 American Historical Review 567 (1985).

When this involves concepts of personal justice relevant to the specific accused in a criminal case, it is probable that his fault is less than that of another accused not affected by cultural difference.[203]

Nevertheless, criminal law is not merely an expression of justice with the accused. In fact, the principal objective of criminal law is social control achieved by legal means (legal social control).[204] In this regard, law reinforces the social order in aiming to protect the society from harm to its peaceful, regular and orderly lifestyle. Maintaining social order constitutes efficient preservation of the majority culture. In this context, the social order is not unsettled, even if it entails a specific cost of damaging the justice of the accused who is an immigrant who believes he has acted properly within his own cultural norms but has not acted according to accepted conduct of the majority culture.[205]

Accepting defense arguments based on cultural difference in criminal law may also create uncertainty with regard to setting the boundary of permissible conduct and prohibited conduct. Any differential approach creates problems with criminal offences in general. For example, if the courts in an immigrant receiving country acquit an accused of possession and use of drugs due to his cultural difference, why should they not acquit the same accused of drug trafficking if he sold drugs to his two neighbors, one of whom belongs to the same culture and the other belongs to a different culture?[206]

In another example, if the courts in the immigrant country acquit an accused of an offence of killing because of his cultural difference—for instance, in the case of murder for family honor—why should they not acquit those accused of cannibalism if, according to their culture, they perpetuate the memory of the deceased by eating parts of his flesh, due to religious or cultural reasons?[207] If courts acquit some of the accused but not others, questions will arise about cultural preference and cultural discrimination in the eyes of the courts. What cultural or legal tools do the courts have for assessing a "correct" culture compared with an "incorrect" culture?[208] The courts already have significant difficulty with determining what is "culture" and which customs can be considered "cultural".[209]

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[203] Marc Ancel, *Les Doctrines Nouvelles de la Défense Social*, 1951 Rev. de Droit Pénal et de Criminologie 46 (1951).

[204] Alan Norrie, Crime, Reason and History – A Critical Introduction to Criminal Law 16–31 (2nd ed., 2006).

[205] Fontan Balestra, La Mission de Garantie du Droit Pénal 5 (1950).

[206] Jean Signorel, Le Crime et La Défense Social 133 (1912).

[207] See e.g., Gabriel Hallevy, *Victim's Complicity in Criminal Law*, 2 International Journal of Punishment and Sentencing 72 (2006).

[208] See, e.g., *In re* Fauziya Kasinga v. United States Department of Justice, 21 I. & N. Dec. 357 (1996); State v. Kargar, 679 A.2d 81 (Me. 1996).

[209] Kristen L. Holmquist, *Cultural Defense or False Stereotype? What Happens When Latina Offenders Collide with the Federal Sentencing Guidelines?*, 12 Berkeley Women's Law Journal 45 (1997); Kristin Koptiuch, *"Cultural Defense" and Criminological Displacements: Gender, Race, and (Trans)nation in the Legal Surveillance of U.S. Diaspora Asians*, Displacement,

The immigrant country, including its courts, is obliged to protect all of its citizens from internal and external harm. One of the prominent signals used in the modern world to identify such harm is through a criminal law regime. In other words, when a person commits a criminal offence in a particular society he harms that society. Thus, when a person from an immigrant culture acts in accordance with his culture but commits a criminal offence in the society to which he immigrated, the country and its courts are obliged to protect the country's citizens through criminal law. In this regard, there it is irrelevant whether the person who harms society does so on grounds relating to his culture.

Accepting defense arguments based on the cultural difference of the accused makes it more difficult in cultural and social terms for the accused and migrants from the same culture to become integrated into the society in which they have been accepted. The recognition of cultural difference through acquittal and non-recognition of his conduct as prohibited conduct, encourages the immigrant not to change the lifestyle he left but, in fact, to bolster it even at the cost of harming the receiving society.[210] In this regard, "When in Rome, do as Romans do" has been the conventional wisdom for centuries.[211] This principle of assimilation, at least for the purposes of law, might leave immigrants without any legitimate claim to the preservation of some, if not all, of their cultural practices, although this 'presumption' might be legitimately challenged on a number of grounds, including the fact that the immigrants' decision to leave their country of origin may not have been voluntary.[212]

Even if an immigrant's movement was based on a truly voluntary decision, it would be clearly wrong to equate voluntary departure with a decision to renounce the immigrant's culture. Immigrants who move to a new place generally wish to continue to follow their cultural traditions, and it would be wrong to deny them their cultural rights. In terms of liberal theory, a person's birthplace is arbitrary, something over which the person has no control, and, therefore, it would be unjust to deny cultural rights to immigrants on this basis.[213]

Accepting that immigrants deserve to maintain their cultural rights, the status of their children is less clear. It is difficult to ascertain whether the children will

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Diaspora, and Geographies of Identity 215 (Smadar Lavie and Ted Swedenburg eds., 1996); Donna K. Maeda, *Subject to Justice: The "Cultural Defense" and Legal Constructions of Race, Culture, and Nation*, Postcolonial America 81 (Richard C. King ed., 2000); Yxta Maya Murray, *The Battered Woman Syndrome and the Cultural Defense*, 7 Federal Sentencing Reporter 197 (1995).

[210] Drew Humphries, *No Easy Answers: Public Policy, Criminal Justice and Domestic Violence*, 2 Criminology & Pub. Pol'y 91 (2002); Lee W. Potts, *Criminal Liability, Public Policy, and the Principle of Legality in the Republic of South Africa*, 73 J. Crim. L. & Criminology 1061 (1982).

[211] This proverb is attributed to Saint Ambrose (Si fueris Romae, Romano vivito more; Si fueris alibib, vivito sicut ibi), i.e.: When in Rome, live as the Romans do; When elsewhere, live as they live elsewhere.

[212] Usually immigrants are assumed to have left voluntarily, as compared with refugees who were compelled to flee.

[213] Renteln, *supra* note 158, at 214.

identify more strongly with the national and cultural identity of the new country and the new society, or whether they will prefer to retain the cultural identity associated with their parents' country and culture of origin.[214]

A major consideration in this context is related to the territorial nature of criminal law. Criminal law applies to a particular territory[215] (*lex loci delicti*). Application of criminal law in that territory also applies to veteran inhabitants and immigrants, and even tourists and random visitors. When a person goes to a different territory he is perceived as someone who accepts the local laws. If this applies to tourists, business people and random visitors, they should be even more applicable to immigrants who wish to become a part of the permanent population of the immigrant country.

Thus, social developments may be the most important factor in creating new *in personam* general defenses, and widening, abolishing, or narrowing the existing ones. When a court accepts cultural defense as part of insanity, it accepts the argument that acting for reasons inherent in the offender's culture can be regarded as a mental disorder, and expanding the insanity defense accordingly.[216] Nevertheless, not all social developments are relevant for the development of general defenses, but only those that potentially affect personal fault.

[214] Ibid, at 214.

[215] Michael Hirst, Jurisdiction and the Ambit of the Criminal Law 60–109 (2003).

[216] People v. Wu, 235 Cal. App. 3d 614, 286 Cal. Rptr. 868 (1991); State v. Ganal, 81 Haw. 358, 917 P.2d 370 (1996).

Tangential *In Personam* General Defenses in Criminal Law and Their Implications for Insanity

3

Contents

Some *in personam* defenses in criminal law are tangential to insanity. The three main defenses are infancy, automatism, and intoxication. The definitions of these defenses shape the boundaries of insanity externally and indirectly. Their implications for insanity, with special emphasis on cases that fall within gray areas, are discussed below.

3.1 Infancy

Infancy is an *in personam* general defense that exempts the offender from criminal liability because of his personal situation. The general idea behind the defense is that an infant is incapable of consolidating the required fault and that society prefers alternative ways to address juvenile delinquency.

G. Hallevy, *The Matrix of Insanity in Modern Criminal Law*,
DOI 10.1007/978-3-319-20597-7_3

3.1.1 Emergence of the Infancy Defense in Criminal Law

The principal legal basis for the emergence of the infancy defense in its modern shape is Roman law. In the ancient East, the extended family was considered one legal unit, and the father of the family was expected to enforce the law within the family. For these reasons, the laws of the ancient East do not include explicit provisions concerning the infancy defense. Although provisions regarding inter-family relations are present, they do not necessarily relate to infants or minors. For example, law 169 of the Hammurabi Code relates to the first offense of a son, which should be forgiven by the father, but no age of the son is mentioned.[1] Law 195 prohibits hitting the father, but again, the age of the son is not mentioned.[2]

At the beginning of the fourth century CE, Roman law determined the minimum age for criminal liability. The age was set to 7 years,[3] for the inclusive presumption that under the age of 7 no person is capable of consolidating the fault required for the imposition of criminal liability.[4] The age of 7 was chosen based on life experience and on the typological value of the number seven in the pre-Roman cultures, which were assimilated into Roman law. The offender under the age of 7 was considered incompetent to stand trial (*doli incapax*)[5] and therefore not subject to criminal liability.

Beyond that age and until sexual maturity, a relative legal presumption (*praesumptio juris tantum*) prevailed, according to which the offender was incapable of consolidating the required fault until sexual maturity. Based on the examination of the offender's mental state, this presumption could be refuted,[6] however. When the offender became sexually mature, the presumption no longer applied. The infancy defense not only exempted the offender from criminal liability, but also protected him from torture.[7] These Roman insights remained in effect for centuries in most legal systems.

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[1] Law 169 of Hammurabi codex provides (L.W. King trans.):

> If he be guilty of a grave fault, which should rightfully deprive him of the filial relationship, the father shall forgive him the first time; but if he be guilty of a grave fault a second time the father may deprive his son of all filial relation.

See more in Samuel Greengus, *Legal and Social Institutions of Ancient Mesopotamia*, 1 CIVILIZATIONS OF THE ANCIENT NEAR EAST 469, 479 (Jack M. Sasson ed., 1995).

[2] Law 195 of Hammurabi codex provides (L.W. King trans.):

> If a son strikes his father, his hands shall be hewn off.

See more in RUSS VERSTEEG, EARLY MESOPOTAMIAN LAW 94–95 (2000).

[3] Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426 (1939); W. W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN 157–158 (2nd ed., 1932).

[4] Digesta, 9.2.5.2; Ulpian, 18 ad ed.

[5] RUDOLPH SOHM, THE INSTITUTES OF ROMAN LAW 219 (3rd ed., 1907).

[6] Digesta, 29.5.14; Ulpian, 25 ad ed.

[7] Digesta, 48.18.10; Ulpian, 50 ad ed.

Early English common law did not accept infancy as a general defense. The common praxis was the granting of amnesty to the juvenile offender *ex post*, after the conviction.[8] In the tenth century, it was determined that no capital penalty was to be imposed on offenders under the age of 15 years, unless the offender attempted to escape or refused to turn himself in to the authorities.[9] At the beginning of the fourteenth century, Roman law gained influence over English law through Cannon law, and the age of 7 was determined as the minimum age for criminal liability.[10]

A problem arose about determining the offender's age without formal registration of birth dates. This was solved through presenting questions to the offender and forming an impression based on the answers.[11] Thus, English common law referred in practice to the mental rather than the biological age of the offender. Formal registration of dates of births and deaths began in 1538 and became mandatory in 1603.[12] Therefore, until 1603 the legal situation was balanced, and no criminal liability was imposed on offenders who lacked the cognitive capability to consolidate the required fault, even if they were biologically beyond the minimum age. This changed with formal registration.

In 1338, English common law has ruled, based on Roman law, that children above the age of 7 were incompetent for purposes of criminal liability, but the presumption was refutable.[13] The court, however, did not set an upper age limit for applying the presumption. In the third quarter of the seventeenth century, the upper age was defined as 14 years, paralleling the age of marriage (the minimum marriage age for girls was 12 and for boys 14).[14] To form a uniform age for criminal liability, the age was set at 14 for both boys and girls. Offenders older than 14 years were considered as adults for purposes of both criminal liability and capital penalty.[15]

Thus, English common law created three main age groups for the imposition of criminal liability:

(1) under the age of 7—no criminal liability was imposed because of the absolute legal presumption concerning the incapability to consolidate fault;
(2) between 7 and 14 years—a relative legal presumption was applied regarding the incapability to consolidate fault, which could be refuted based on the offender's circumstances;
(3) above 14 years—the offender was considered to be an adult.

[8] A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 L. Q. Rev. 364 (1937).

[9] Frederick Levi Attenborough, The Laws of the Earliest English Kings 169 (1922).

[10] Kean, *supra* note 8, at p. 366; Woodbridge, *supra* note 3, at p. 435.

[11] Y.B. Rol. 30 & 31 Edw. I, 529 (1302); Y.B. Hil. 4 Edw. II, f.142 (1310); Y.B. Trin. 5 Edw. II, f.3 (1312); Y.B. Rol. 12 Edw. III, 627 (1338).

[12] Woodbridge, *supra* note 3, at p. 432.

[13] Y.B. Rol. 12 Edw. III, 627 (1338).

[14] Sir Edward Coke, Institutions of the Laws of England – Third Part 247b (6th ed., 1681, 1817, 2001); Matthew Hale, Historia Placitorum Coronae 16 (1736) [Matthew Hale, History of the Pleas of the Crown (1736)].

[15] Hale, ibid, at p. 25.

These age groups, which were accepted in English common law, became the basis for the modern infancy defense in most legal systems. This legal situation prevailed in Britain until 1933.[16] Section 50 of the Children and Young Persons Act, 1933, raised the minimum age for criminal liability from 7 to 8; in 1963, the statute was amended and the minimum age was defined as 10 years,[17] which moved the borderline between the first two age groups. This legal situation prevailed in Britain until 1998.

In some cases the legal question was whether the relative presumption of the common law is still valid, because the statute, which referred to the absolute presumption, was not explicit about a relative presumption.[18] Different courts ruled differently, until the British legislator explicitly abolished the relative presumption in 1998, so that children until the age of 10 are fully exempt from criminal liability,[19] and above that age are considered adults.[20] In 2000, the European Court of Human Rights ruled that in order to impose criminal liability on a juvenile offender above the age of 10, he must be capable of actively participating in the criminal process against him.[21]

In the United States, the English approach was embraced by both legislation[22] and court rulings.[23] Some states preferred to raise the minimum age from the traditional seven to a range between 7 and 12[24] (the reference being to biological and not to mental age).[25] But the statute is balanced by a relative legal presumption, which remains valid between the determined minimum age and the age of 14.

[16] Children and Young Persons Act, 1933, 23 Geo. V, c.12.

[17] Children and Young Persons Act, 1963, c.37.

[18] C. v. Director of Public Prosecutions, [1996] 1 A.C. 1, [1995] 2 All E.R. 43, 159 J.P. 269, [1995] 2 W.L.R. 383, [1995] 1 F.L.R. 933, [1995] Fam. Law 401, [1995] Fam. Law 401, [1995] 2 Cr. App. Rep. 166, [1995] R.T.R. 261. See more in David Ormerod, Smith and Hogan Criminal Law 322 (12th ed., 2008).

[19] Section 34 of the Crime and Disorder Act, 1998, c.37 provides:

> The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.

[20] T, [2008] E.W.C.A. Crim. 815, [2008] All E.R. (D) 215; Crown Prosecutions Service v. P., [2007] E.W.H.C. 946 (Admin.), [2007] 171 J.P. 349.

[21] T. v. United Kingdom, (2000) 30 E.H.R.R. 121; S.C. v. United Kingdom, [2005] Crim. L.R. 130; See more in Practice Note (Trial of Children and Young Persons), [2000] 2 All E.R. 285, [2000] 1 W.L.R. 659, [2000] 1 Cr. App. Rep. 483.

[22] For example, Minn. Stat. §9913 (1927); Mont. Rev. Code §10729 (1935); N.Y. Penal Code § 816 (1935); Okla. Stat. §152 (1937); Utah Rev. Stat. 103-i-40 (1933).

[23] State v. George, 20 Del. 57, 54 A. 745 (1902); Heilman v. Commonwealth, 84 Ky. 457, 1 S.W. 731 (1886); State v. Aaron, 4 N.J.L. 269 (1818).

[24] McCormack v. State, 102 Ala. 156, 15 So. 438 (1894); Little v. State, 261 Ark. 859, 554 S.W.2d 312 (1977); Clay v. State, 143 Fla. 204, 196 So. 462 (1940); *In re* Devon T., 85 Md.App. 674, 584 A.2d 1287 (1991).

[25] State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970); State v. Jackson, 346 Mo. 474, 142 S.W.2d 45 (1940).

Refuting that presumption requires significant evidence regarding the juvenile offender's mental capabilities.[26]

The general examination is whether the juvenile offender understands the meaning of the behavior that formed the criminal offense.[27] The Model Penal Code suggested raising the minimum age for criminal liability to 16, with an absolute legal presumption, abolishing the relative presumption (which then becomes unnecessary), and between the ages 16 and 18, bringing juvenile offenders to trial before a juvenile court.[28]

In France, the Napoleon Code of 1810 amended the old law, which was based on Roman law. According to the code, the minimum age for criminal liability was set at 16 years. This definition was based on an absolute legal presumption of incapability to consolidate the required fault under that age. In 1906, the minimum age for criminal liability was raised to 18, but the absolute presumption was replaced by a relative one, allowing the imposition of criminal liability on the juvenile offender but mitigating the punishment. In 1912 and again in 1945, the legal situation in France underwent a gradual change.

Juvenile offenders were divided into two groups: offenders under the age of 13, and those between 13 and 18. Offenders in the first group enjoy an absolute legal presumption, which prevents the imposition of any criminal liability on them. These offenders may be subject to alternative therapeutic treatment, which is not part of the criminal process. Offenders in the second group enjoy a relative legal presumption, which prevents the imposition of criminal liability, unless it is proven that they have the mental capability to consolidate the required fault. The punishment of these offenders is mitigated based on judicial discretion, and if the offender is under the age of 16, the court must impose a reduced punishment.[29] This legal situation was preserved in the criminal code of 1994.[30]

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[26] Godfrey v. State, 31 Ala. 323 (1858); Martin v. State, 90 Ala. 602, 8 So. 858 (1891); State v. J.P. S., 135 Wash.2d 34, 954 P.2d 894 (1998); Beason v. State, 96 Miss. 165, 50 So. 488 (1909); State v. Nickelson, 45 La.Ann. 1172, 14 So. 134 (1893); Commonwealth v. Mead, 92 Mass. 398 (1865); Willet v. Commonwealth, 76 Ky. 230 (1877); Scott v. State, 71 Tex.Crim.R. 41, 158 S.W. 814 (1913); Price v. State, 50 Tex.Crim.R. 71, 94 S.W. 901 (1906).

[27] Adams v. State, 8 Md.App. 684, 262 A.2d 69 (1970):

> the most modern definition of the test is simply that the surrounding circumstances must demonstrate, beyond a reasonable doubt, that the individual knew what he was doing and that it was wrong.

[28] See The American Law Institute, Model Penal Code – Official Draft and Explanatory Notes 73 (1962, 1985) (hereinafter "**American Model Penal Code**"), Article 4.10.

[29] Catherine Elliott, French Criminal Law 121–123 (2001).

[30] Article 122-8 of the French Penal Code provides:

> Les mineurs capables de discernement sont pénalement responsables des crimes, délits ou contraventions dont ils ont été reconnus coupables, dans des conditions fixées par une loi particulière qui détermine les mesures de protection, d'assistance, de surveillance et d'éducation dont ils peuvent faire l'objet. Cette loi détermine également les sanctions éducatives qui peuvent être prononcées à l'encontre des mineurs de dix à dix-huit ans ainsi que les peines auxquelles peuvent être condamnés les mineurs de treize à dix-huit ans,

German law accepts three age groups of juvenile offenders. The first group, under the age of 14, enjoys an absolute legal presumption, and these offenders are incapable of consolidating the required fault for criminal liability. This presumption is inclusive and independent of the offender's actual mental state.[31] The second group contains offenders between the ages of 14 and 18. These offenders may be subject to criminal liability based on their mental state, which the court must examine in every case separately.[32] The third group contains juvenile offenders above the age of 18, who are formally adults and may not be exempt from criminal liability on the basis of age.[33]

The United Nations Covenant on the Rights of the Child requires the determination of a minimum age for criminal liability and the establishment of therapeutic frameworks for the rehabilitation of juvenile offenders, without judicial sanctions.[34]

3.1.2 The Presumption of Infancy

The legal basis for the general defense of infancy is the presumption of infancy. Different developments in the various legal systems endowed this presumption with

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en tenant compte de l'atténuation de responsabilité dont ils bénéficient en raison de leur âge.

[31] Article 19 of the German Penal Code provides:

> Schuldunfähig ist, wer bei Begehung der Tat noch nicht vierzehn Jahre alt ist.

[32] Article 3 of the German Juvenile Act provides:

> Ein Jugendlicher ist strafrechtlich verantwortlich, wenn er zur Zeit der Tat nach seiner sittlichen und geistigen Entwicklung reif genug ist, das Unrecht der Tat einzusehen und nach dieser Einsicht zu handeln. Zur Erziehung eines Jugendlichen, der mangels Reife strafrechtlich nicht verantwortlich ist, kann der Richter dieselben Maßnahmen anordnen wie das Familiengericht.

See more in German rulings: RG 31, 161; RG 47, 385; RG 53, 143; BGH 10, 35; BGH 12, 116; BGH 26, 67, and in Hans-Heinrich Jescheck und Thomas Weigend, Lehrbuch des Strafrechts – Allgemeiner Teil 434–437 (5 Auf., 1996).

[33] Although these offenders are formally adults, certain juvenile procedural considerations are still relevant for them.

[34] Sub-Article 40(3) of the United Nations Covenant on the Rights of the Child provides:

> States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
>
> (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

different content. In some legal systems, the presumption is absolute, in others it is relative, and in still others it combines absolute and relative elements. Some legal systems prefer the biological age, others the mental age, and others yet a combination of both. The biological age differs in different legal systems. Despite all these differences between various legal systems, the principal legal basis expressed by the presumption of infancy is identical.

The general formulation of the presumption of infancy may be stated as follows:

A person under the age of criminal liability is presumed to be incapable of consolidating the required fault for the imposition of criminal liability.

Owing to the presumption of infancy, the fault required for the imposition of criminal liability is negated as long as the offender is under the age of criminal liability. The presumption of infancy creates the required linkage between the offender's age and the principle of fault in criminal law. Because the infancy defense negates the offender's fault, it is part of the negative fault elements, similarly to all general defenses.[35] The presumption of infancy contains two cumulative elements:

(1) the offender is considered a "person"; and
(2) the offender is biologically or mentally under the age of criminal liability.

These elements are discussed below.

The first element is the offender's personhood. When the offender is human, personhood is natural and the offender's infancy is measured biologically or mentally based on personal characteristics. But humans are not the only possible offenders. Legal entities, such as corporations, are also subject to criminal liability, and therefore to the negative fault elements as well. The infancy defense may be applied to corporations, but it requires certain adjustments. Naturally, the calendar age of the corporation is not the relevant parameter for the applicability of the infancy defense. A one-day-old corporation is already subject to criminal liability. But early stages of the enterprise, before the formal act of incorporation, may be considered as the period of the corporation's infancy.

These stages form the twilight zone of corporate law, between the corporation's non-existence and full personhood. The owners of the corporation may take various actions on its behalf before the formal act of incorporation: they may contact third parties, cause damages to them, and commit criminal offenses. After the corporation becomes formally a legal entity, the question arises whether it is criminally liable for the offenses committed on its behalf at these early stages. Application of

[35] For the negative fault elements see above at Sect. 2.2.2.

infancy defense to corporations would impose criminal liability on the owners, as the corporation was still not mature to be subject to such liability.[36]

The second element is the offender's age, which must be under the age of criminal liability. Determination of that age differs in various legal systems in

[36] Infancy may also be relevant to artificial intelligence systems, see GABRIEL HALLEVY, LIABILITY FOR CRIMES INVOLVING ARTIFICIAL INTELLIGENCE SYSTEMS 150–153 (2015). Generally, the mental capacity of corporations does not depend on their chronological "age," that is, the date of registration, and it is considered to be constant. Moreover, the mental capacity of a corporation derives from its human officers, who are mature entities. Consequently, there is no legitimate justification for the general defense of infancy to be applied to corporations. The question of interest to us is whether AI systems resemble humans or corporations in this context.

The answer is different for different types of AI systems, and we must distinguish between fixed AI systems and dynamically developing ones. Fixed AI systems begin their activity with the capacities they are going to have throughout their life cycle. These systems do not experience any change in their capacities with the passage of time. Consequently, their capacity to form mental requirements (e.g., awareness, intent, negligence, etc.) must be examined at every point where an offense has been committed, and the general defense of infancy does not apply.

But the starting and end points of dynamically developing AI systems are different. Their capacities, including mental ones, develop over time through machine learning or other techniques. If the system began its activity without the mental capacities required for criminal liability, and at some point it developed such capabilities, the time between the starting point and the point it possesses such capacities parallels that of childhood. During this period the system does not have capabilities required for the imposition of criminal liability.

But if the mental capacity of the AI system is already developed at the time of the commission of the offense, the question arises whether the infancy defense is still relevant because if the system possesses the required capabilities, it is criminally liable regardless of the point in time when these capabilities became available. The answer to this question is similar to the rationale for the general defense for human offenders, see Frederick J. Ludwig, *Rationale of Responsibility for Young Offenders*, 29 NEB. L. REV. 521 (1950); *In re* Tyvonne, 211 Conn. 151, 558 A.2d 661 (1989). We can examine the mental capacity of each child at any age and determine individually whether or not the child possesses the required capabilities, but this would be very inefficient. Any pre-schooler who may have hit another one in a kindergarten is immediately identified as not having the mental capacities required for criminal liability.

The other way is to establish a legal presumption whereby children under a certain age are not criminally liable. This is the situation with AI systems. Massive production of strong AI systems (e.g., dozens of prison guards, military robots, etc.) of the exact same capabilities and using the same learning techniques makes it unnecessary to evaluate the mental capacities of each individual robot. If we know empirically that a given system possesses all required mental capabilities after 264 hours of activity, and if such a robot commits an offense before having operated for 264 hours, the robot is presumed to be in its childhood and no criminal liability is imposed.

If the prosecution insists that the individual system possesses the required mental capacities already in its "infancy," or if the defense insists that the system does not possess the required mental capacities despite the fact that it has passed its infancy, the actual mental capacities of the systems can be examined and evaluated specifically. This would not be substantively different from the natural gaps between the biological and mental ages of humans. When the argument is made that a 17-year-old human offender is mentally underdeveloped, the court examines the offender's mental capacities and decides whether or not he has the required capacity to become criminally liable.

The above rationale is relevant for both humans and dynamically developing AI systems, but not for corporations. Therefore, it seems that the general defense of infancy can be relevant for this type of AI systems under the right circumstances.

two main aspects: the type of age being examined and the number of years. Two main types of age are considered: biological and mental. Biological or calendar age is counted from a person's birth or a company's formal incorporation. This type is simple to define and does not require special resources to determine. At the same time, determination of biological age for purposes of the infancy presumption is based on a general premise that the offender's mental age accurately matches the biological one. According to this premise, a 10-year-old boy has the mental capacity appropriate for a youth of that age, although many youths of that age naturally deviate from presumed capacity, in either direction, and can include geniuses at one end and mentally retarded individuals at the other.[37] The question is, what capacity is relevant for the infancy defense.

Because the infancy defense is part of the negative fault element, it negates the offender's fault on the basis of his mental capacity, which is presumed to be inadequate for the consolidation of the required fault. Using biological age for this purpose helps determine the offender's mental capacity. But the required age in this context is mental age, which does not infer the offender's mental capacity indirectly and presumably, but determinates explicitly what it is. Therefore, the appropriate type of age to be used for applying the infancy defense is mental age.

Discovering the offender's mental age is more complicated than discovering his biological age at a time when all births are recorded. Discovering the mental age requires psychological examination and challenging the offender's mental capacity. Determining the accurate mental age of the offender is crucial especially when there is a gap between the biological and mental ages. How should the court relate to a 17-year-old youth with mental capacity of a 4-year-old? And would it be just to prevent imposition of criminal liability on a youth who is biologically 1 year under the criminal liability age, but mentally 3 years above it?

The acute problem is with mentally retarded offenders. In most legal systems, mentally retarded persons are not considered insane, therefore the insanity defense is irrelevant for them. In legal systems that determine infancy on the basis of biological age, the infancy defense is also irrelevant for them. In these cases, without a special defense for the mentally retarded, criminal liability is imposed on these offenders despite the fact that their mental capacity is much lower than that required to consolidate criminal liability.

Mentally retarded persons are children locked in an adult body. They appear to be adults, but their inner world is entirely that of a child. It is common to distinguish between four main groups of mentally retarded persons based on their IQ[38]:

(1) easy mental retardation (IQ of 55–69): almost capable of leading a normal daily life, capable of working and of learning most daily skills;

[37] The IQ is based on the mismatch of the biological and mental ages. See Stephen Murdoch, IQ: A Smart History of a Failed Idea (2007).

[38] Yaacov Bazak, Law and Psychiatry – Legal Responsibility and Mental Defects 191–193 (2006).

(2) medium mental retardation (IQ of 40–54): capable of working in simple jobs and of having an organized daily routine, but with great effort;
(3) severe mental retardation (IQ of 25–39): incapable of working at all or of having an organized daily routine, and having difficulty acquiring simple skills; and
(4) deep mental retardation (IQ under 24): absolutely dependent on assistance, requiring constant supervision, and having difficulty responding to complicated stimuli.

Using the biological age of mentally retarded people as a scale for the applicability of the infancy defense is unjust. Applying the insanity defense is also unjust, because mentally retarded persons are not insane. Therefore, the most appropriate defense is the general defense that matches the offender's mental age, which is the infancy defense if it is determined based on the offender's mental and not biological age. In most legal systems, the mental age of juvenile witnesses has already been determined when the court is required to accept their testimony, in order to assess its reliability. If this practice is required and followed for witnesses, why not for offenders as well?

The second aspect of the offender's age is the number of years. Regardless of whether we are counting biological or mental age, the legal system determines the age in number of years required for the imposition of criminal liability. For example, the law may state that the mental capacities of a 12-year-old correspond to the minimum required capacity for imposing criminal liability. Different legal systems set different age limits, based on local social insight. Setting an age limit of 12 years reflects the social understanding of the age at which children should take responsibility for their behavior.

More protective societies prefer to expose young persons to criminal liability at an older age than less protective ones do. In the past, children were married by the age of 14, whereas today at this age they are still under their parents' supervision.[39] As life is extended because of rapid developments in the medical sciences, the period of childhood is also becoming longer. Modern children may be technologically sophisticated, but still retain the cognition and volition of children. Therefore, in the modern era, most legal systems tend to set older ages as the minimum age for the imposition of criminal liability.

The burden of proof for these two elements is on the party that wishes to rely on it during the trial. In most cases, this means that the burden of proof is on the offender, who seeks to prevent the imposition of criminal liability on the ground of insanity. It is not always the offender, however, who claims infancy. In some legal systems, in order to begin therapeutic procedures for the treatment of a child, it is necessary to initiate criminal proceedings, in which case the prosecution makes a claim of infancy. In such cases, the court stops the criminal proceedings, and after

[39] Although in most cases they were still under parents' supervision, even after having been married.

being persuaded of the offender's infancy (biologically or mentally), therapeutic procedures are initiated accordingly.[40]

The party that bears the burden of proof, whether it is the prosecution or the offender, needs to raise no more than a reasonable doubt regarding the age (biological or mental) of the offender. In some legal systems, general defenses must be proven by a preponderance of evidence. If the presumption is properly proven, the conclusion of the presumption is absolute, and therefore the offender is presumed to be incapable of consolidating the required fault for the imposition of criminal liability. Such a person would not be convicted under the given charge, and no criminal liability would be imposed on him.

The presumption relates to the time of the commission of the offense, and not the time of the trial. The time of the trial may be relevant for procedural purposes. For the imposition of criminal liability, the time of the commission of the offense is the only relevant time, exactly as it is the relevant time for checking all the other requirements for criminal liability, including the factual and mental elements. Thus, to use the infancy defense, a reasonable doubt must be raised regarding the age of the offender when committing the offense.

For the infancy defense to apply, an offender must be considered infant (biologically or mentally) at the time of the commission of the offense. If by the time he stands the trial, he is already adult, it does not affect the status of the criminal liability of the offender because the relevant time is that of the commission of the offense. This is because the presumption refers to the substantive law and to criminal liability, and it is therefore examined in relation to the commission of the offense.

Because the presumption of infancy is an absolute presumption, the conclusion cannot be refuted as long as all elements are proven. In this situation, no criminal liability is imposed on the offender if the offense has been committed while the offender was considered infant. Consequently, as an absolute presumption, it can be voided in two principal ways:

(1) Negating the elements of the presumption; or-
(2) Imposing legal restrictions on applying the presumption.

To negate the elements of the presumption, it is necessary to prove the inexistence of at least one of them in the supplementary burden of proof. For example, if the offender must prove all elements by raising a reasonable doubt regarding their existence, the prosecution needs to prove beyond reasonable doubt that at least one of them did not exist at the time of the commission of the offense. It is not necessary to prove the non-existence of *all* elements, but only of one, because the elements are cumulative conditions, and if even one of these conditions is not proven, the entire

[40] See below at Sect. 3.1.3.

presumption is not proven. When the relevant party fails to prove the existence of the elements of the presumption, the court cannot apply the presumption and the infancy defense is rejected.

The imposition of legal restrictions on the application of the presumption is part of the *ex ante* considerations of the legislator or the court. The legislator can exclude certain situations from the applicability of infancy. For example, certain offenses may not be subject to the infancy defense, certain ages may not be considered infancy, etc. Using this alternative may result in unjust outcomes for the offender, who may be minor and incapable of consolidating the required fault, therefore this alternative is rarely used.

3.1.3 Legal and Therapeutic Consequences

After the presumption of infancy has been proven it cannot be refuted, and the offender is exempt from criminal liability. Besides the general defense of infancy, most legal systems also accept particular defenses, both substantive and procedural, regarding the juvenile offender. The particular substantive defenses do not replace the general defense of infancy, but expand the defense for juvenile offenders into situations that are not included within the scope of the general defense. For example, most legal systems accept a particular defense against criminal liability in statutory rape if the offender was not older than the victim by more than a certain number of years.

This particular defense does not replace the general defense of infancy, but expands the exemption from criminal liability for offenders who are not necessarily under the age of criminal liability. Another common example is a minimum age for membership in a terrorist organization, which is above the minimum age for criminal liability. Procedural defenses grant juvenile offenders immunity from being prosecuted and tried in any criminal process, or immunity from certain punishments, although criminal liability may be imposed.

Thus, in most legal systems that allow capital punishment, juvenile offenders would not be subject to it. In most legal systems incarceration is not a valid punishment unless the offender is older than a certain age. Naturally, procedural and substantive questions are treated separately and examined at different points in time. The procedural question is examined at the time of the trial, whereas the substantive question is examined with reference to the time of the commission of the offense. Thus, if the offender was under the age of criminal liability when he committed the offense, but is prosecuted when he is above that age, he may be tried (procedure), but no criminal liability may be imposed (substance).

Even if no criminal liability is imposed on the juvenile offender because of his age, regardless of whether for substantive or procedural reasons, society is still aware of his need for social and personal treatment. Participation of the juvenile offender in the commission of an offense is in many cases a sign of distress. Although the treatment inherent in the criminal process may not be applicable for

the offender, other treatments may be relevant.[41] These are therapeutic alternatives to the criminal process, which under the circumstances is not applicable.

In many other cases, although criminal liability may be imposed and the criminal process is applicable to the juvenile offender, the mental damage caused by applying the criminal process can be disproportional and cause more damage than benefit. Therefore, the therapeutic alternatives may be relevant not only when it is impossible to impose criminal liability, but in a much wider range of cases. The key player in these cases is the juvenile court, which is part of most modern legal systems.[42] Juvenile courts have both civil and criminal jurisdiction, and therefore the therapeutic alternatives may be applied both in criminal and civil processes.

In general, when no criminal liability may be imposed on the juvenile offender, the civil process is relevant, and the offender is subject to treatment by the juvenile court through the intervention of the social services. In these cases, the social services are notified about the participation of the juvenile offender in the offense, and they intervene, attempting his rehabilitation. The social services need the confirmation of the court for some of the treatment, and they obtain it by applying to the juvenile court through a civil process.

When criminal liability may be imposed on the juvenile offender, i.e., the presumption of infancy is not applicable or has not been proven, the prosecution charges the offender, who is brought to criminal trial in the juvenile court. As part of the criminal process, the juvenile court has the judicial discretion to apply a therapeutic treatment instead of the criminal liability or in addition to it. If the juvenile court applies such treatment or examines whether the case is suitable for such treatment, the social services assist the court in obtaining a broader perspective on the case. In most cases, the therapeutic alternatives are considered both in relation to the imposition of criminal liability and to sentencing.[43]

Of course, the question of punishing juvenile offenders becomes relevant only when they are above the age of criminal liability. If they are, they may be subject to treatment but not by way of criminal proceedings. Thus, punishment is relevant to juvenile offenders who have reached the age of criminal liability but not the age of maturity. The range of specific ages for different types of punishments varies from one legal system to another according to the social concepts in effect at a given time and place.

The general assumption towards juvenile sentencing is that the young age and personal inexperience of the offenders require a deeper examination of the possibility of using rehabilitative programs and treatments, given that the personal

[41] Frederick J. Ludwig, *Rationale of Responsibility for Young Offenders*, 29 Neb. L. Rev. 521 (1950); *In re* Tyvonne, 211 Conn. 151, 558 A.2d 661 (1989).

[42] Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. Rev. 503 (1984); Keith Foren, *Casenote: In Re Tyvonne M. Revisited: The Criminal Infancy Defense in Connecticut*, 18 Q. L. Rev. 733 (1999).

[43] For sentencing juvenile offenders see Gabriel Hallevy, The Right to Be Punished – Modern Doctrinal Sentencing 77–80 (2013).

rehabilitation potential at this age is higher than later in life. Higher potential for rehabilitation means a greater chance to prevent reoffending by using appropriate means.[44] Moreover, because of the young age of the offenders, the assumption is that inappropriate treatment will result in society having to face their delinquency for a longer period of time than it does for mature offenders. Consequently, the courts tend to emphasize rehabilitation among the general purposes of punishment of juvenile offenders.[45]

Retribution is not affected by age of the offender, because the harm caused to society by the commission of the offense is evaluated objectively, and it is not affected by the age of the offender or by his identity. And although the subjective pricing of suffering included in retribution may be affected by the offender's age, this effect is not different from that of any other personal characteristic considered by the court as part of the subjective pricing of suffering. Therefore, the young age of the offender has no significant value from the point of view of retribution.

Deterrence may be affected by the offender's age. When deterrence is examined in order to impose the appropriate punishment intended to prevent reoffending, the court must consider the personal characteristics of the offender. In most cases, the measures needed to deter juvenile offenders are milder than those needed to deter mature offenders. The general assumption is that juvenile offenders lack life experience and are fully subject to the process of socialization,[46] but individual juvenile offenders may require extreme measures of punishment compared with adults, as their short experience with the law enforcement system shows that it is not effective.

Some juvenile offenders may be experienced in manipulating the system and some may be very stubborn in resisting the efforts of the system to prevent them from reoffending and integrate them in society. Deterrence treats the offender as a rational person, which may be an over-inclusion in the case of juveniles under certain circumstances because their life experience may be too poor, especially with respect to their tendency of taking risks or reject them. Thus, the expected values of benefits and punishments may be different when the offenders are juvenile, which must also be taken into consideration.

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[44] Andrew Ashworth, *Sentencing Young Offenders*, Principled Sentencing: Readings on Theory and Policy 294 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009); Franklin E. Zimring, *Rationales for Distinctive Penal Policies for Youth Offenders*, Principled Sentencing: Readings on Theory and Policy 316 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009); Andrew von Hirsch, *Reduced Penalties for Juveniles: The Normative Dimension*, Principled Sentencing: Readings on Theory and Policy 323 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009).

[45] George Mair, *Diversionary and Non-Supervisory Approaches to Dealing with Offenders*, Alternatives to Prison: Options for an Insecure Society 153 (Bottoms, Rex and Robinson eds., 2004).

[46] Andrew Ashworth, *Sentencing Young Offenders*, Principled Sentencing: Readings on Theory and Policy 294, 297–300 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009).

Public deterrence is also affected by the offender's age. When the message to society is forgiving and merciful and the court uses extremely mild measures, the public's tendency may be to take advantage of that forgiving and merciful approach in order to commit further offenses, paying a low price if caught. Harsh punishments toward juvenile offenders may deliver an effective deterring message because many juvenile offenders are still part of social frameworks (family, school, youth movement, sports team, etc.), which may exert pressure on the young offender to avoid delinquency. Thus, because of the deterring message broadcast by society to the public, the juvenile's family may put pressure on the youth not to offend.

Of all general purposes of punishment, rehabilitation is affected the most by the age of the offender. Rehabilitation is considered based on the evaluation of the offender's personal rehabilitation potential. The general assumption about juvenile offenders is that their personal rehabilitation potential is extremely high compared with that of adult offenders. This assumption sometimes relies on the existence of appropriate treatments and rehabilitative programs adapted to juveniles and targeted to reduce the rate of recidivism among them. Thus, the court is required to match the offender with the appropriate program to maximize the juvenile's abilities to rehabilitate.[47]

Nevertheless, the absence of an appropriate treatment or rehabilitation program can result in misuse or no use of the juvenile offenders' personal rehabilitation potential and in blurring the difference between juvenile and adult offenders in this context. Moreover, empirical research shows that inappropriate rehabilitation programs for juveniles not only fail to reduce recidivism but significantly increase it.[48] Indeed, the sensitivity of modern legal systems to this issue made most of them establish juvenile courts, tribunals, or departments in order to enable proper evaluation of the offenders' personal potential and to match them with proper treatments or rehabilitation programs.[49]

Incapacitation is affected indirectly by the age of the offender. Incapacitation is intended to reduce the social endangerment posed by the offender and stop him from reoffending. The personal characteristics of the offender play a dominant role in choosing the most appropriate measure for incapacitating the offender. The age

[47] Susan Easton and Christine Piper, Sentencing and Punishment: The Quest for Justice 237–270 (2nd ed., 2008).

[48] Gregory J.O. Phillpotts and Leslie B. Lancucki, Previous Convictions, Sentence and Reconviction – Home Office Research Study No. 53, tables 3–4 (1979).

[49] Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. Rev. 503 (1984); Keith Foren, *Casenote: In Re Tyvonne M. Revisited: The Criminal Infancy Defense in Connecticut*, 18 Q. L. Rev. 733 (1999); Barry C. Feld, *The Transformation of the American Juvenile Court*, Principled Sentencing: Readings on Theory and Policy 331 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009); Nicholas Bala and Julian V. Roberts, *Restraining the Use of Custody for Young Offenders: The Canadian Approach*, Principled Sentencing: Readings on Theory and Policy 338 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009); Lucia Zedner, *Sentencing Young Offenders*, Fundamentals of Sentencing Theory 176–181 (Andrew Ashworth and Mark Wasik eds., 1998).

of the offender does not necessarily affect the incapacitation measures. Nevertheless, measures used to incapacitate juvenile offenders are usually milder than those used with adults, as juveniles lack the rich experience and social frameworks (family, school, youth movement, sports teams, etc.) to assist in preventing them from reoffending.[50]

For example, in many cases it is more effective to place restrictions on a juvenile offender living in his parents' home or to involve parents more intensively in the juvenile's life and in imposing strict limits on his behavior than to impose a formal punishment. If the juvenile offender is sent to juvenile prison, his social connections with other juvenile offenders are expected to expand, develop, and later come to full realization in future offending. This assumption is, however, too general. To incapacitate some juvenile offenders, harsher measures may be required than those used with adults because their personal capabilities of self-control may be underdeveloped.

The dominant tendency in modern legal systems with regard to the sentencing of juvenile offenders is to increase the effect of rehabilitation as a general purpose of punishment. This is a social decision rooted in the desire to integrate juvenile offenders in society through appropriate treatment. Effective treatment of juvenile delinquents requires careful examination of their personal rehabilitative potential. Sensitivity in treating juvenile offenders, the need for expert treatment, and the higher rehabilitative potential of young offenders were the main causes for the development of unique approaches to treating juvenile offenders.

The younger the juvenile offender is, the greater the social benefit expected from reintegrating him into society because society benefits from a longer period of time free from that former offender's delinquency. Special juvenile courts may ease this process given their expertise, but even if no such court functions in a given society, the general court is required to seriously consider rehabilitation as a general purpose of punishment in these cases.

3.1.4 The Tangent: Infancy vs. Insanity

The infancy defense refers to juvenile offenders, and the insanity defense to insane offenders; then how can they be tangential defenses? Nevertheless, both defenses have to do with difficulties in consolidating the offender's fault. Analytically, infancy refers to mental immaturity and insanity to mental deficiency; the tangent is in mental immaturity, which is a mental deficiency. We can distinguish four situations involving a combination of insanity and infancy (Table 3.1).

The first situation refers to juvenile offenders who are completely sane. This situation appears to fall within the scope of the infancy defense alone, and the

[50] Andrew Ashworth, *Sentencing Young Offenders*, Principled Sentencing: Readings on Theory and Policy 294, 297–300 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009).

Table 3.1 Combination of infancy and insanity

	Juvenile	Adult
Sane	(1)	(2)
Insane	(3)	(4)

insanity defense us irrelevant. But this is not always the case. If the offender's immaturity, which prevents consolidating the required fault for the imposition of criminal liability, derives not from his biological but from his mental age, some legal systems consider this situation to be within the scope of the insanity defense. In these legal systems, mentally retarded offenders are protected under the insanity defense.[51] Applying insanity defense, however, may have various undesirable social consequences, and the offender may opt for the infancy defense if his mental age is under the age of criminal liability. These situations call for a clear distinction between infancy and insanity.

The second situation refers to adult and sane offenders. In these situations both the infancy and insanity defenses appear to be irrelevant, but this is not necessarily the legal situation. In many legal systems, mentally retarded adult offenders are considered both adult and sane because there is no defense for mental retardation. The court must execute various legal maneuvers to prevent the unreasonable outcome of imposing criminal liability on an offender who suffers from severe mental retardation and is incapable of understanding the criminal consequences of his behavior. Indeed, the offender's mental situation may match both the presumption of insanity concerning a deficiency in cognition and volition, and the presumption of infancy, because of his mental age. These situations also call for a clear distinction between infancy and insanity.

The third situation refers to insane juvenile offenders. When a child under the age of criminal liability commits an offense, he is subject to the infancy defense. But when the child suffers from a mental deficiency, he may also be subject to the insanity defense, which is independent of the offender's age. Because these defenses may have different legal and social consequences, the defense that is most appropriate, both legally and socially, should be applied. These situations also call for a clear distinction between infancy and insanity.

The fourth situation refers to insane adult offenders, where the insanity defense appears to be relevant, and the infancy defense is inapplicable. But what happens if the mental deficiency of the offender causes him to behave like a child? The clear internal reason for the behavior is the offender's mental deficiency, even if the external behavior and the offender's inner world are identical with those of a child.[52] The court may ask whether it should be impressed more by the formal reason or by the symptoms and the offender's inner world. These situations also call for a clear distinction between infancy and insanity.

[51] For the biological age and mental age see above at Sect. 3.1.2.

[52] See in this context the "wild beast" test for insanity discussed above at Sect. 1.1.2.

If the legal and social consequences of the insanity and infancy defenses were identical, the question of a clear distinction between insanity and infancy would have had a theoretical but not a practical value. In most legal systems, however, the two defenses have different legal and social consequences. When an offender is exempt from criminal liability for insanity, some of his civil rights and freedoms are taken away. For example, such individuals are not allowed to possess guns, drive motor vehicles, work with vulnerable persons (children, the mentally retarded, etc.), to work in certain jobs, conduct certain civil transactions, etc.

Most of these offenders are referred to psychiatric treatment, some with their consent, others under coercion. These consequences are usually not part of infancy defense, therefore the distinction has both theoretical and practical value. Comparison of the legal elements of the two defenses shows that what they have in common is the symptoms, and that the difference between them lies in the reasons for these symptoms: in the case of insanity the reason for the incapability of consolidating the required fault is mental deficiency, whereas in the case of infancy the offender's age.

Furthermore, the presumption of insanity involves a functional test of whether the mental deficiency *actually* negated the cognitive capabilities of the offender with regard to the commission of the offense at hand, or his volitive capabilities.[53] The presumption of infancy does not require examination of the *actual* effect of young age on the offender's cognition or volition in the commission of the offense. According to the presumption of infancy, such an effect is due to the offender's age (either biological or mental).

The infancy defense is therefore more abstract than the insanity defense. If the offender has a low IQ, which, however, does not affect cognition or volition, the insanity defense is not applicable, but the infancy defense is. But what if the offender's low IQ does affects cognition and volition? In such cases, the legal and social purposes of these general defenses dictate to inquire about the roots of the effect, i.e., the *actual* reason for the particular effect on cognition or volition.

If the offender's cognition or volition is disrupted by a mental deficiency, the insanity defense is more appropriate than the infancy defense, but if the reason is the offender's mental or biological age, the infancy defense is more appropriate. Appropriateness refers both to the legal and social consequences of these defenses, i.e., whether the exempt offender is referred to psychiatric treatment or to a juvenile rehabilitation program. The ultimate question, however, is whether the legal classification of mental retardation belongs with infancy or insanity.

Mental retardation may have the symptoms of insanity because under certain circumstances it attests to damaged cognition or volition. But mental retardation does not necessarily include such symptoms. Ultimately, what matters in the effect and symptoms of mental retardation is the similarity of the inner world of the offender with that of a younger person: the inner world of the mentally retarded person is similar to that of a younger *sane* person. Severe and deep retardation

[53] See above at Sect. 1.3.

correspond to younger ages, even to early stages of infancy; easy and medium retardation to somewhat older ages.[54] But all degrees of mental retardation correspond to younger ages within the range of sanity.

It appears, therefore, that mental retardation, when it is the sole reason for the commission of the offense, does not fall under the insanity defense, but rather the infancy defense. Legal systems that classify mental retardation as part of insanity defense fail to make an accurate distinction between the two defenses. A mentally retarded person is not insane. Such a person may be insane, but only if he suffers from a mental deficiency *in addition* to the mental retardation. In this case, as in the cases of insane juvenile offenders, the court must determine the reason for the offense: the age (biological or mental) of the offender or his mental deficiency. By choosing the appropriate defense, a suitable treatment can be matched to the offender.

3.2 Automatism

Automatism is an *in personam* general defense that exempts the offender from criminal liability because of his personal situation. The general idea behind the defense is that a person with an inner coercion is incapable of consolidating the required fault.

3.2.1 Emergence of the Automatism Defense in Criminal Law

The general defense of automatism, or loss of self-control, refers to situations in which an offense is committed while the perpetrator lacked control over the relevant body movements. The idea behind automatism has remained unchanged in classical and modern criminal law, but its classifications and examinations have changed. In the Anglo-American legal systems, automatism was traditionally classified with the positive requirements having to do with the offender's control. The offender was considered to be coerced if he had no control over his body movements while committing the offense. Thus, if the offense is committed without a free choice, no criminal liability is imposed.[55]

For example, when the ultimate reason for the commission of the offense is the offender's reflex, over which he has no control, the offender is presumed to have been coerced to commit the offense. In some Anglo-American legal systems, automatism was not considered a general defense, but a preliminary condition within the factual element requirement. The offender's conduct should have been controlled in order for it to be considered "conduct." Therefore, conduct was

[54] See above at Sect. 3.1.2.

[55] See, e.g., in Britain: Hill v. Baxter, [1958] 1 Q.B. 277, [1958] 1 All E.R. 193, [1958] 2 W.L.R. 76, 56 L.G.R. 117, 42 Cr. App. Rep. 51.

defined within the factual element requirement as "a willed muscular contraction," "a willed muscular movement," or "a willed bodily movement."[56]

These definitions went far beyond the scope of the factual element requirements because they involved mental element components. Will, naturally, is not part of the factual element but of the mental element. If the intention was to prevent criminal liability in the case of unwilled movements,[57] the proper legal measures for achieving this involve the principle of fault rather than the principle of conduct.[58] Consequently, modern legal systems gradually reclassified automatism and made it part of the principle of fault.[59]

It may have been argued that the offender's control over the movements of his body is to be examined in any case, so why should it matter whether it is examined under the principle of conduct or the principle of fault. One of the reasons is that the standards behind the two principles are not identical. Under the principle of fault, subjective examination is the rule, objective examination being considered an exception and softened through various measures. Under the principle of conduct, the only legitimate standard is the objective one. Including will under the factual element was perplexing and resulted in erroneous conclusions.[60]

The factual element requirement, addressing the criminal norm, requires essential external objective components in order to impose criminal liability, because *nullum crimen sine actu*. Any requirement placed on the offender's mental inner world is irrelevant here. This approach became dominant in modern criminal law. For example, the American Law Institute Model Penal Code defined the term "act" as "a bodily movement, whether voluntary or involuntary."[61] The voluntariness of

[56] Oliver W. Holmes, The Common Law 54 (1881, 1923); Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386, 409, [1961] 3 All E.R. 523, [1961] 3 W.L.R. 965, 46 Cr. App. Rep 1, per Lord Denning:

> The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily.

See more in Kay v. Butterworth, (1945) 173 L.T. 191; Leicester v. Pearson, [1952] 2 Q.B. 668, [1952] 2 All E.R. 71, 50 L.G.R. 534, [1952] W.N. 317; Hill v. Baxter, [1958] 1 Q.B. 277, [1958] 1 All E.R. 193, [1958] 2 W.L.R. 76, 56 L.G.R. 117, 42 Cr. App. Rep. 51; Poole, [2003] All E.R. (D) 448; State v. Mishne, 427 A.2d 450 (Me. 1981); State v. Case, 672 A.2d 586 (Me. 1996).

[57] See, e.g., in the United States: People v. Newton, 8 Cal.App.3d 359, 87 Cal.Rptr. 394 (1970).

[58] For the fundamental principles of criminal law see above at Sect. 2.1.1.

[59] See, e.g., J.W.C. Turner, *The Mental Elements in Crimes at Common Law*, The Modern Approach to Criminal Law 195, 203 (Radzinowicz and Turner eds., 1945).

[60] Paul H. Robinson, *Should the Criminal Law Abandon the* Actus Reus – Mens Rea *Distinction?*, Action and Value in Criminal Law 187 (Stephen Shute, John Gardner and Jeremy Horder, 1993, 2003).

[61] The American Model Penal Code, *supra* note 28, at p. 18 suggested to define in subsection 1.13 (2):

> (2) 'act' or 'action' means a bodily movement whether voluntary or involuntary.

the conduct became part of the negative fault elements, which prevent imposition of criminal liability in cases of involuntariness, but this was accomplished gradually.[62]

After classifying this requirement within the principle of fault, the question arose whether to include it as part of the positive or negative fault elements. In other words, should it be part of the mental element requirement or of the general defenses? This question has various legal consequences related to the legal differences between positive and negative fault elements.[63] The proper classification is within the negative fault elements, as part of the general defenses in criminal law, because of the existing factual reality, which is common in most cases.

An offender may consolidate full general intent (*mens rea*) and still have no control over his bodily movements. For example, an offender can act under an involuntary reflex, and at the same time be aware of his conduct of the commission of the offense. If this situation is relevant for general intent, it can easily be relevant also in cases of negligence and strict liability.[64] Nevertheless, the negative aspect of the principle of fault, which is expressed by the general defenses, can negate the offender's fault, even though the offender fully consolidated the mental element requirement. Therefore, automatism is relevant to the general defenses rather than to the mental element requirement.

Automatism refers not only to bodily reflexes but also to completely natural movements and third-party effects. For example, during a routine medical examination of reflexes, the physician taps the patient's knee. In a normal response, the patient moves involuntarily the foot and kicks the physician. Although the person is fully aware of the action, the general defense of automatism prevents imposition of criminal liability. This refers also to other natural situations such as sleeping, allergic reactions to insect bites, hypoglycemia, hyperglycemia, etc.

Consider a person standing inside a bus on his way home. The bus driver stops suddenly to avoid running over an animal, and the person falls on one of the passengers. Given that the passenger did not consent to this, it may be considered an assault. Although the person was fully aware of the situation, the general defense of automatism prevents imposition of criminal liability because the bodily movements were uncontrollable. Thus, automatism refers both to internal and external coercion. When functionally the offender could not have possibly controlled his bodily movements, the results of these movements may be subject to the general defense of automatism.

Automatism refers to the personal circumstances of the offender (*in personam*) rather than to the impersonal circumstances of the factual occasion (*in rem*). Because the capability to control bodily movements is part of the offender's personal data, automatism is classified within the general defenses as an exemption and not as a justification. Automatism is therefore an *in personam* general defense,

[62] Ibid, at p. 19, subsection 2.01(1):

> (1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.

[63] See above at Sects. 2.2.1 and 2.2.2.

[64] For the types of mental element requirements see above at Sect. 2.2.1.

and this is how European-Continental legal systems traditionally classify it.[65] European legal tradition has weakened this general defense through the doctrine of *actio libera in causa*, which in modern interpretation amounts to a transformation of the fault.[66]

Under the European legal approach to automatism, the moment of the commission of the offense is less significant than the moment when situation of automatism was entered. If the offender had control over his entry into this situation, and chose to place himself in a state of automatism, he is not entitled to the exemption from criminal liability for automatism. But this approach is vague, because offenders may enter into a state of automatism in various situations, including as a result of negligence. Below we discuss the issue of controlling entry into a state of automatism under the theory of transformation of fault.[67]

3.2.2 The Presumption of Automatism

The legal basis for the general defense of automatism is the presumption of automatism. Different developments in various legal systems endowed this presumption with different content. In some legal systems it is an absolute presumption, in others a relative one, and in others still it combines absolute and relative elements. Although the content of the presumption differs in each legal system, the principal legal basis, as expressed by the presumption of automatism, is identical.

The general formulation of the presumption of automatism may be stated as follows:

> **A person who is incapable of controlling his bodily movements and is not responsible for the conditions for this incapacity is presumed to be incapable of consolidating the required fault for the imposition of criminal liability.**

The presumption of automatism negates the offender's fault because the offender is unable to control his bodily movements or the circumstances that led to this condition. For example, if the offender is taking certain medication that makes him incapable of controlling his bodily movements at the time the offense is committed, but he determines whether or not to take the medication, the presumption of automatism does not apply. Therefore, two cumulative conditions must be met for the presumption of automatism to apply:

(1) inability to control one's bodily movements; and-
(2) inability to control the conditions that cause the inability to control one's bodily movements.

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[65] Article 122-2 of the French Penal Code provides:

> N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contrainte à laquelle elle n'a pu resister.

[66] Elliott, *supra* note 29, at p. 118.

[67] Below at Sect. 4.2.2.

Because the presumption of automatism negates the offender's fault, it becomes part of the negative aspect of the principle of fault, i.e., it is a negative fault element.

The second condition refers to the transformation of fault, and discussed below.[68] The first condition refers to the inability to control one's bodily movements can be the result of various circumstances. At times, the cause is purely physical, and the involuntary movements are produced automatically by the nervous system. These movements may be reflexes, twitches, and more: contraction of the heart muscles, knee jerks, tremors of various organs due to Parkinson disease, etc.[69]

Automatism, however, can manifest not only as actions, but also as inaction. When a person is required to carry out a certain act but his body does not obey, the condition is within the scope of automatism. This type of manifestation of automatism is more relevant to omission offenses and to derivative criminal liability.[70]

Although in many cases people who cannot control their bodily movements are unaware of them, automatism and unawareness are two different situations.[71] Automatism does not require awareness or unawareness. The offender's awareness of his automatic bodily movement does not negate their automatic character. Awareness of involuntary bodily movements does not make them voluntary. Indeed, awareness is required to control the body, but this is not the only condition for control. A Parkinson patient may be aware of involuntary bodily movements, but still incapable of controlling them.

Similarly, when a person is in a deep sleep and unaware of his acts, he is both unaware and incapable of control, a situation that is within the scope of automatism. Nevertheless, in cases of this type the offender may raise two arguments: being unaware of the factual element, as required by the mental element requirement (in general intent offenses),[72] and being under a situation of automatism. The two arguments complement each other because they cover both positive and negative aspects of the fault, but they may be relevant only in general intent offenses, because no awareness is required in other offenses (so that only automatism is applicable).[73]

Automatism refers to situations in which a person acts as if he were an automaton, without voluntary, central control over action or inaction.[74] The best-known situations recognized as automatism in most legal systems are epileptic twitches,

[68] Ibid.

[69] Dwaine F. Emerich, Reginald L. Dean III and Paul R. Sanberg, Central Nervous System Diseases 131–248 (2000).

[70] For the role of inaction within derivative criminal liability see Gabriel Hallevy, The Matrix of Derivative Criminal Liability 178–184 (2012).

[71] Attorney General's Reference (No. 2 of 1992) [1994] Q.B. 91, [1993] 4 All E.R. 683, [1993] 3 W.L.R. 982, 158 J.P. 741, 97 Cr. App. Rep. 429, [1994] Crim. L.R. 692, [1993] R.T.R. 337; Nelson, [2004] E.W.C.A. Crim. 333.

[72] For general intent offenses see above at Sect. 2.2.1.

[73] Charlson, [1955] 1 All E.R. 859, [1955] 1 W.L.R. 317, 39 Cr. App. Rep. 37.

[74] Kenneth L. Campbell, *Psychological Blow Automatism: A Narrow Defence*, 23 Crim. L. Q. 342 (1981); Winifred H. Holland, *Automatism and Criminal Responsibility*, 25 Crim. L. Q. 95 (1982).

post-epileptic states,[75] twitches caused by organic brain diseases or by diseases of the central nervous system, twitches resulting from strokes,[76] side effects of head injuries, side effects of oxygen shortage in the brain, side effects of hypoglycemia or hyperglycemia in diabetes patients,[77] somnambulism (sleep-walking),[78] shortage of sleep,[79] side-effects of bodily trauma[80] or mental trauma,[81] and others.[82]

It is not necessary to identify accurately the physical cause of automatism in a particular case for the presumption of automatism to apply; the possible causes for automatism do not form a closed list. Nevertheless, the situations are examined functionally, and in each case, the offender is required to show inability to control his bodily movements. When the offender is indeed incapable of controlling his bodily movements, automatism may be applicable regardless of the medical cause for the inability.

A person who suffers from amnesia and is capable to control his bodily movements but cannot remember doing so, is considered to be incapable of controlling them.[83] A person who was brainwashed is not considered incapable of controlling his conduct, even if he has a different perception of that conduct and understands it differently in retrospect.[84] Consequently, the court needs to examine automatism in functional terms. If the offender had *de facto* control over bodily movements in functional terms, the automatism defense is not applicable.

The first condition does not refer to control over bodily movements but to the inability to exercise control. The relevant examination is of that capability, not of control itself. If a person did not control his bodily movement but had the capability

[75] People v. Higgins, 5 N.Y.2d 607, 186 N.Y.S.2d 623, 159 N.E.2d 179 (1959); State v. Welsh, 8 Wash.App. 719, 508 P.2d 1041 (1973).

[76] Reed v. State, 693 N.E.2d 988 (Ind. App. 1998).

[77] Quick, [1973] Q.B. 910, [1973] 3 All E.R. 347, [1973] 3 W.L.R. 26, 57 Cr. App. Rep. 722, 137 J.P. 763; C, [2007] E.W.C.A. Crim. 1862, [2007] All E.R. (D) 91.

[78] Fain v. Commonwealth, 78 Ky. 183 (1879); Bradley v. State, 102 Tex.Crim.R. 41, 277 S.W. 147 (1926); Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 Res Judicatae 29 (1951).

[79] McClain v. State, 678 N.E.2d 104 (Ind. 1997).

[80] People v. Newton, 8 Cal.App.3d 359, 87 Cal.Rptr. 394 (1970); Read v. People, 119 Colo. 506, 205 P.2d 233 (1949); Carter v. State, 376 P.2d 351 (Okl. Crim. App. 1962).

[81] People v. Wilson, 66 Cal.2d 749, 59 Cal.Rptr. 156, 427 P.2d 820 (1967); People v. Lisnow, 88 Cal.App.3d Supp. 21, 151 Cal.Rptr. 621 (1978); Lawrence Taylor and Katharina Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 Cal. W. L. Rev. 269 (1983); Michael J. Davidson, *Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis*, 2000 Army Lawyer 5 (2000).

[82] Francis Antony Whitlock, Criminal Responsibility and Mental Illness 119–120 (1963).

[83] State v. Gish, 17 Idaho 341, 393 P.2d 342 (1964); Evans v. State, 322 Md. 24, 585 A.2d 204 (1991); State v. Jenner, 451 N.W.2d 710 (S.D. 1990); Lester v. State, 212 Tenn. 338, 370 S. W.2d 405 (1963); Polston v. State, 685 P.2d 1 (Wyo. 1984).

[84] Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Offender*, 63 Minn. L. Rev. 1 (1978); Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 Minn. L. Rev. 335 (1978).

of doing so, automatism is not applicable. For example, a person spinning a top does not control its movements, but he has the capability of doing so, for example, by using his hands to stop it or to change its course. In this case, the person is not considered to be in a condition of automatism.

Capability of control refers to the potential for control. When the offender has such potential, even if it is not realized, automatism becomes irrelevant. The object of this potential is the offender's conduct alone, i.e., the conduct component of the factual element requirement. Controlling mental components or thoughts is not considered realistic, and as long these thoughts have no explicit factual expression, they are beyond the scope and interest of criminal law (*nullum crimen sine actu*).

Other factual components of the factual element requirement are also irrelevant. In most offenses the circumstance components are beyond control. For example, the circumstance "woman" in rape is beyond the offender's control, and the victim is defined as a woman regardless any of the offender's actions. The result component is also beyond the offender's control, because it is considered to lie in the future. The offender is capable of controlling the conduct that is the cause of the result, but not the result itself.

Automatism refers not only to human offenders and may apply to corporations as well. Just as human offenders may be incapable of controlling their conduct, so are corporations. The criminal liability of a corporation is imposed by relating the factual and mental elements (as well as the derivative criminal liability) to the corporation. This is relevant to all offenses, regardless of the type of required factual element or of the degree of the required mental element. Therefore, if fault elements may be related to the corporation, there is no difference between positive and negative fault elements in this context.

When the general defense refers to human characteristics, which have significance only for human offenders, it cannot be applied to corporations, which lack that particular characteristic. In these cases, if there is a significant difference between humans and corporations, it would be justified not to apply the general defense to corporations. Therefore, in most legal systems automatism defense applies to humans alone. Nevertheless, the general defense of automatism may be applied to corporations because it does not refer to human characteristics exclusively.[85] Automatism in the case of corporations can occur in two types of cases:

[85] Automatism may also be relevant to artificial intelligence systems, see Gabriel Hallevy, Liability for Crimes Involving Artificial Intelligence Systems 153–156 (2015). Generally, AI systems can experience automatism in the context of criminal law due to external and internal causes. For example, a human pushes an AI robot onto another human. The robot being pushed has no control over that movement. This is an example of an external cause for automatism. If the pushed robot makes non-consensual physical contact with the other person, it may be considered an assault. The mental element required for assault is awareness, so if the robot is aware of that physical contact, both factual and mental elements requirements of the assault are met.

If the AI robot were human, it would have probably claimed the general defense of automatism. Thus, although both mental and factual elements of the assault are fulfilled, no criminal liability is imposed because commission of the offense was involuntary, or due to automatism. This general defense would prevent the imposition of criminal liability upon human offenders, and it should

(1) absence of control over the conduct of the corporation; or
(2) absence of control over a particular organ acting on behalf of the corporation.

The first type refers to cases in which the conduct of the corporation has been carried out directly by the corporation, unrelated to actions of any of its organs. A wide range of conducts can match this situation. For example, when a liquidation order is issued against a corporation in response to creditors' actions, significant changes and processes take place within the corporation, over which the corporation has no control. In most cases, these processes are considered to be acts carried out by the corporation.

Thus, as part of the liquidation order, all the employees of the corporation are considered to be dismissed, although this action may be against the will of the corporation. If, for some reason, such dismissal is illegal, the corporation cannot be considered criminally liable for it. If, however, the corporation brought this circumstance on itself by its previous conduct (e.g., not paying its debts, intending to be subject to a liquidation order as a result of probable legal action by its creditors), the transformation of fault, discussed below,[86] would negate the automatism defense, and the corporation would be considered criminally liable.

By contrast, if the liquidation order was completely unexpected or illegal, and was accepted in court by mistake, the corporation did not consolidate any fault in reaching this situation, and therefore no fault is transformed. Consequently, the corporation would be exempt from criminal liability based on the automatism defense.

The second type of cases refers to legal and operational relationships between the corporation and its organs. The term "organ" refers in general to all persons whose conduct may be considered as that of the corporation. These are the employees of the corporation, but not only they; for example, they can also be service providers acting on behalf of the corporation. In these types of cases, the automatism defense can refer to two main causes:

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also prevent the imposition of criminal liability upon robots. If the robot has no AI capabilities for consolidating awareness, there is no need for this defense because the robot would be functioning as a mere tool. The AI robot, however, is aware of the assault.

The ability of the AI robot to meet the mental element requirement of the offense makes it necessary to apply the general defense, which functions identically with humans and robots. An example of internal cause for automatism is the case of an internal malfunction or technical failure that causes uncontrolled movements on the part of the robot. The robot may be aware of the malfunction and still not be able to control it or correct it. This is also the case for the general defense of automatism. Whether the cause for the automatism is external or internal is relevant to the applicability of this general defense.

If the robot controlled these causes, however, the defense is not applicable. For example, if the robot physically caused a person to push it (the robot) onto another person (external cause), or if the robot caused the malfunction knowing the probable consequences of it for its mechanism (internal cause), the second condition of the defense is not met and the defense is not applicable. The situation is the same for humans. It appears, therefore, that the general defense of automatism is applicable to AI systems.

[86] Below at Sect. 4.2.2.

(1) the organ is incapable of controlling his conduct; and/or-
(2) the corporation is incapable of controlling the conduct of the organ owing to *ultra vires* actions.

The first cause has to do with the connection between the automatism of the corporation and of the organ. The inability of the organ to control his conduct is not related to the corporation, because automatism is an exemption (*in personam*), not a justification (*in rem*). Therefore, if regardless of the inability of the organ to control its conduct, this conduct would have been related to the corporation, the automatism of the organ would still not be related to the corporation. The key explanation for this legal situation lies in the rule of impersonal and personal characteristics, as discussed above.[87] Thus, personal characteristics are personal and not subject to one's relation to the corporation.

The second cause has to do with the *ultra vires* situations, where the organ does not adhere to the orders of the corporation. In these cases, the powers of the organ are specified by the corporation, but the organ exceeds them and commits a criminal offense. Nowadays, when private initiatives are rewarded by corporations, such incidents are quite common. In these cases, the organ is criminally liable for the offense, but the question of the criminal liability of the corporation still arises. If the corporation takes all reasonable measures to prevent the commission of criminal offenses, and nevertheless one of its organs commits an offense, is it just to incriminate the corporation, even if it had no means of controlling the conduct of the organ?[88]

For example, the general manager of a construction company authorizes a deputy to negotiate with a civil servant for obtaining a building permit. The deputy is warned not to bribe the civil servant or commit any kind of criminal offense, and it is made clear that if he fails, the corporation would not backup him up, and he will be fired immediately. The deputy understands the warnings, confirms them, and promises to adhere to them, but during the negotiation he bribes the civil servant. Is the corporation criminally liable for the offense?

In general, the deputy is criminally liable. But given that the corporation explicitly warned against committing criminal offenses, is there any legal basis for impose criminal liability on it? In this case, the corporation may raise the automatism defense, because it could not have controlled the organ's conduct. The *ultra vires* defense has not been accepted in criminal law in most legal systems, not with respect to the organ's powers or to those of the corporation. Therefore, the

[87] Above at Sect. 2.3.1.

[88] State v. Pincus, 41 N.J. Super. 454, 125 A.2d 420 (1956); People v. Alrich Restaurant Corp., 53 Misc.2d 574, 279 N.Y.S.2d 624 (1967); State v. McBride, 215 Minn. 123, 9 N.W.2d 416 (1943); Compton v. Commonwealth, 22 Va.App. 751, 473 S.E.2d 95 (1996).

corporation is criminally liable for the offenses committed by its organ, despite the fact that they were clearly *ultra vires*.[89]

This legal situation reflects the concept that the corporation acts through its organs, and as far as criminal liability is concerned, these organs are an inseparable part of the corporation. When the organ commits an offense while acting on behalf of the corporation, it is considered as if the corporation had committed the offense itself, regardless of whether or not it was within the powers of the organ to commit the offense. The criminal liability of the organ extends to the corporation as well.[90] And because the organ has control over his conduct, this controlled and voluntary conduct is applied also to the corporation.

The general social justification for this state of affairs, apart from the legal justification, is that the corporation has the obligation to choose the most appropriate officers, skilled, compliant with the law, and unwilling to commit criminal offenses. The corporation's choice of an officer who does not meet these standards is not an excuse for exempting it from criminal liability for the offenses committed by an officer acting in the capacity of an organ of the corporation. The corporation cannot hide behind its organs who commit criminal offenses, even if they are committed *ultra vires*.[91]

Furthermore, the presumption of automatism is not applicable in these cases because the corporation controlled the conditions that led to its inability to control the conduct of the organ, and its choice of officers is part of this capability. Finally, if the offense is not exposed, the corporation generally enjoys the benefits of the offense, which may act as an incentive for other officers to commit criminal offenses on behalf of the corporation.

The burden of proof for all elements is on the party that wishes to rely on it during the trial. In most cases, this means that the burden of proof is on the offender, who seeks to prevent the imposition of criminal liability on the ground of automatism. The party that bears the burden of proof needs to raise no more than a reasonable doubt regarding the offender's inability to control the bodily movements. In some legal systems, general defenses must be proven by a preponderance of evidence.

If the presumption is properly proven, the conclusion of the presumption is absolute, and therefore the offender is presumed to be incapable of consolidating the required fault for the imposition of criminal liability. Such a person would not be convicted under the given charge, and no criminal liability would be imposed on him.

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[89] United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3rd Cir. 1970); Stewart v. Waterloo Turn Verein, 71 Iowa 226, 32 N.W. 275 (1887); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); United States v. Harry L. Young & Sons, 464 F.2d 1295 (10th Cir. 1972).

[90] Continental Banking Co. v. United States, 281 F.2d 137 (6th Cir. 1960).

[91] People v. Jarvis, 135 Cal.App. 288, 27 P.2d 77 (1933); State v. Burns, 215 Minn. 182, 9 N.W.2d 518 (1943).

The presumption relates to the time of the commission of the offense, and not the time of the trial. For the imposition of criminal liability, the time of the commission of the offense is the only relevant time, exactly as it is the relevant time for checking all the other requirements for criminal liability, including the factual and mental elements. Thus, to use the automatism defense, a reasonable doubt must be raised regarding the offender's inability to control the bodily movements when committing the offense.

For the automatism defense to apply, an offender must be considered unable to control the bodily movements at the time of the commission of the offense. If by the time he stands the trial, his inability is completely cured, it does not affect the status of the criminal liability of the offender because the relevant time is that of the commission of the offense.

Because the presumption of automatism is an absolute presumption, the conclusion cannot be refuted as long as all its elements are proven. In this situation, no criminal liability is imposed on the offender if the offense has been committed while the offender was considered under automatism. Even if it is proven beyond a reasonable doubt, although he was in this situation at the time of the commission of the offense, the offender has consolidated the required fault for the imposition of criminal liability, no criminal liability is imposed. Consequently, as an absolute presumption, it can be voided in two principal ways:

(1) Negating the elements of the presumption; or-
(2) Imposing legal restrictions on applying the presumption.

To negate the elements of the presumption, it is necessary to prove the inexistence of at least one of them in the supplementary burden of proof. For example, if the offender must prove all elements by raising a reasonable doubt regarding their existence, the prosecution needs to prove beyond reasonable doubt that at least one of them did not exist at the time of the commission of the offense. It is not necessary to prove the non-existence of *all* elements, but only of one, because the elements are cumulative conditions, and if even one of these conditions is not proven, the entire presumption is not proven. When the relevant party fails to prove the existence of the elements of the presumption, the court cannot apply the presumption and the automatism defense is rejected.

The imposition of legal restrictions on the application of the presumption is part of the *ex ante* considerations of the legislator or the court. The legislator can exclude certain situations from the applicability of automatism. For example, certain offenses may not be subject to the automatism defense, certain automatism states may not be considered automatism, etc. Using this alternative may result in unjust outcomes for the offender, who may be quite under automatism state and incapable of consolidating the required fault, therefore this alternative is rarely used.

3.2.3 The Tangent: Automatism vs. Insanity

Mental deficiency may lead to inability to control one's conduct or the conditions for this inability. It is therefore necessary to distinguish between automatism and insanity. Such distinction has not only theoretical value, but legal practical significance as well. In most legal systems, acceptance of the insanity defense enables the court to order therapeutic treatment and the infringement of various civil rights, such as the right to drive, carry certain weapons, work in certain jobs, etc. The distinction is also of great significance when it comes to the transformation of fault, as discussed below.[92]

The distinction is required also because of the wide variety of cases that raise the question of tangency. For example, a person suffers from a mental deficiency that affects his cognitive and volitive capabilities. He is medically treated under psychiatric supervision, and takes certain medication to mitigate the symptoms of the mental deficiency. Because of a strike and interruption of pharmaceutical services, he was not able to purchase the medication, and as a result all the symptoms of his mental deficiency have erupted, making him incapable of controlling his bodily movements. One of these movements was an offense (e.g., assault). The question is whether this is a case of insanity, automatism, both, or none.

The answer is a vague one in most Anglo-American legal systems, and identical phenomena are classified differently in different contexts. For example, in the Anglo-American rulings somnambulism (sleep-walking) was classified at times as automatism,[93] at other times as insanity.[94] Epilepsy was also classified either as automatism[95] or as insanity.[96] The leading rulings in Anglo-American legal systems have also intermixed automatism with insanity, ruling that mental deficiency may be a basis for automatism and that physical injuries that negate the cognitive capabilities may be a basis for insanity.[97]

English common law did not restrict the definition of mental deficiency for applying the M'Naghten rules strictly to mental diseases recognized by modern

[92] Below at Sects. 4.2.2. and 4.2.4.

[93] Fain v. Commonwealth, 78 Ky. 183 (1879).

[94] Tibbs v. Commonwealth, 138 Ky. 558, 128 S.W. 871 (1910); Bradley v. State, 102 Tex.Crim.R. 41, 277 S.W. 147 (1925); Burgess, [1991] 2 Q.B. 92.

[95] Government of Virgin Islands v. Smith, 278 F.2d 169 (3rd Cir. 1960); People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435 (1943).

[96] Sullivan, [1984] 1 A.C. 156, [1983] 2 All E.R. 673, [1983] 3 W.L.R. 123, 77 Cr. App. Rep. 176, 148 J.P. 207; People v. Higgins, 5 N.Y.2d 607, 186 N.Y.S.2d 623, 159 N.E.2d 179 (1959); People v. Furlong, 187 N.Y. 198, 79 N.E. 978 (1907); People v. Grant, 71 Ill.2d 551, 17 Ill.Dec. 814, 377 N.E.2d 4 (1978).

[97] Charlson, [1955] 1 All E.R. 859, [1955] 1 W.L.R. 317, 39 Cr. App. Rep. 37; Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386, 409, [1961] 3 All E.R. 523, [1961] 3 W.L.R. 965, 46 Cr. App. Rep. 1.

psychiatry, and physical injuries may also be considered to be causes of insanity.[98] Consequently, even diabetes has been classified as insanity in certain cases.[99]

In some cases it has been suggested to distinguish between automatism and insanity because of internal and external causes, with automatism considered to be a consequence of external factors, and insanity a consequence of internal factors.[100] This distinction may be practical for some cases but not for all. An offender's arm being moved by another person, an external factor, is automatism. Schizophrenia, an accepted mental disease in psychiatry, is considered to be internal factor, and therefore it is insanity. Such cases generally raise no special difficulty in their classification. The difficulty lies in cases in which an internal factor caused automatism and an external factor caused insanity. In these cases the proposed distinction is ineffective.

Consider a person undergoing an epileptic seizure. The seizure is an internal factor involving the person's neurological system. Under the proposed distinction, epilepsy would be classified as a consequence of an internal factor, and therefore would be considered insanity. But epilepsy is not insanity. This classification does not match the medical knowledge about epilepsy, and it is not consistent with the purpose of the insanity defense. Naturally, it makes no sense to refer an epileptic person to psychiatric treatment. Epileptic seizures match the characteristics of automatism much better than those of insanity.

Another example is that of a person who watches a mother shouting at her son, which triggers a psychotic episode in the course of which he strikes the shouting mother. It was watching the mother shouting at her son that caused the psychotic episode, which in turn caused him to hit the mother. In the course of the psychotic episode he lost control over his conduct, but this was the result of an external factor. Based on the proposed distinction above, this situation may be classified as insanity, a classification that does not match the medical knowledge about psychotic events or the purpose of the automatism defense. In this case, psychiatric treatment may be helpful, but the proposed distinction does not provide for it.

Returning to our starting point: associating a certain case with the relevant norm (insanity defense vs. automatism defense) is based on the principles of interpretation in criminal law.[101] The difficulty in distinguishing between these two defenses occurs generally when the cause for the offender's criminal conduct was a mental deficiency. When no mental deficiency is present, the insanity defense is irrelevant

[98] See above at Sect. 1.1.2.

[99] Hennessy, [1989] 2 All E.R. 9, [1989] 1 W.L.R. 287, 89 Cr. App. Rep. 10, [1989] R.T.R. 153, [1989] Crim. L.R. 356.

[100] Rabey, (1981) 114 D.L.R. (3rd) 193; Oakley, (1986) 24 C.C.C. (3rd) 351; Parnerkar, [1974] S.C.R. 449, 10 C.C.C. (2nd) 253; Winterwerp v. Netherlands, (1979) 2 E.H.R.R. 387; Luberti v. Italy, (1984) 6 E.H.R.R. 440; Huckerby, [2004] E.W.C.A. Crim. 3251, [2004] All E.R. (D) 364; Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386, 409, [1961] 3 All E.R. 523, [1961] 3 W.L.R. 965, 46 Cr. App. Rep. 1.

[101] For the principles of interpretation of the criminal law see Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law 133–164 (2010).

Table 3.2 Insanity and automatism defenses compared

	Automatism	Insanity
Mental deficiency	Not required	Required
Transformation of fault[a]	Applicable	Inapplicable
Functional application	Exempt from criminal liability	Exempt from criminal liability and treatment

[a]See below at Sects. 4.2.2 and 4.2.4

because mental deficiency is one of the requirements for the presumption of insanity.[102]

Therefore, when mental deficiency exists, it is necessary to examine both presumptions (insanity and automatism) to determine whether either of them matches the case at hand. If the case matches only one of these presumptions, only that presumption may be applied. For example, if the mental deficiency is controllable from the offender's point of view, the third condition for the applicability of the presumption of insanity is not met, and therefore the presumption is not applicable. The case may still match the presumption of automatism, however. These cases are interpreted based on the verbal logic of the criminal norm (*ratio verborum*).[103]

If the case matches more than one presumption, the functional match between the particular case and the legal rationale of each presumption must be examined, based on the legal rationale of the criminal norm (*ratio legis*).[104] Thus, when the offender suffers from a mental disorder that can be relieved, cured, or medically examined, and medical treatment can be effective, the legal rationale of the insanity defense appears to be more suitable. By contrast, when the mental problem is incurable and its symptoms cannot be relieved or medically treated, the legal rationale of the automatism defense appears to be more suitable. The key differences between these defenses are presented in Table 3.2.

Therefore, when both the automatism and insanity defenses may be applicable to a case, the most appropriate legal construction is the one that matches the case at hand with the legal rationale (*ratio legis*) of these criminal norms. This type of classification and legal construction matches the principle of legality in criminal law.[105]

Nevertheless, note that the automatism and insanity defenses do not necessarily conflict or depend on each other. Thus, if one defense is rejected, nothing prevents the court from accepting the other one. Each defense is examined independently, and if the relevant requirements are fulfilled, it should be accepted. *All* general defenses may serve *all* parties, and procedurally no party is required to choose only one general defense in any given case.

[102] See above at Sect. 1.3.3.

[103] Hallevy, *supra* note 101, at pp. 149–152.

[104] Ibid.

[105] Hallevy, *supra* note 101, at pp. 133–164.

3.3 Intoxication

Intoxication is an *in personam* general defense that exempts the offender from criminal liability based on his personal situation because an offender under the functional effect of intoxicating substances is incapable of consolidating the required fault. The offender is considered to be incapable of choosing freely between right and wrong, therefore the transformation of fault plays an important role in this defense.[106]

3.3.1 Emergence of the Intoxication Defense in Criminal Law

The effect of intoxicating substances on the human consciousness was known to mankind already in prehistory. These substances included, among others, alcohol. Various substances that affect the human mind through swallowing, smelling, touching, etc. have been used for generations. The best-known intoxicating substance is alcohol, which has been produced since the beginnings of agriculture, at the end of the Mesolithic and the beginning of the Neolithic era.[107]

The Bible presents various characters acting under the influence of alcohol, who are deemed as having no responsibility for their deeds. For example, Noah's drunkenness prevented him from being aware of factual reality.[108] Lot's daughters made their father drink wine to make him unaware of having sexual intercourse with them.[109] The intoxicating effect of alcohol was historically referred to as

[106] See below at Sect. 4.2.3.

[107] For the dating of these eras see Steven Mithen, After the Ice: A Global Human History 20,000 – 5,000 BC (2003); Peter Bellwood, First Farmers: The Origins of Agricultural Societies (2004).

[108] Genesis 9:20–27:

> And Noah began to be an husbandman, and he planted a vineyard: And he drank of the wine, and was drunken; and he was uncovered within his tent. And Ham, the father of Canaan, saw the nakedness of his father, and told his two brethren without. And Shem and Japheth took a garment, and laid it upon both their shoulders, and went backward, and covered the nakedness of their father; and their faces were backward, and they saw not their father's nakedness. And Noah awoke from his wine, and knew what his younger son had done unto him. And he said, Cursed be Canaan; a servant of servants shall he be unto his brethren. And he said, Blessed be the Lord God of Shem; and Canaan shall be his servant. God shall enlarge Japheth, and he shall dwell in the tents of Shem; and Canaan shall be his servant.

[109] Genesis 19:31–38:

> And the firstborn said unto the younger, Our father is old, and there is not a man in the earth to come in unto us after the manner of all the earth: Come, let us make our father drink wine, and we will lie with him, that we may preserve seed of our father. And they made their father drink wine that night: and the firstborn went in, and lay with her father; and he perceived not when she lay down, nor when she arose. And it came to pass on the morrow, that the firstborn said unto the younger, Behold, I lay yesternight with my father: let us

drunkenness. Later, when drugs became prevalent, the term "intoxication" became current.[110]

In general, the effect of alcohol on the human body is dependent on the quantity absorbed in relation to body mass. Alcohol depresses the central nervous system by disrupting the electrical messages of certain neuro-transmitters, affecting cognition and volition, body organs, motor skills, the ability to speak clearly, muscle coordination, etc. Consumption of larger quantities carries the risk of coma or death. After the absorption of the alcohol into the blood begins a process of intoxication, in which the blood mixed with alcohol reaches the brain. The main affect of alcohol is on the cerebral cortex and the limbic system, where the processes of thinking related to cognition and volition are performed. When the consumption of alcohol stops, certain neural tissues are already dead.[111]

As noted, alcohol is not the only intoxicating substance. Some of the intoxicating substances are defined as prohibited drugs, but it is not necessary for a substance to be defined as intoxicating as part of a legal prohibition. People who suffer from over-sensitivity to certain chemical substances may be in state of intoxication as a result of exposure even if none of these substances are prohibited. Some of the substances may trigger an allergic reaction, but no such reaction is required for intoxication, either.

Whether the reason is alcohol, drugs, or other substances, the effect of intoxication on the criminal liability has been accepted in most legal systems, and its modern legal structure is mostly uniform across these systems. Until the beginning of the nineteenth century, intoxication was not accepted as a general defense in criminal law. Most legal systems tended to attribute to the offender the fault that was present in his mind the moment he entered a state of intoxication, if he did so voluntarily.

According to the rules of criminal liability of the archbishop of Canterbury (668–690), it was accepted that if an intoxicated person killed another, the charge was homicide regardless of the state of intoxication. The intoxicated offender's fault consisted of two components: the fault of being intoxicated and the fault of killing a Christian, a combination that justified the imposition of criminal liability.[112] In the eighth century it was accepted in England that killing when intoxicated would not be considered killing in cold blood.[113] These two

make him drink wine this night also; and go thou in, and lie with him, that we may preserve seed of our father. And they made their father drink wine that night also: and the younger arose, and lay with him; and he perceived not when she lay down, nor when she arose. Thus were both the daughters of Lot with child by their father. And the firstborn bare a son, and called his name Moab: the same is the father of the Moabites unto this day. And the younger, she also bare a son, and called his name Ben-ammi: the same is the father of the children of Ammon unto this day.

[110] R. U. Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 Law Q. Rev. 528 (1933).

[111] Kenneth Blum, Alcohol and the Addictive Brain 73–116 (1991).

[112] Theodori Liber Poenitentialis, III, 13 (668–690).

[113] Ecgberti Poenitentiale, IV, 68 (735–766).

understandings formed the legal basis for the intoxication law in the English common law until the nineteenth century.

In the fourteenth century, English common law accepted the general defense of infancy[114] and the diminished liability rule for insanity[115] based on the absence of fault in these two situations. But no exemption from criminal liability was accepted for intoxication, although it negated the existence of fault at the time of perpetration. In 1550, English common law rephrased the legal rule for intoxication, so that perpetration of an offense in state of intoxication created no exemption from criminal liability because in itself, entering a state of intoxication consolidates the required fault.[116]

In the sixteenth and seventeenth centuries, this argument was justified theologically. Thus, insane offenders were not to be executed because their insanity was caused by God, but intoxicated offenders freely chose to become intoxicated and therefore consolidate the required fault for imposition of criminal liability.[117] In 1603, it was ruled, accordingly, that although intoxicated persons are mentally incompetent (*non compos mentis*) at the time of perpetration of the offense, criminal liability is imposed for the fault existed within the entrance to the state of intoxication,[118] i.e., for the existing fault at the moment of entering the state of intoxication. This ruling held for more than 300 years.

At the beginning of the nineteenth century, the legal development of the principle of fault reached an advanced stage, and criminal law could have examined intoxication more accurately. Intoxication was considered to be part of the negative

[114] See above at Sect. 3.1.1.

[115] See above at Sect. 1.1.2.

[116] Fogossa, (1550) 1 Plowd. 1, 19, 75 Eng. Rep. 1:

> But where a man breaks the words of the law by voluntary ignorance, there he shall not be excused. As if a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby. And Aristotle says that such a man deserves double punishment because he has doubly offended, viz. in being drunk to the evil example of others and in committing the crime of homicide.

[117] Francis Bacon, Elements of the Common Laws of England 29 (1636, 1969); Sir Edward Coke, Institutions of the Laws of England – Third Part 200 (6th ed., 1681, 1817, 2001); Matthew Hale, Historia Placitorum Coronae 32 (1736) [Matthew Hale, History of the Pleas of the Crown (1736)]:

> By the laws of England such a person i.e., one intoxicated, shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses;

William George Hawkins, A Treatise of the Pleas of the Crown 3 (1716, 8th ed., 1824, 1972):

> And he who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober.

[118] Beverley (1603), reported in Coke, *ibid*, at p. 125.

fault elements, and the courts were expected to formulate a modern legal rule for intoxication. The courts distinguished between different types of entering into a state of intoxication, especially between voluntary and involuntary modes. The legal change was also heavily affected by tendencies of secularization. Religion considered intoxication as a sin in itself, therefore courts could not exempt the drunk from criminal liability.[119]

The effects of secularization on the courts made is possible not to entirely disqualify and reject intoxication as a general defense in criminal law, and to distinguish between different situations. The first legal move was in *Grindley* (1819),[120] where the court ruled that voluntary intoxication may not be considered exempt from criminal liability. Nevertheless, when the charge is murder and one of the questions is premeditation, the court should consider intoxication as negating premeditation under relevant circumstances.

The ruling in *Grindley* placed intoxication within the negative fault elements and became the legal basis for accepting intoxication as a general defense in the 1830s.[121] In 1830, the court ruled in *Marshall* (a case of stabbing) that the jury should consider, together with other considerations, the fact that the stabber was intoxicated during the perpetration of the offense in order to determine whether the offender had acted *bona fide* and believed that a person or property were about to be attacked by the stabbed person.[122]

In *Pearson* (1835), the offender murdered his wife by hitting her. It was ruled that the jury should consider his intoxicated state when deciding on premeditation.[123] Intoxication was therefore considered capable of negating the cold-blood component of premeditation. In *Thomas* (1837), this ruling was generalized. It was ruled that intoxication should be considered in offenses that require an increased mental component as part of the fault requirement of the offense, e.g., premeditation and specific intent.[124] An intoxicated person is more irritable than a sober one, therefore he is more likely to be considered having been provoked than having struck out in cold blood.

From this point onward, modern criminal law adopted the approach that intoxication at the time of perpetration may negate the offender's fault. Subsequently, the

[119] Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1014–1015 (1932).

[120] Grindley (1819), reported in William Oldnall Russell, A Treatise on Crimes and Misdemeanors 8 (1843, 1964).

[121] Compare with Carroll, (1835) 7 Car. & P. 145, 173 Eng. Rep. 64.

[122] Marshall, (1830) 1 Lewin 76, 168 Eng. Rep. 965.

[123] Pearson, (1835) 2 Lewin 144, 168 Eng. Rep. 1108.

[124] Thomas, (1837) 7 Car. & P. 817, 173 Eng. Rep. 356:

> Drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober.

key considerations in cases of intoxication had to do with the circumstances of entering the state of intoxication. This approach was commonly applied in offenses that required specific intent, when the offender entered a state of intoxication before the perpetration of the offense, but not with intent to committing the offense; he did so voluntarily, but was not guided by the desire to commit the offense.

The courts have used the intoxication argument to negate the specific intent component in the relevant offenses, but imposed criminal liability for another offense with the same factual element, which requires no specific intent.[125] These rulings were the application of the European-Continental legal concept of *actio libera in causa* to intoxication. Thus, the most important factor concerning the intoxication defense is the circumstance of entering the state of intoxication. Most legal systems have accepted this form of intoxication defense in criminal law, and the differences concern mostly nuances of legal implementation.

In English law, the intoxication defense is applied in three main stages.[126] First, entering the state of intoxication is examined to determine whether or not it was voluntary. If it was not voluntary (as in the case of coercion or absence of free choice), the offender is exempt from criminal liability. If it was voluntary, the court moves to the second stage and examines the mental element requirement for the offense at hand. Intoxication may legally negate the upper level of volition, i.e., specific intent and direct intent, but not necessarily cognition or lower levels of volition.

If the mental element requirement does not consist of specific intent or direct intent, the court proceeds to the third stage and examines the intoxicating substance functionally (alcohol, drugs, etc.), that is, the functional effect of the intoxicating substance on the given offender at the time of the commission of the offense. The court examines whether the offender was indeed in state of intoxication, and if yes, how it affected his capability to consolidate the fault. The first two stages involve the *actio libera in causa* concept.

American law resembles English law in this respect, but the application of *actio libera in causa* is more detailed and distinguishes a wider variety of situations.[127] American law distinguishes between voluntary and involuntary intoxication. Involuntary intoxication exempts the offender from criminal liability because he did not choose to enter the state of intoxication, and at the time of the commission of the

[125] Meakin, (1836) 7 Car. & P. 297, 173 Eng. Rep. 131; Meade, [1909] 1 K.B. 895; Director of Public Prosecutions v. Beard, [1920] All E.R. Rep. 21, [1920] A.C. 479, 89 L.J.K.B. 437, 122 L.T. 625, 84 J.P. 129, 36 T.L.R. 379, 64 Sol. Jo. 340, 26 Cox C.C. 573, 14 Cr. App. Rep. 159; Pigman v. State, 14 Ohio 555 (1846); People v. Harris, 29 Cal. 678 (1866); People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921).

[126] Heard, [2007] E.W.C.A. Crim. 125, [2008] Q.B. 43, [2007] 3 All E.R. 306.

[127] Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse*, 64 Mo. L. Rev. 383 (1999); Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045 (1944); Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. Crim. L. & Criminology 482 (1997); Monrad G. Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L. F. 1 (1961).

offense he is presumed to have been incapable of consolidating the required fault. If intoxication was voluntary, the mental element requirement of the offense is examined.

Under the right circumstances, intoxication may negate specific intent, direct intent, knowledge (awareness), and premeditation in homicide. But intoxication may serve as the legal basis for imposing criminal liability for recklessness and negligence offenses. It may also be the legal basis for justifying self-defense and other *in rem* defenses. American law examines intoxication concretely, with reference to the concrete circumstances at hand, the assumption being that the same substances may affect different offenders differently.

In European-Continental legal systems, implementation of the intoxication defense, including the application of *actio libera in causa*, resembles the automatism defense.[128] Thus, being in the state of intoxication is not sufficient for negating the offender's fault, and the fault at the time the offender entered the state of intoxication is examined as well.[129] His existing fault at the time he entered the state of intoxication is transferred to the time when the offense has been committed, so that the offender is considered to consolidate the identical level of fault he consolidated at the time he entered the state of intoxication.

This legal situation is generally different from the factual situation, because the fault consolidated as part of the commission of the offense differs from the one consolidated when the offender entered the state of intoxication. In European-Continental legal systems, the state of intoxication is examined explicitly for each case because of the assumption that the same substances may have different intoxicating effect on different persons. Nevertheless, in certain types of cases there are refutable legal presumptions of being in a state of intoxication, for example, based on general data about the effect of alcohol on certain body masses.[130]

3.3.2 The Presumption of Intoxication and Addiction to Intoxicating Substances

The legal basis for the general defense of intoxication is the presumption of intoxication. The different developments in various legal systems endowed this presumption with different content. In some legal systems the presumption is absolute, in others it is relative, and in others still it combines absolute and relative elements. Although the content of the presumption differs between different legal

[128] See above at Sect. 3.2.2.

[129] BGH 10, 247; BGH 16, 124; BGH 20, 284; BGH 34, 29; BGH 35, 308; BGH 37, 231; DAR 1983, 395; OGH 2, 325; VRS 50, 24. See more in Jescheck und Weigend, *supra* note 32, at pp. 448–449.

[130] See, e.g., BGH NStZ 1984, 408; BGH NJW 1953, 1760; BGH GA 1984, 124.

systems, the principal legal basis, as expressed by the presumption of intoxication, is identical.

The presumption of intoxication may be formulated as follows:

If under the influence of full or partial involuntary intoxication the cognitive or volitive capabilities of a person are negated with regard to some conduct, and if the intoxication is the factual reason for that conduct, the person is presumed to be incapable of consolidating the required fault for the imposition of criminal liability.

Because of the presumption of intoxication, the required fault is negated by the involuntary intoxication if it is shown that it negated the person's cognition or volition concerning the commission of the offense. As intoxication may negate the offender's fault, it is part of the negative fault elements in criminal law. The presumption of fault contains four elements that function as four cumulative conditions:

(1) the offender's legal personhood;
(2) full or partial intoxication, which negates:
    (i) the person's cognitive capabilities with regard to the commission of the offense, or
    (ii) the person's volition with regard to the commission of the offense;
(3) involuntary intoxication; and
(4) factual causation between the intoxication and the commission of the offense.

The burden of proof for all four elements is on the party that wishes to rely on it during the trial. In most cases, this means that the burden of proof is on the offender, who seeks to prevent the imposition of criminal liability on the ground of intoxication. It is not always the offender, however, who claims intoxication. In some legal systems, in order to begin weaning procedures for the treatment of a person, it is necessary to initiate criminal proceedings, in which case the prosecution makes a claim of intoxication. In such cases, the court stops the criminal proceedings, and after being persuaded of the offender's addiction to certain chemicals, weaning procedures are initiated accordingly.[131]

The party that bears the burden of proof, whether it is the prosecution or the offender, needs to raise no more than a reasonable doubt regarding the intoxication state of the offender. In some legal systems, general defenses must be proven by a preponderance of evidence. If the presumption is properly proven, the conclusion of the presumption is absolute, and therefore the offender is presumed to be incapable of consolidating the required fault for the imposition of criminal liability. Such a person would not be convicted under the given charge, and no criminal liability would be imposed on him.

[131] See below at Sect. 3.3.3.

The presumption relates to the time of the commission of the offense, and not the time of the trial. The time of the trial is relevant for procedural purposes. For the imposition of criminal liability, the time of the commission of the offense is the only relevant time, exactly as it is the relevant time for checking all the other requirements for criminal liability, including the factual and mental elements. Thus, to use the intoxication defense, a reasonable doubt must be raised regarding the offender's intoxication when committing the offense.

For the intoxication defense to apply, an offender must be considered intoxicated at the time of the commission of the offense. If by the time he stands the trial, his addiction is completely cured, it does not affect the status of the criminal liability of the offender because the relevant time is that of the commission of the offense. The change may affect his competence to stand trial, but not the imposition of criminal liability. This is because the presumption refers to the substantive law and to criminal liability, and it is therefore examined in relation to the commission of the offense.

Because the presumption of intoxication is an absolute presumption, the conclusion cannot be refuted as long as all its four elements are proven. In this situation, no criminal liability is imposed on the offender if the offense has been committed while the offender was considered intoxicated. Even if it is proven beyond a reasonable doubt, although he was intoxicated at the time of the commission of the offense, the offender has consolidated the required fault for the imposition of criminal liability, no criminal liability is imposed. Consequently, as an absolute presumption, it can be voided in two principal ways:

(1) Negating the elements of the presumption; or-
(2) Imposing legal restrictions on applying the presumption.

To negate the elements of the presumption, it is necessary to prove the inexistence of at least one of them in the supplementary burden of proof. For example, if the offender must prove all four elements by raising a reasonable doubt regarding their existence, the prosecution needs to prove beyond reasonable doubt that at least one of them did not exist at the time of the commission of the offense. It is not necessary to prove the non-existence of *all* elements, but only of one, because the elements are cumulative conditions, and if even one of these conditions is not proven, the entire presumption is not proven. When the relevant party fails to prove the existence of the elements of the presumption, the court cannot apply the presumption and the intoxication defense is rejected.

The imposition of legal restrictions on the application of the presumption is part of the *ex ante* considerations of the legislator or the court. The legislator can exclude certain situations from the applicability of intoxication. For example, certain offenses may not be subject to the intoxication defense, addiction to certain chemicals may not be considered intoxication, etc. Using this alternative may result in unjust outcomes for the offender, who may be quite intoxicated and incapable of consolidating the required fault, therefore this alternative is rarely used. The elements of the presumption are discussed below.

The first element is the offender's legal personhood. Intoxication may be considered natural for a human offender, but it is not exclusively the domain of human beings. Other legal entities may display signs of intoxication. Corporations may be affected in their making-decisions systems by various malwares or other external factors that substantively function as intoxicating substances.[132] In general, intoxication of corporations can occur in two types of cases:

(1) absence of control over the conduct of the corporation; or
(2) absence of control over a particular organ acting on behalf of the corporation.

The first type refers to cases in which the conduct of the corporation has been carried out directly by the corporation, unrelated to actions of any of its organs. A wide range of conducts can match this situation. The second type of cases refers to legal and operational relationships between the corporation and its organs. The term "organ" refers in general to all persons whose conduct may be considered as that of the corporation. These are the employees of the corporation, but not only they; for example, they can also be service providers acting on behalf of the

[132] Intoxication may also be relevant to artificial intelligence systems, see Gabriel Hallevy, Liability for Crimes Involving Artificial Intelligence Systems 159–162 (2015). Generally, as noted above, the general defense of intoxication requires an external substance (e.g., the presence or absence of certain chemical), that has cognitive or volitive effects on the inner process of consciousness. For example, the manufacturer of AI robots wanted to reduce production costs and used inexpensive materials. After a few months of operation, a process of corrosion began in some of the initial components of the robots, and as a result, transfer of information was deficient and affected the awareness process. Technically, this is similar to the effect of alcohol on human neurons.

In another example, a military AI robot was activated in a civilian area after a real or simulated chemical attack. As a result of exposure to the poisonous gas, parts of its hardware were damaged and the robot began to malfunction, became unable to properly identify people, and started to attack innocent civilians. Subsequent analysis of the robot's records showed that exposure to the gas was the only reason for the attacks. If the robot had been human, the court would have accepted the general defense of intoxication and acquitted the offender. Should not the same procedure apply to AI systems as well?

If there is no difference between the effects of external substances on humans and AI systems from a functional point of view, there is no justification for applying the general defense of intoxication to one and not to the other. Strong AI systems can possess both cognitive and volitive inner processes, as noted above. These processes can be affected by various factors, and when they are affected by external substances, as shown above, the requirements of intoxication as a general defense are met. Thus, if exposure to certain substances affects the cognitive and volitive processes of an AI system in a way that causes it to commit an offense, there is no reason why intoxication as a general defense should not be applicable.

It may be true that AI systems cannot become drunk on alcohol or have delusions following the ingestion of drugs, but these effects are not the only possible ones related to intoxication. If a human soldier attacks his friends as a result of exposure to a chemical attack, his argument for intoxication is accepted. If this exposure has the same substantive and functional effect upon both humans and AI systems, there is no legitimate reason for making the general defense of intoxication applicable to one type of offender but no to another. Consequently, it appears that the general defense of intoxication can be applicable to AI systems.

corporation. In these types of cases, the intoxication defense can refer to two main causes:

(1) the organ is incapable of controlling his conduct due to intoxication; and/or-
(2) the corporation is incapable of controlling the conduct of the organ owing to *ultra vires* actions.

The first cause has to do with the connection between the corporation and of the organ. The inability of the organ to control his conduct is not related to the corporation, because intoxication is an exempt (*in personam*), not a justification (*in rem*). Therefore, if regardless of the inability of the organ to control its conduct, this conduct would have been related to the corporation, the intoxication of the organ would still not be related to the corporation. The key explanation for this legal situation lies in the rule of impersonal and personal characteristics, as discussed above.[133] Thus, personal characteristics are personal and not subject to one's relation to the corporation.

The second cause has to do with the *ultra vires* situations, where the organ does not adhere to the orders of the corporation. In these cases, the powers of the organ are specified by the corporation, but the organ exceeds them and commits a criminal offense. Nowadays, when private initiatives are rewarded by corporations, such incidents are quite common. In these cases, the organ is criminally liable for the offense, but the question of the criminal liability of the corporation still arises. If the corporation takes all reasonable measures to prevent the commission of criminal offenses, and nevertheless one of its organs commits an offense, it is considered just to incriminate the corporation, even if it had no means of controlling the conduct of the organ.[134]

This legal situation reflects the concept that the corporation acts through its organs, and as far as criminal liability is concerned, these organs are an inseparable part of the corporation. When the organ commits an offense while acting on behalf of the corporation, it is considered as if the corporation had committed the offense itself, regardless of whether or not it was within the powers of the organ to commit the offense. The criminal liability of the organ extends to the corporation as well.[135] And because the organ has control over his conduct, this controlled and voluntary conduct is applied also to the corporation.

The general social justification for this state of affairs, apart from the legal justification, is that the corporation has the obligation to choose the most appropriate officers, skilled, compliant with the law, and unwilling to commit criminal offenses. The corporation's choice of an officer who does not meet these standards

[133] Above at Sect. 2.3.1.

[134] State v. Pincus, 41 N.J.Super. 454, 125 A.2d 420 (1956); People v. Alrich Restaurant Corp., 53 Misc.2d 574, 279 N.Y.S.2d 624 (1967); State v. McBride, 215 Minn. 123, 9 N.W.2d 416 (1943); Compton v. Commonwealth, 22 Va.App. 751, 473 S.E.2d 95 (1996).

[135] Continental Banking Co. v. United States, 281 F.2d 137 (6th Cir. 1960).

is not an excuse for exempting it from criminal liability for the offenses committed by an officer acting in the capacity of an organ of the corporation. The corporation cannot hide behind its organs who commit criminal offenses, even if they are committed *ultra vires*.[136]

Furthermore, the presumption of intoxication is not applicable in these cases because the corporation controlled the conditions that led to its inability to control the conduct of the organ, and its choice of officers is part of this capability. Finally, if the offense is not exposed, the corporation generally enjoys the benefits of the offense, which may act as an incentive for other officers to commit criminal offenses on behalf of the corporation.

The second element is full or partial intoxication that negates the person's cognitive or volitive capabilities regarding the commission of the offense.[137] This element distinguishes between different reasons for negating the offender's fault, and it is also significant for the therapeutic consequences of intoxication.[138] There are two main ways of identifying intoxication, but only one of them is relevant for the presumption of intoxication.

The first is the identification of a certain chemical that is recognized by various authoritative lists as intoxicating, generally in specified quantities, and regardless of the *actual* intoxicating effect of the substance on the offender in question.[139] Common examples are the definitions of intoxication in transportation offenses in various legal systems.[140] These definitions do not take into account the personal characteristics of the individual offender, which can raise two main difficulties: over-inclusion (certain chemicals may affect certain persons by negating their fault) and under-inclusion (some persons are not affected at all or are affected in other ways).

For example, certain rates of alcohol in the blood may affect different persons differently. Moreover, the method is also under-inclusive because not all possible chemicals at all possible levels, which might negate the fault of certain persons, are included in the lists. For the lists to be complete and inclusive, they must predict chemicals that have not been discovered yet. For example, sugar may affect certain

[136] People v. Jarvis, 135 Cal.App. 288, 27 P.2d 77 (1933); State v. Burns, 215 Minn. 182, 9 N.W.2d 518 (1943).

[137] United States v. Navarrete, 125 F.3d 559 (7th Cir. 1997); People v. Johnson, 32 Ill.App.3d 36, 335 N.E.2d 144 (1975); People v. Savoie, 419 Mich. 118, 349 N.W.2d 139 (1984); State v. Cameron, 104 N.J. 42, 514 A.2d 1302 (1986); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975); State v. Mitts, 81 Ohio St.3d 223, 690 N.E.2d 522 (1998).

[138] The therapeutic consequences of intoxication are discussed below at Sect. 3.3.3.

[139] Lipman, [1970] 1 Q.B. 152, [1969] 3 All E.R. 410, [1969] 3 W.L.R. 819, 53 Cr. App. Rep. 600, 133 J.P. 712; Bailey, [1983] 2 All E.R. 503, [1983] 1 W.L.R. 760, 77 Cr. App. Rep. 76, 99 L.Q.R. 511, 147 J.P. 558; Hardie, [1984] 3 All E.R. 848, [1985] 1 W.L.R. 64, 80 Cr. App. Rep. 157.

[140] Shelburne v. State, 446 P.2d 56 (Okl. Cr. 1968); City of Seattle v. Hill, 72 Wash.2d 786, 435 P.2d 692 (1967); State v. Brown, 38 Kan. 390, 16 P. 259 (1888); People v. Koch, 250 App.Div. 623, 294 N.Y.S. 987 (1937).

persons' cognition or volition, although other people may not be affected. The same is true about pure water, which in high quantities can affect the electrolytic balance. These difficulties attest to the inappropriateness of this method of applying the presumption of intoxication.

The other way of identifying intoxication is functional, based on examination of the effect of the presence or absence of certain substance on the cognitive and volitive capabilities of the offender.[141] This method makes it possible to determine that the presence of certain substance in a certain quantity in the offender's blood can be considered intoxicating because of the symptoms it elicited (even if the identical substance in the same quantity in another person's blood may affect his cognitive and volitive functions differently). This appears to be the most appropriate way of measuring intoxication for the purposes of the intoxication defense, because it is consistent with the principle of fault in criminal law.[142]

Functionally, there is no difference between intoxication resulting from the presence of a certain substance in the offender's blood (e.g., a person who uses medication) and that resulting from the absence of a certain substance (e.g., an addicted person who is denied the drug that his body craves). In both cases the substance affects the human body: in the former, the chemical affects the human organs directly, in the latter, the effect is caused by the dependence on the chemical and by the effects of its absence on cognitive or volitive capabilities. The latter case is common among addicted persons who experience withdrawal effects, as discussed below.

Naturally, the functional examination is carried out with regard to the exact time when the offense was committed and does not concern the offender's general experience. The state of intoxication must be in effect when the delinquent conduct is consolidated. Being intoxicated at a different time is irrelevant for the imposition of criminal liability.

Similarly to insanity, the functional examination of intoxication involves two aspects. One relates to the negation of the cognitive capabilities with respect to the conduct in question, the other to the negation of the volitive capabilities. Thus, intoxication combines possible effects on the offender's cognition and volition.[143] This combination was inspired by the presumption of insanity, which incorporates both the M'Naghten rules (cognitive) and the irresistible impulse test (volitive),[144]

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[141] The American Model Penal Code, *supra* note 28, at p. 36, suggested in subsection 2.08(5)(a) to define intoxication this way:

> (a) 'intoxication' means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.

See more in Britain the cases of *Bailey* and *Hardie*, *supra* note 139.

[142] See above at Sect. 2.1.2.

[143] State v. Cameron, 104 N.J. 42, 514 A.2d 1302 (1986); State v. Smith, 260 Or. 349, 490 P.2d 1262 (1971); People v. Leonardi, 143 N.Y. 360, 38 N.E. 372 (1894); Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935); Roberts v. People, 19 Mich. 401 (1870); People v. Kirst, 168 N.Y. 19, 60 N.E. 1057 (1901); State v. Robinson, 20 W.Va. 713, 43 Am.Rep. 799 (1882).

[144] See above at Sects. 1.1.2 and 1.3.

to cover all the aspects of fault. This attests to the deep linkage between insanity and intoxication.

Negation of the offender's cognitive capabilities as a result of intoxication may have to do both with the understanding of the actions committed and with the prohibitions imposed by the criminal offense.[145] For example, the attacker may fail to understand that he assaulted the victim or that assault is a prohibited conduct. Given that the presumption of intoxication is part of criminal law, the above prohibition is a legal one, not necessarily a moral one.

Consider a person in a state of intoxication who experiences a delusion, in which he is commanded by his god to set fire to a brothel. In his understanding, this may be the ultimate path to redemption and therefore morally desirable, although he knows that the conduct is legally prohibited. Furthermore, from his point of view, the legal prohibition makes him a martyr. Nevertheless, because the offender understands that his conduct is illegal, his cognitive capabilities cannot be considered to have been negated by intoxication. Delusions leading to moral justifications for the commission of criminal offenses are not sufficient to prevent the imposition of criminal liability.

The negation of volition refers to negation of control over the offender's conduct, to the point of automatism, whether the conduct is expressed as actions or as omissions. Thus, chemicals can cause people to act (e.g., stimulants) or not to act (e.g., sedatives), and at high level they can negate the offender's volition. In these cases, the offender is considered to be coerced to act (or to omit acting) the way he did. It is not necessary to prove negation of both cognition and volition in order to establish the intoxication defense; proving one of the two is sufficient.

Full intoxication negates the cognitive capabilities with regard to all the components of the factual elements, whereas partial intoxication may include awareness of some of them. The negation is complete, and the partiality refers only to its object (the components of the factual element). Partial intoxication does not refer to the negation of volitive capabilities, but to cognitive capabilities alone.

For example, rape committed under full intoxication requires the negation of cognition both regarding the conduct (having sexual intercourse) and to all its circumstances (absence of consent, the victim being a woman). This situation is generally rare and requires an uncommonly strong intoxication. Partial intoxication, by contrast, is more plausible, and might manifest, for example, in believing that the victim consented to the sexual intercourse, while knowing all along who she was and what was the nature of the act.[146]

Legally, partial intoxication functions as full intoxication. For the presumption of intoxication to apply, it is not necessary for the perpetrator to be fully

[145] Attorney-General for Northern Ireland v. Gallagher, [1963] A.C. 349, [1961] 3 All E.R. 299, [1961] 3 W.L.R. 619, 45 Cr. App. Rep. 316; Director of Public Prosecutions v. Beard, [1920] All E.R. Rep. 21, [1920] A.C. 479, 89 L.J.K.B. 437, 122 L.T. 625, 84 J.P. 129, 36 T.L.R. 379, 64 Sol. Jo. 340, 26 Cox C.C. 573, 14 Cr. App. Rep. 159.

[146] United States v. Short, 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954).

intoxicated. The fault may be negated by negating cognition with regard to at least one factual element component.[147] The reason follows from the structure of the mental element. All components of the mental element must be proven beyond any reasonable doubt for imposition of criminal liability, and the absence of even one of them prevents such imposition. If partial intoxication negates even one of these components, it functions the same way.[148]

Thus, the offender is not required to prove that intoxication made him be unaware of everything, only that it made him unaware of at least one component of the factual element of the offense. Indeed, it is partial rather than full intoxication that is the basic intoxication situation, but although it can fulfill the second element of the presumption of intoxication, it does not necessarily exempt the offender from criminal liability. The criminal liability imposed reflects the concrete relevant fault.

For example, in the above rape example, if the offender was not aware of the woman's lack of consent because of intoxication, and all the other elements of the presumption are proven, the offender will probably be exempt from criminal liability. But if the victim is minor, and the partial intoxication referred only to this fact (the offender was unaware of the victim's age), but he was aware of all other factual element components (woman, having sexual intercourse, and non-consent), the partial intoxication does not prevent the imposition of criminal liability for rape. In this case the criminal liability is for rape of an adult, not of a minor.

The third element is involuntary intoxication. This element refers to the transformation of fault, discussed below.[149]

The fourth element is factual causation between the intoxication and the commission of the offense.[150] Factual causation in this context is defined in the same way as the factual causation required between the conduct and the result within the factual element requirement, *mutatis mutandis*. Accordingly, the requirement is directly derived from the state of intoxication, so that were it not for the intoxication, the conduct would not have occurred. Thus, the requirement is that the intoxication be the *causa sine qua non* of the occurrence of the conduct as it occurred in practice.

If without the intoxication the conduct would not have occurred, the fourth element is not necessarily satisfied. Intoxication is also required to be the cause for the particular way in which the conduct has occurred. The general rules of factual causation are applicable to the examination of this element, including in

[147] The American Model Penal Code, *supra* note 28, at p. 35, suggested in subsection 2.08(1):

> (1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.

[148] Brennan v. People, 37 Colo. 256, 86 P. 79 (1906).

[149] Below at Sect. 4.2.3.

[150] Monrad G. Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L. F. 1, 23–24 (1961); Roberts v. People, 19 Mich. 401 (1870).

relation to alternative, complementary, cumulative, and parallel causes, and to *novus actus interveniens*.

Consequently, if the offender was in state of intoxication, but this state did not cause him to commit the offense or to commit it in the particular way in which it was committed, it would be considered that no factual causation exists between the intoxication and the conduct. In such situations, it is considered that the conduct would have occurred irrespective of the state of intoxication, and therefore intoxication is not the cause of it. Consequently, the presumption of intoxication is not applicable.

Addiction to intoxicating substances is a known phenomenon in the modern world.[151] Addiction may be to both forbidden substances (e.g., forbidden drugs) and permitted ones (e.g., alcohol, nicotine, in most legal systems). Addiction is a physical state in which the body develops physical dependence on the intoxicating effect of the particular substance. This does not include "addiction" to certain behaviors (e.g., watching TV), but to the physical effect of certain chemicals on the body.

People consuming these substances are not always aware of their physical dependence on them, although they may be aware of using such instances. For example, people know that they are smoking cigarettes, and with what frequency, but are not always aware of the physical dependence they develop over time to nicotine released in the process of smoking. At times people are not always aware of consuming certain substances, especially if the source of these substances is inside their body. For example, sexual addiction in some cases may be an addiction to the physical effect of certain hormones excreted inside the body as a consequence of certain stages of the sexual intercourse. The person may think that he is addicted to the intercourse, in reality being addicted to the physical effect of these chemicals.

Addiction can include two main physical effects. The first arises from the absence of the chemical after the body has become physically dependent on it. This effect is generally accompanied by withdrawal symptoms that manifest as physical and mental disorders. The disorders can take the form of violent impulses toward the social environment or property, delusions, seclusion, depression, and continuous attempts to obtain the craved substance. These symptoms are generally present during the weaning process.

A second main physical effect is the result of the use of the chemical, which is characterized by the typical physical effects of the substance in question on the user's body. There are two key differences between using a substance and being

[151] Addison M. Bowman, *Narcotic Addiction and Criminal Responsibility under* Durham, 53 Geo. L. J. 1017 (1965); Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 Yale L. J. 413 (1975); Lionel H. Frankel, *Narcotic Addiction, Criminal Responsibility and Civil Commitment*, 1966 Utah L. Rev. 581 (1966); Peter Barton Hutt and Richard A. Merrill, *Criminal Responsibility and the Right to Treatment for Intoxication and Alcoholism*, 57 Geo. L. J. 835 (1969); L.S. Tao, *Psychiatry and the Utility of the Traditional Criminal Law Approach to Drunkenness of Offenses*, 57 Geo. L. J. 818 (1969); Patricia M. Wald, *Judicial Activism in the Law of Criminal Responsibility – Alcohol, Drugs, and Criminal Responsibility*, 63 Geo. L. J. 69 (1974).

addicted to it. First, the addicted person needs to use the substance in order to moderate or reduce the withdrawal symptoms caused by its absence, and thus achieve relief. Second, there is a difference in the quantity of the substance required to achieve relief.

As the addiction progresses, the addicted person develops relative tolerance for the substance, therefore to experience the desired relief, he may have to continually increase its quantity. This is because the physical effect of the chemical erodes over time. The addicted person keeps increasing the quantity until it reaches potentially lethal rates.[152]

A person who suffers from withdrawal symptoms due to the absence of a chemical, and functional examination reveals that these symptoms negate his cognitive or volitive capabilities, is considered to be in a state of intoxication (full or partial). Thus, both the presence and the absence of chemicals in the person's body may be considered to cause intoxication.

The legal consequence of making these two situations (intoxication due to the presence and absence of the chemical) identical is that the presumption of intoxication can be applied in both types of cases. For example, a person addicted to nicotine, who is trying to stop smoking and is having withdrawal symptoms, may succumb to an irresistible impulse to steal a pack of cigarettes from another person. In this situation, if all other elements of the presumption of intoxication are fulfilled, the presumption is applicable. In most of these cases, however, the transformation of fault, discussed below,[153] would make possible the imposition of criminal liability.

In general, as addiction to intoxicating substances is the result of continuous intoxication, it generally fulfills all elements of the presumption of intoxication and exempts the offender from criminal liability. The third element is involuntary intoxication, which triggers the transformation of fault.[154] Thus, when the offender enters a state of intoxication voluntarily, the presumption of intoxication is not applicable. If a person experiences the absence of nicotine following involuntary exposure to nicotine, it fulfills the element of involuntary intoxication.

When an adult voluntarily consumes nicotine and as a result develops addiction to it, the transformation of fault makes it possible to impose criminal liability for offenses committed under the relevant intoxication. If because of symptoms caused by withdrawal from nicotine he acts violently, the presumption of intoxication is applied differently. If he voluntarily chose to wean himself from his addiction, he

[152] As noted above, when examining the state of intoxication, there is not much difference between intoxication resulting from using a particular chemical (e.g., a person who is under the active effect of alcohol) and from the absence that chemical (e.g., a person who is addicted to alcohol and craves it). Both types of cases are considered intoxication, resulting from the physical effect of the chemical on the body. The first type has to do with the direct effect on the organs, whereas the second with the effect caused by the physical dependence developed on the chemical, which affects the cognitive or volitive capabilities.

[153] Below at Sect. 4.2.3.

[154] Ibid.

may not be able to prevent the imposition of criminal liability, as the responsibility for entering a state of intoxication (which caused the addiction) is transformed into responsibility for the commission of the offense. The legal result in this case is the imposition of criminal liability with the degree of fault that existed when the offender became voluntarily intoxicated.

Criminal liability is imposed on the addicted person not for being addicted but for committing the offense when under the intoxicating effect of the presence or absence of the substance of his addiction.[155] When the commission of the offense requires no use of intoxicating substance, the criminal liability is imposed for the commission of the offense and not for the addiction to the substance. The required fault is consolidated because of the transformation of fault, as noted above, because the fault attached to the offender when entered the state of intoxication. The use of the intoxicating substance, if not in itself forbidden, is not part of the criminal liability.

Even when the offense concerns the involvement of intoxicating substances, the criminal liability is not for the addiction. For example, a person who uses forbidden substances and voluntarily begins a weaning process, which results in withdrawal symptoms, causing him to resort to the drugs again, is criminally liable for possession and use of the substances, not for being addicted to them. The offender may claim that he used the drugs in response to his withdrawal symptoms and not voluntarily. In this case, according to the third element (involuntary intoxication), the fault that was present at the time he entered the state of addiction is examined and transferred to the time of the commission of the offense.[156]

Therefore, addiction to intoxicating substances is not a legitimate legal basis for the imposition of criminal liability. Using prohibited substances is a criminal act, but the offense is usage, not addiction.[157] Moreover, addiction itself does not function as defense against criminal liability, neither in relation to offenses that require being under the influence of such substances, nor in relation to other offenses. Alcoholism is not a defense against the offense of consuming alcohol (e.g., while driving).[158] Alcoholism is examined based on the circumstances that prevailed when the offender entered a given situation, and voluntary consumption that caused addiction is not considered involuntary intoxication.

[155] Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

[156] Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968); United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973); State v. Herro, 120 Ariz. 604, 587 P.2d 1181 (1978); State v. Smith, 219 N.W.2d 655 (Iowa 1974); People v. Davis, 33 N.Y.2d 221, 351 N.Y.S.2d 663, 306 N.E.2d 787 (1973).

[157] Heard v. United States, 348 F.2d 43 (D.C. Cir. 1964); Johnson v. State, 43 Ala.App. 224, 187 So.2d 281 (1966); State v. Cote, 560 A.2d 558 (Me. 1989); Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. Pa. L. Rev. 2245, 2253 (1992).

[158] Vick v. State, 453 P.2d 342 (Alaska 1969); People v. Hoy, 380 Mich. 597, 158 N.W.2d 436 (1968); Seattle v. Hill, 72 Wash.2d 786, 435 P.2d 692 (1967), State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969); State v. Zegeer, 170 W.Va. 743, 296 S.E.2d 873 (1982).

3.3.3 Legal and Therapeutic Consequences

When all elements of the presumption of intoxication are fulfilled, the offender is exempt from criminal liability for being intoxicated. If addicted to intoxicating substances, treatment for the addiction is voluntary and decided upon by the offender. As long as addiction and intoxication do not result in the commission of criminal offenses, society has no legal right to force a person to be treated for addiction or intoxication.

For example, addiction to nicotine, which does not result in the commission of criminal offenses, provides no legal basis for intervention using the measure available in criminal law. But other measures may be taken in other spheres of law. For example, if sex addiction causes a person be a deficient father, the social services may remove the children from his custody and enroll him in a weaning program. If intoxication or addiction are not sufficient to exempt an offender from criminal liability, generally as a result of the transformation of fault, criminal liability is imposed and the society can initiate treatment measures.

When intoxication is part of an addiction to an intoxicating substance, and not one-time event, the question of the efficiency of the common punishment for the prevention of future intoxication arises.[159] When intoxication forms a habit, there is a high probability that a punishment of incarceration or fine would not prevent the offender from becoming intoxicated in the future for the same reason. When intoxication is a one-time event, the common punishments may deter the offender from committing offenses in a state of intoxication in the future, and the one-time offender may try to avoid intoxication.

Situations of addiction are different. In most legal systems, medical treatments have been incorporated into the criminal process in cases of addiction that cause the commission of certain offenses. Often, these treatments are part of sentencing after criminal liability is imposed. At times, however, the medical treatment is a full or partial alternative to imposition of criminal liability. When it serves as a full alternative, it replaces the imposition of criminal liability, and when it is a partial alternative, it results in the imposition of a milder punishment together with the treatment. The general assumption in these cases is that the offender wishes to be rehabilitated and to free himself from addiction to the substance in question.

In some cases the treatment is medical, but in most cases it is social. For example, weaning off of drugs or alcohol generally combines both medical and social measures. The offender is directed to the required treatment by the court in response to the commission of the offense. The court continues to supervise the offender's progress under the treatment. If the offender is cooperative, the court may reward him in reducing his punishment.[160] Generally, these terms are specified

[159] For the purposes of punishment and sentencing see Gabriel Hallevy, The Right to Be Punished – Modern Doctrinal Sentencing 15–56 (2013).

[160] People v. Borrero, 19 N.Y.2d 332, 280 N.Y.S.2d 109, 227 N.E.2d 18 (1967); State v. White, 27 N.J. 158, 142 A.2d 65 (1958); United States v. Sullivan, 406 F.2d 180 (2nd Cir. 1969).

in advance. For example, the court can impose a suspended sentence on the offender instead of incarceration, if the offender cooperates and participates in the weaning process. If the process fails, the offender will probably commit the offense again and the suspended sentence is activated the next time he is sentenced.

The medical treatment provided to an insane person who committed a criminal offense is coerced to prevent the danger that the insane person poses to society, as noted.[161] The insane person is not required to consent to the medical treatment or to cooperate with it. But medical and social treatments provided to addicted persons require the offender's consent and cooperation. The main reason for this difference is that intoxicated offenders, including addicted ones, may be subject to the common punishments in criminal law, whereas insane offenders are not subject to criminal liability.

Because the insane offender is not punishable, treatment is necessary to prevent further danger to society. The intoxicated offender may be punished, and therefore the treatment serves as an alternative but it is not compulsory. Consequently, the intoxicated offender may choose the more suitable alternative from his point of view. Because no such alternatives are available in the case of insanity, the offender is not given a choice.

Having to make a decision between therapeutic alternatives and common punishments does not eliminate or limit the discretion of the court to diminish the liability and the punishment it imposes on the offender. In some legal systems, diminished liability in cases of intoxication that has been successfully treated may take the form of probation (where no criminal record of the offense is kept). But diminished criminal liability and diminished punishments are not alternatives to the imposition of criminal liability, because they are the consequences of such imposition. Diminished liability and punishment are not intended to cure the addiction, to reduce its symptoms, or to treat it.

3.3.4 The Tangent: Intoxication vs. Insanity and Automatism

A person in a state of intoxication does not necessarily control his bodily movements and may suffer from temporary or permanent mental deficiency. Mental deficiency or automatism may be the result of intoxication or addiction to chemical substances. The question therefore is whether there is a distinction between the presumptions of intoxication, automatism, and insanity. Such distinction has pragmatic significance, as in most legal systems the consolidation of the insanity presumption is an adequate legal basis for coerced treatment, whereas the intoxication and automatism presumptions are not.

For example, if intoxication caused the offender a mental deficiency manifested by losing control over his bodily movements, the question is what the applicable presumption would be: intoxication, insanity, or automatism. The insanity

[161] Above at Sect. 1.4.2.

vs. automatism tangent has been discussed above[162]; the intoxication vs. insanity and automatism tangent is discussed below.

In most Anglo-American legal systems there is much ambiguity in this respect. Identical phenomena in the same contexts have been classified differently. For example, intoxication that has led to brain concussion and caused loss of control over certain bodily movements was classified automatism, although earlier rulings classified it as intoxication.[163] Similar difficulty exists with regard to the classification of situations in which intoxication (generally using prohibited drugs) leads to mental deficiency, or when mental deficiency leads to intoxication through use of drugs or alcohol to the point of addiction.[164]

The main rulings in English common law mixed intoxication, automatism, and insanity together by ruling that mental deficiency may be the legal basis for intoxication and automatism and *vice versa*, and that physical injuries that negate the offender's cognitive capabilities are an adequate basis for insanity, even if derived from intoxication.[165] As noted above, the English common law did not limit the M'Naghten rules to mental diseases, as defined in modern psychiatry, but allowed physical injuries also to be applied to insanity.[166]

Indeed, the classification of any given case to the relevant criminal norm (intoxication vs. insanity and automatism) should be based on the interpretation rules determined by the principle of legality in criminal law.[167] The difficulties in this classification are in cases in which intoxication is involved. In the absence of intoxication, the relevant presumptions are those of automatism and insanity and not of intoxication, because full or partial intoxication is required for the presumption of intoxication.[168] In these cases, the relevant tangent is automatism vs. insanity, as discussed above.[169]

When intoxication is involved, each presumption must be examined based on its elements. If the case matches only one of the presumptions, this presumption is to

[162] Above at Sect. 3.2.3.

[163] Stripp, (1979) 69 Cr. App. Rep. 318, but compare with Director of Public Prosecutions v. Majewski, [1977] A.C. 443, [1976] 2 All E.R. 142, [1976] 2 W.L.R. 623, 62 Cr. App. Rep. 262, 140 J.P. 315, 100 L.Q.R. 639; Majewski, [1977] A.C. 443, [1975] 3 All E.R. 296, [1975] W.L.R. 401, 62 Cr. App. Rep. 5, 139 J.P. 760.

[164] Davis, (1881) 14 Cox C.C. 563, 564; Director of Public Prosecutions v. Beard, [1920] All E.R. Rep. 21, [1920] A.C. 479, 501, 89 L.J.K.B. 437, 122 L.T. 625, 84 J.P. 129, 36 T.L.R. 379, 64 Sol. Jo. 340, 26 Cox C.C. 573; 14 Cr. App. Rep. 159; Finegan v. Heywood, (2000) 2000 S.C.C.R. 460, 2000 S.C. (J.C.) 444.

[165] Charlson, [1955] 1 All E.R. 859, [1955] 1 W.L.R. 317, 39 Cr. App. Rep. 37; Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386, 409, [1961] 3 All E.R. 523, [1961] 3 W.L.R. 965, 46 Cr. App. Rep. 1. See more in Rucker v. State, 119 Ohio St. 189, 162 N.E. 802 (1928); Commonwealth v. Hicks, 483 Pa. 305, 396 A.2d 1183 (1979); Burns, (1973) 58 Cr. App. Rep. 364.

[166] Above at Sect. 1.1.2.

[167] For the interpretation rules determined by the principle of legality in criminal law see Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law 133–164 (2010).

[168] See above at Sect. 3.3.2.

[169] Above at Sect. 3.2.3.

Table 3.3 Intoxication, automatism, and insanity defenses compared

	Intoxication	Automatism	Insanity
Full or partial intoxication	Required	Not required	Not required
Full or partial mental disorder	Not required	Not required	Required
Functional use of the presumption	Exempt from criminal liability and referred to treatment	Exempt from criminal liability	Exempt from criminal liability and referred to treatment
Transformation of fault	Applicable directly	Applicable directly	Not applicable directly, but may be part of the presumption

be applied. This is the trivial case. For example, if the intoxication is voluntary, the third element of the intoxication presumption is not consolidated and therefore not applicable, but the case may still match the presumptions of automatism or insanity. This is the first layer of the interpretation rules of criminal law, referring to the criminal verbal rationale of the norm (*ratio verborum*).[170]

But if the case matches more than one presumption, each match should be functionally examined with respect to the legal purpose of each presumption. This is the second layer of interpretation rules, which refers to the legal rationale of the criminal norm (*ratio legis*).[171] At this stage, the legal purpose of the presumption plays the main role. For example, if a person suffers from mental deficiency caused by a continuous state of intoxication or addiction to certain chemicals, and if the mental deficiency can be cured, relieved, or medically supervised, and if the therapy is effective, the insanity presumption is likely to be more appropriate.

If, however, the intoxication is not continuous but a one-time event caused by temporary mental deficiency (e.g., a one-time exposure to powerful drugs), which cannot be cured, relieved, or medically supervised, the intoxication presumption is more likely to be appropriate. Naturally, when intoxication caused no mental deficiency, the relevant presumption is intoxication, because mental disorder is required for the presumption of insanity.[172] The key differences between the insanity, automatism, and intoxication presumptions is summarized in Table 3.3.

Therefore, when a case may be classified as insanity, intoxication, and automatism, the reasonable legal interpretation is based on the legal rationale (*ratio legis*) of each presumption. This interpretation matches the principle of legality in criminal law. Note, however, that there is no contradiction or dependence between the three presumptions. Procedurally, if one presumption is rejected, it does not necessarily prevent the court from accepting another one, if all relevant elements are consolidated. No party in the criminal process is obligated to limit itself to claiming only one presumption.

[170] Hallevy, *supra* note 167, at pp. 149–152.

[171] Ibid.

[172] See above at Sect. 1.3.4.

Legal Transformation of Fault

4

Contents

When a perpetrator voluntarily enters into a situation that requires an insanity, automatism, or intoxication defense to prevent imposition of criminal liability, applying one of these defenses is not necessarily just. For example, if a person drinks alcohol deliberately and subsequently commits an offense, it is not right to exempt him from criminal liability based on the intoxication defense. Modern criminal law solves this problem by transforming the fault that existed at the time when the perpetrator placed himself in a situation that removed his control to the time of the commission of the offense. This is the legal transformation of fault.

4.1 The Function of Legal Transformation of Fault

4.1.1 Basic Structure and Rationale

When an offender commits an offense in a state of insanity, infancy, automatism, or intoxication, the fault itself cannot be consolidated. These states are presumed to prevent the consolidation of fault because they negate the offender's cognitive or volitive capabilities. Because fault is required for the imposition of criminal liability, if the offender has not consolidated it, no criminal liability can be imposed.

G. Hallevy, *The Matrix of Insanity in Modern Criminal Law*,
DOI 10.1007/978-3-319-20597-7_4

The legal consequences of adopting such an attitude *ex ante* would be catastrophic in social terms. Quite probably, potential offenders would deliberately bring themselves to one of the above situations, most likely intoxication, and plead not guilty.

Knowing that if the offense is committed in one of these states prevents imposition of criminal liability, potential offenders would simply commit it in one of these states. Traditionally, fault is examined at the time the offense has been committed (the time when the conduct has been consolidated).[1] But in these situations it would be right to consider that the fault was consolidated when the offender entered the relevant state.

Indeed, it would be right to do so in all cases, if doing so is relevant to the factual or legal questions raised at a given trial. Considering the fault at the time when the offender entered the relevant state moves the time when the fault is examined from the time of the commission of the offense to an earlier time. Nevertheless, in order to impose criminal liability, an adequate fault must still be present at the time when the offense was committed. Therefore, the legal action does not end with the examination of the fault at an earlier point of time, but also involves copying the fault to the later point (the time of the commission of the offense).

This legal action is the transformation of fault. The legal function consists of examining the fault at one point in time and copying it to another point. What is being copied, however, is not the initial fault but a transformation of it. At the first point in time, the object of the fault consists of the entrance into the state of irresponsibility; at the second point in time, the object concerns the facts that form the factual element requirement of the offense at hand. Therefore, the legal function involves not merely the *copying* of the fault but also its *transformation*.

For example, A wants to kill B. While fully sober, A deliberately drinks alcohol to achieve the desired mental state for killing B. Shortly thereafter, A kills B in a state of intoxication and pleads not guilty. To impose criminal liability on A, it is necessary to prove A's fault in the offense. The fault consists of a combination of cognitive and volitive components in relation to the factual elements of the offense (homicide), and the offender argues that at the time when the offense was committed, i.e., when the conduct was consolidated (t_2), the required fault could not be consolidated and therefore no criminal liability can be imposed.

[1] Fowler v. Padget, (1798) 7 T.R. 509, 101 Eng. Rep. 1103; Thabo Meli, [1954] 1 All E.R. 373, [1954] 1 W.L.R. 228; Church, [1966] 1 Q.B. 59, [1965] 2 All E.R. 72, [1965] 2 W.L.R. 1220, 49 Cr. App. Rep. 206, 129 J.P. 366; Le Brun, [1992] Q.B. 61; Masilela, 1968 (2) S.A. 558 (A.D.); Ramsay, [1967] N.Z.L.R. 1005; Jackson v. Commonwealth, 100 Ky. 239, 38 S.W. 422 (1896); Masilela, 1968 (2) S.A. 558 (A.D.); Chiswibo, 1960 (2) S.A. 714; Scott, [1967] V.R. 276; Fagan v. Metropolitan Police Commissioner, [1969] 1 Q.B. 439, [1968] 3 All E.R. 442, [1968] 3 W.L.R. 1120, 52 Cr. App. Rep. 700, 133 J.P. 16; Miller, [1983] 2 A.C. 161, [1983] 1 All E.R. 978, [1983] 2 W.L.R. 539, 77 Cr. App. Rep. 17; Singh, [1974] 1 All E.R. 26, [1973] 1 W.L.R. 1444, 138 J.P. 85; Kaitamaki, [1985] 1 A.C. 147, [1984] 2 All E.R. 435, [1984] 3 W.L.R. 137, [1984] Crim. L.R. 564, 79 Cr. App. Rep. 251; Matthews, [1950] 1 All E.R. 137, 48 L.G.R. 190, 66 T.L.R. (Pt. 1) 153, 114 J.P. 73, 34 Cr. App. Rep. 55; People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799, 157 N.Y.S.2d 558 (1956); Hill v. Baxter, [1958] 1 Q.B. 277, [1958] 1 All E.R. 193, [1958] 2 W.L.R. 76, 56 L.G.R. 117, 42 Cr. App. Rep. 51.

But if the court examines the situation at an earlier and yet relevant point of time, the offender is not as innocent as he would like to appear. When the offender has entered the state of intoxication (t_1), the cognitive and volitive components were consolidated in the offender's mind. Two problems arise, however:

(1) the time of consolidation is earlier than the time of the commission of the offense; and
(2) the object of the cognitive and volitive components is not identical with the factual element components.

Both problems find their solution within the transformation of fault.

One of the functions of the transformation of fault has to do with the time axis, as the fault is being transferred from the point when the offender entered the fault-negating state (t_1) to the point of the commission of the offense (t_2). The assumption behind this transfer is that the fault-negating state (e.g., intoxication) preserves the offender's accountability for the commission of the offense, so that even if the offender could not have exercised control over the commission of the offense, he controlled the conditions under which the offense was committed and of the way in which it was committed.

For example, if the offender committed homicide while drunk, when the offense was committed (t_2) the offender had no control over his conduct, but he did control the conditions for entering into a state of intoxication and he consumed the alcohol voluntarily. When a person consumes alcohol voluntarily, he remains accountable for all consequences of the intoxication. Thus, the function of the transformation of fault is to transfer the fault from the point when the offender entered a state of irresponsibility to the point of the commission of the offense.

Another function of the transformation of fault is the substantive change in the object of the fault. The required fault in the case of the commission of the offense, as part of the mental element requirement, relates to the components of the factual element in a symmetric structure. For example, it is necessary to prove awareness of conduct, of circumstances, etc.[2] General awareness has no meaning in criminal law; awareness must relate to a particular object, i.e., the components of the factual element.

In addition to transferring the fault from one point in time to another, its object in both points of time must be identical. But awareness of drinking alcohol does not parallel awareness of stealing. Therefore, for the transformation of fault to be complete, the object of the fault must be metamorphosed so that it matches the mental element requirement. But how can fault in relation to object A be transformed into fault in relation to object B?

This type of change, however, is not rare in criminal law. All presumptions of the mental element requirement are based on such a transformation, the most significant one in this context being the presumption of transferred malice (error in

[2] See above at Sect. 2.2.1.

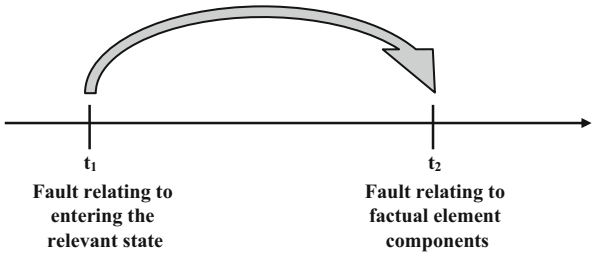

Fig. 4.1 The function of the transformation of fault

persona, error in objecto), which transfers intent in relation to one object to another.[3] This is not the only instance. The presumption of indirect intent transfers awareness of the probability that the results would occur to purpose (specific intent) in relation to the results themselves.[4]

Thus, the change of object that takes place in the course of the transformation of fault is not exceptional in criminal law; nevertheless, it must be justified because a legal structure should reflect a just premise. The rationale of the change in object relates to the inherent connection between these objects. The commission of the offense, and therefore the components of its factual element, is held to be the consequence of the fault-negating state. Therefore, if the offender had not been intoxicated, no offense would have been committed, and if the offender had not entered this state, the offense would not have been committed.

The same rationale characterizes the mental element presumptions. For example, concerning the transferred malice presumption: if the offender had not intended to commit an offense against A, no offense would have been committed against B. Thus, the change of object together with the transfer in time form the transformation of fault, as illustrated in Fig. 4.1.

The European-Continental doctrine of *actio libera in causa*, discussed above, is an early conceptualization of the idea of transformation of fault. Originally, it referred to two basic types of fault when entering the relevant state: general intent

[3] Salisbury, (1553) 1 Plowd. 100, 75 Eng. Rep. 158; Saunders, (1576) 2 Plowd. 473, 75 Eng. Rep. 706; Gore, (1611) 9 Co. Rep. 81a, 77 Eng. Rep. 853; Jarvis, (1837) 2 Mood. 40, 174 Eng. Rep. 207; Michael, (1840) 2 Mood. 120, 169 Eng. Rep. 48; Hussain, [1969] 2 Q.B. 567, [1969] 2 All E.R. 1117, [1969] 3 W.L.R. 134, 53 Cr. App. Rep. 448; Mitchell, [1983] 1 Q.B. 741, [1983] 2 All E.R. 427, [1983] 1 W.L.R. 938, 76 Cr. App. Rep. 293; Ford v. State, 330 Md. 682, 625 A.2d 984 (1993); State v. Brady, 745 So.2d 954 (Fla. 1999); Mayweather v. State, 29 Ariz. 460, 242 P. 864 (1926); Coston v. State, 144 Fla. 676, 198 So. 467 (1940); Gladden v. State, 273 Md. 383, 330 A.2d 176 (1974); State v. Martin, 119 N.J. 2, 573 A.2d 1359 (1990); State v. Henry, 253 Conn. 354, 752 A.2d 40 (2000); People v. Sanchez, 26 Cal.4th 834, 111 Cal.Rptr.2d 129, 29 P.3d 209 (2001); United States v. Fornez-Espinoza, 241 Fed. Appx. 398 (2007); RG 2, 335; RG 3, 384; RG 54, 349; RG 58, 27; RG 67, 258; BGH 9, 240; BGH 14, 193; BGH 34, 53.

[4] Director of Public Prosecutions v. Morgan, [1976] A.C. 182, [1975] 2 All E.R. 347, [1975] 2 W.L.R. 913, 61 Cr. App. Rep. 136, 139 J.P. 476; Heard, [2007] E.W.C.A. Crim. 125, [2008] Q.B. 43, [2007] 3 All E.R. 306; B., [2008] E.W.C.A. Crim. 4, [2008] All E.R. (D) 85; State v. Clardy, 73 S.C. 340, 53 S.E. 493 (1906); People v. Campbell, 237 Mich. 424, 212 N.W. 97 (1927); United States v. Kabat, 797 F.2d 580 (8th Cir. 1986).

and specific intent. Although *actio libera* is the "prototype" of the transformation of fault function, it is partial because it does not cover all possible types of fault. For example, if the offender entered the relevant state in a case of negligence, the *actio libera* would not be relevant. A comprehensive function could be based on the *actio libera* understandings, but they would have to be widened to cover every type of fault.

The derivative functional questions are when the transformation of fault should be activated and what its consequences are. These questions are discussed below with respect to infancy, automatism, intoxication, and insanity.

4.1.2 Algebraic Insights

The fascinating field of mathematics and law should be explored more thoroughly, especially with a view toward possible applications in mechanizing or computing portions of the law. Mathematical principles can be implemented within the law in order to clarify certain legal principles and reduce the probability of error. At times, legal principles are formulated by induction in ways that are over- or under-inclusive. When these principles are reformulated in mathematical terms, the legal realm becomes wider, clearer, and quite likely more just.

Transformation of fault resembles linear transformation functions, one of the basic instruments in linear algebra. Because transformation of fault relates to fault, we can define the linear space as the space of fault. Therefore, the basis would include the relevant states that span the space: specific intent (v_1), general intent (v_2), negligence (v_3), and strict liability (v_4). When the offender has no fault at all, the element of the space is null ($\underline{0}$).

The transformation of fault acts as a linear transformation. For example, A had general intent (v_2) with regard to drinking alcohol, and negligence (v_3) with regard to not taking the medication he uses to control his involuntary reflexes. Therefore:

$$T(v_2 + v_3) = T(v_2) + T(v_3)$$

This means that general intent would be considered with regard to the offense committed under intoxication, and negligence with regard to the offense committed under automatism.

Moreover, A had λ general intents (v_2) with regard to the λ glasses of alcohol consumed on different occasions. Therefore:

$$T(\lambda v_2) = \lambda T(v_2)$$

This means general intent would be considered for each time the offender offended in a state of intoxication.

If the offender had no fault at the time he entered the relevant state (e.g., involuntary intoxication), no fault is related to the factual element components. Therefore:

$$T\left(\underline{0}\right) = \underline{0}$$

A full and accurate transformation of fault (T) would produce an isomorphism. Thus, for each v_i there is a different image Tv_i, so that the kernel is $\underline{0}$ and nothing but it. Therefore, if:

$$\dim\ker T + \dim\mathrm{Im}T = n$$

and:

$$\ker T = \underline{0}$$

then: ImT spans the fault space ($\dim\mathrm{Im}T = n$, and T is a surjective function), the null space is $\underline{0}$ (T is an injective function), and T forms an isomorphism. Isomorphism is important because it refers to the legal legitimacy of the transformation of fault. Only if the definition of the transformation of fault forms an isomorphism (no over-inclusions or under-inclusions are possible) is the criminal law just both toward the offender and toward society. Unfortunately, transformations of fault do not produce isomorphism in all legal systems, which can be over-inclusive (e.g., negligence leading to automatism becomes general intent for the factual element components) or under-inclusive (e.g., negligence leading to intoxication becomes no-fault with regard to the factual element components).[5]

If the legal provisions that form the transformation of fault fail to produce an isomorphism, the algebraic insights described above can suggest ways of correcting and improving criminal law to make it more just.

4.2 Applicability

The transformation of fault may be applicable to all controllable *in personam* states.

4.2.1 Infancy

Infancy may refer to biological and mental age.[6] Unless the offender has found the way of entering a state of infancy by becoming younger or mentally retarded, transformation of fault is irrelevant in this case. As long as one cannot control entering a state of infancy, transformation of fault is not applicable.

This is only one situation of transformation of fault, which refers to the transformation of the offender's "no fault" in entering the state of infancy (by being born as

[5] See, e.g., in Israel. According to article 34I of the Israeli Penal Code, negligence leading to intoxication becomes no-fault with regard to the factual element components.

[6] See above at Sect. 3.1.2.

such) to the factual element components of the offense committed when infant. The result is identical whether or not the transformation of fault function is activated in infancy, but its activation is significant as it makes this function be considered general. If there is a way to control mental retardation by any means, the transformation of "no fault" would not be the only transformation within this function.

4.2.2 Automatism

The second element of the presumption of automatism is inability to control the conditions that led to the inability to control one's bodily movements.[7] As noted, this element refers to the transformation of fault. According to the original concept of *actio libera in causa*, if the offender's conduct was not coerced, the automatism defense is not applicable.[8] Therefore, if the state of automatism was controllable, and if the offender controlled his entry into this state, he is not considered having been coerced and the delinquent conduct reflects the fault. Automatism that can be controlled, however, is not necessarily associated with a given purpose to commit and offense.

Inclusion of this element within the transformation of fault function requires us to distinguish between five types of fault:

(1) specific intent to enter into a state of automatism (the offender entered the state of automatism deliberately in order to commit the offense);
(2) general intent to enter into a state of automatism (the offender entered the state of automatism being fully aware of what he was doing and/or through recklessness);
(3) negligence in entering the state of automatism;
(4) strict liability in entering the state of automatism; and
(5) no fault in entering the state of automatism.

Application of the transformation of fault function to these five types of fault, transforms, in each case, the fault from the point when the offender entered the state of automatism to the time when he committed the offense, although when he committed the offense his conduct contained no fault. Applicability of this function as part of the automatism defense can be illustrated by an example that can be divided into five different scenarios, based on the five types of fault.

Consider the case of a driver who causes the death of a person in a car accident. The investigation reveals that the offender had fainted while driving and lost

[7] See above at Sect. 3.2.2.

[8] Government of the Virgin Islands v. Smith, 278 F.2d 169 (3rd Cir. 1960); People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435 (1943); State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996). For intoxication see in Sheehan, [1975] 2 All E.R. 960, [1975] 1 W.L.R. 739, 60 Cr. App. Rep. 308; Menniss, [1973] 2 N.S.W.L.R. 113; Kamipeli, [1975] 2 N.Z.L.R. 610.

control over the vehicle, after which the car struck the victim, causing his death. In this example, the first element of the presumption of automatism is consolidated because the offender had no control over his bodily movements. Investigation of the reasons for the fainting, however, may produce five different results, based on the following scenarios:

(1) This was not the first time the driver has fainted while driving. The driver was aware of his condition, and knew that lack of sleep would have such an effect on him. The driver deliberately avoided sleeping the night before so that he would faint exactly at the time and place required to kill the victim, by losing control over his car;
(2) This was not the first time the driver has fainted while driving. The driver was aware of his condition, but hoped that this time it would not happen, or he was indifferent to this possibility;
(3) This was the first time the driver fainted while driving a car, but a few days earlier was diagnosed with a disease, one of symptoms of which was fainting. A reasonable person would have asked the physicians about the symptoms of his disease, but the offender did not;
(4) This was the first time the driver fainted while driving a car, but the offender did not take all reasonable measures to prevent the fainting, e.g. eating and drinking in the past 24 h;
(5) This was the first time the driver fainted while driving a car, and nothing could have prevented it.

Each of the five scenarios matches a different legal situation regarding criminal liability for homicide. The isomorphic match is illustrated in Table 4.1.

Scenario (1) refers to specific intent in entering into the state of automatism. Transformation of this type of fault from the time the offender entered the state of

Table 4.1 Application of transformation of fault in automatism

Scenario	The fault in entering the state of automatism	The fault that exists during the commission of the offense	The fault is related to the factual element components (owing to the transformation of fault)	The appropriate offense for which the offender may be criminally liable
(1)	Specific intent	No fault	Specific intent	Murder
(2)	General intent	No fault	General intent	Manslaughter
(3)	Negligence	No fault	Negligence	Negligent homicide
(4)	Strict liability	No fault	Strict liability	Felony murder (if it exists)[a]
(5)	No fault	No fault	No fault	–

[a]In Anglo-American legal systems there was a felony murder offense which referred to homicide under strict liability terms. See Jerome Hall, General Principles of Criminal Law 547 (2nd ed., 1960, 2005)

automatism to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with specific intent. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the homicide is considered to have been committed with specific intent. In most legal systems this refers to murder.

Scenario (2) refers to general intent in entering into the state of automatism. Transformation of this type of fault from the time the offender entered the state of automatism to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with general intent. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the homicide is considered to have been committed with general intent. In most legal systems this refers to manslaughter.

Scenario (3) refers to negligence in entering into the state of automatism. Transformation of this type of fault from the time the offender entered the state of automatism to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with negligence. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the homicide is considered to have been committed with negligence. In most legal systems this refers to negligent homicide.

Scenario (4) refers to strict liability in entering into the state of automatism. Transformation of this type of fault from the time the offender entered the state of automatism to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with strict liability. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the homicide is considered to have been committed with strict liability. In some legal systems this refers to felony murder.

Scenario (5) refers to no fault in entering into the state of automatism. This is the basic situation for no imposition of criminal liability on the offender. Transformation of this type of fault from the time the offender entered the state of automatism to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with no fault. Thus, without the required fault, no criminal liability may be imposed on the offender.

In all of the above scenarios, the pattern of transformation of fault is identical, the only difference between them being the type of fault being transformed. Thus, the same fault that was present when the offender entered the state of automatism is being transferred to the point when the offense was committed, and it refers the factual element components of the offense. This function enables criminal law to override and overcome the absence of fault during the actual commission of the offense, and therefore modern criminal law has embraced the concept.[9]

[9] RG 60, 29; RG 73, 177; VRS 23, 212; VRS 46, 440; VRS 61, 339; VRS 64, 189; DAR 1985, 387; BGH 2, 14; BGH 17, 259; BGH 21, 381; RG 22, 413; VRS 23, 213; VRS 25, 33; DAR 1983, 395; Hans-Heinrich Jescheck und Thomas Weigend, Lehrbuch des Strafrechts – Allgemeiner Teil 445–448 (5 Auf., 1996).

4.2.3 Intoxication

Consider the case of a driver who causes the death of a person in a car accident. The investigation reveals that the offender was drunk while driving and lost control over the car, after which the car struck the victim, causing his death. In this example, all the elements of the presumption of intoxication are consolidated, but investigation of the reasons for the intoxication may produce five different results, based on the following scenarios:

(1) The offender went to a bar with some friends before the accident and drank three glasses of alcohol deliberately, intending to kill the victim. The drinking eased the offender's mind making it easier for him to commit the offense;
(2) The offender went to a bar with some friends before the accident and drank a few glasses of alcohol. He was aware of the alcoholic content of the drinks, but hoped that it would not affect his driving, or was indifferent as to that possibility;
(3) The offender went to a bar with some friends and ordered a drink. Although the offender was not aware of the alcoholic content of his drink, any reasonable person in these circumstances would have known about it;
(4) The offender drank something before driving, but was not aware of its alcoholic content, and no reasonable person could have known about it under the same circumstances. Nevertheless, the offender did not take all reasonable measures to prevent the error;
(5) The offender had just been released from the hospital, where an alcoholic substance was erroneously was injected into his blood. The medical staff had told him that it was safe for him to drive.

Each of the five scenarios matches a different legal situation regarding criminal liability for homicide. The isomorphic match is illustrated in Table 4.2.

Scenario (1) refers to specific intent in entering into the state of intoxication. Transformation of this type of fault from the time the offender entered the state of intoxication to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with specific intent. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the homicide is considered to have been committed with specific intent. In most legal systems this refers to murder.[10]

[10] Kingston, [1995] 2 A.C. 355, [1994] 3 All E.R. 353, [1994] 3 W.L.R. 519, [1994] Crim. L.R. 846, 99 Cr. App. Rep. 286, 158 J.P. 717; Gallagher, [1963] A.C. 349, [1961] 3 All E.R. 299, [1961] 3 W.L.R. 619, 45 Cr. App. Rep. 316; McDaniel v. State, 356 So.2d 1151 (Miss. 1978); State v. Richardson, 495 S.W.2d 435 (Mo. 1973); State v. Shipman, 354 Mo. 265, 189 S.W.2d 273 (1945); State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979); State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977); Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970).

Table 4.2 Application of transformation of fault in intoxication

Scenario	The fault in entering the state of intoxication	The fault that exists during the commission of the offense	The fault is related to the factual element components (owing to the transformation of fault)	The appropriate offense for which the offender may be criminally liable
(1)	Specific intent	No fault	Specific intent	Murder
(2)	General intent	No fault	General intent	Manslaughter
(3)	Negligence	No fault	Negligence	Negligent homicide
(4)	Strict liability	No fault	Strict liability	Felony murder (if it exists)[a]
(5)	No fault	No fault	No fault	–

[a]See footnote in Table 4.1

Scenario (2) refers to general intent in entering into the state of intoxication. Transformation of this type of fault from the time the offender entered the state of intoxication to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with general intent. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the homicide is considered to have been committed with general intent. In most legal systems this refers to manslaughter.[11]

Scenario (3) refers to negligence in entering into the state of intoxication. Transformation of this type of fault from the time the offender entered the state of intoxication to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with negligence. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the

[11] Hopt v. People, 104 U.S. 631, 26 L.Ed. 873 (1881); Occhicone v. State, 768 So.2d 1037 (Fla. 2000); Aszman v. State, 123 Ind. 347, 24 N.E. 123 (1890); State v. Wilson, 234 Iowa 60, 11 N. W.2d 737 (1943); Heideman v. United States, 259 F.2d 943 (D.C. Cir. 1958); Jamison v. State, 53 Okl. Crim. 59, 7 P.2d 171 (1932); Allen v. United States, 239 F.2d 172 (6th Cir. 1956); People v. Jones, 263 Ill. 564, 105 N.E. 744 (1914); People v. Eggleston, 186 Mich. 510, 152 N.W. 944 (1915); People v. Guillett, 342 Mich. 1, 69 N.W.2d 140 (1955); Roberts v. People, 19 Mich. 401 (1870); State v. Watts, 223 N.W.2d 234 (Iowa 1974); Commonwealth v. Kichline, 468 Pa. 265, 361 A.2d 282 (1976), Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941); People v. Freedman, 4 Ill.2d 414, 123 N.E.2d 317 (1954); State v. Huey, 14 Wash.2d 387, 128 P.2d 314 (1942); State v. Shine, 193 Conn. 632, 479 A.2d 218 (1984); Brown v. Commonwealth, 575 S. W.2d 451 (Ky. 1978); People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921); People v. Register, 60 N.Y.2d 270, 469 N.Y.S.2d 599, 457 N.E.2d 704 (1983); State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925); Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957); People v. Decina, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799 (1956).

homicide is considered to have been committed with negligence. In most legal systems this refers to negligent homicide.[12]

Scenario (4) refers to strict liability in entering into the state of intoxication. Transformation of this type of fault from the time the offender entered the state of intoxication to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with strict liability. Thus, although at the moment the homicide was committed, no fault accompanied the offense, the homicide is considered to have been committed with strict liability. In some legal systems this refers to felony murder.[13]

Scenario (5) refers to no fault in entering into the state of intoxication. This is the basic situation for no imposition of criminal liability on the offender. Transformation of this type of fault from the time the offender entered the state of intoxication to the point of the commission of the offense combines the factual element of homicide (causing a person's death) with no fault. Thus, without the required fault, no criminal liability may be imposed on the offender.[14]

In all of the above scenarios, the pattern of transformation of fault is identical, the only difference between them being the type of fault being transformed. Thus, the same fault that was present when the offender entered the state of intoxication is being transferred to the point when the offense was committed, and it refers the factual element components of the offense. This function enables criminal law to override and overcome the absence of fault during the actual commission of the offense, and therefore modern criminal law has embraced the concept.

[12] People v. Garcia, 250 Cal.App.2d 15, 58 Cal.Rptr.186 (1967); State v. Coates, 107 Wash.2d 882, 735 P.2d 64 (1987); People v. Whitfield, 7 Cal. 4th 437, 27 Cal.Rptr.2d 858, 868 P.2d 272 (1994); State v. Brown, 122 N.M. 724, 931 P.2d 69 (1996); Stenzel v. United States, 261 Fed. 161 (8th Cir. 1919); State v. Galvin, 147 Vt. 215, 514 A.2d 705 (1986); Embry v. State, 310 P.2d 617 (Okl. Crim. App. 1957); State v. Campos, 122 N.M. 148, 921 P.2d 1266 (1996).

[13] People v. Koerber, 244 N.Y. 147, 155 N.E. 79 (1926); Director of Public Prosecutions v. Beard, [1920] All E.R. Rep. 21, [1920] A.C. 479, 89 L.J.K.B. 437, 122 L.T. 625, 84 J.P. 129, 36 T.L.R. 379, 64 Sol. Jo. 340, 26 Cox C.C. 573, 14 Cr. App. Rep. 159.

[14] People v. Scott, 146 Cal. App.3d 823, 194 Cal. Rptr. 633 (1983); Torres v. State, 585 S.W.2d 746 (Tex. Crim. App. 1979); Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931); Borland v. State, 158 Ark. 37, 249 S.W. 591 (1923); McCook v. State, 91 Ga. 740, 17 S.E. 1019 (1893); State v. Sopher, 70 Iowa 494, 30 N.W. 917 (1886); Perryman v. State, 12 Okl.Cr. 500, 159 P. 937 (1916); Brancaccio v. State, 698 So.2d 597 (Fla. App. 1997); Prather v. Commonwealth, 215 Ky. 714, 287 S.W. 559 (1926); City of Minneapolis v. Altimus, 306 Minn. 462, 238 N.W.2d 851 (1976); State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (App. 1999); Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923); Kane v. United States, 399 F.2d 730 (9th Cir. 1968); State v. Sette, 259 N.J. Super. 156, 611 A.2d 1129 (1992); Lawrence P. Tiffany, *Pathological Intoxication and the Model Penal Code*, 69 Neb. L. Rev. 763 (1990).

4.2.4 Insanity

Finally, the applicability of the transformation of fault within insanity defense may be discussed. A person suffers from psychotic episodes, in the course of which he loses control over his physical motions. To retain his mental balance, he is instructed to take a pill every day at 10.00. He knows that if he fails to do so he will lose self-control within a few hours. Under the influence of the pill he is fully aware of his motions and capable of controlling them. When his business competitor irritates him, he decides to kill him.

With full awareness of his act, he chooses not to take the pill, intending to kill his competitor. When he sees his competitor again, he is having a psychotic episode and kills him. He is charged with murder, and pleads the insanity defense. More generally, in practice, five different situations are possible:

(1) The offender deliberately does not take the medication in order to kill the victim (purpose, or specific intent);
(2) The offender does not take the medication, but unreasonably hopes the psychotic episode will not take place (recklessness);
(3) The offender forgets to take the medication, although any reasonable person would not have forgotten to do so (negligence);
(4) The offender forgets to take the medication, and no reasonable person would have remembered to take it under the specific circumstances, but the offender did not take all reasonable measures required to remember taking the medication (strict liability); and-
(5) The offender is prevented from taking the medication (absence of fault).

In each of these five situations the offender kills the victim in the throes of a psychotic event. Does criminal law really address the problem in all five cases?

Although the immediate cause for the homicide is a psychotic episode, that episode can be fully controlled by taking the medication. If the psychotic episode is the result of not taking the medication, the situation may easily be referred to either intoxication or automatism. If it was the absence of the active ingredient of the medication that prevented the offender from controlling his conduct, the case definitely matches the defense of intoxication, and therefore the transformation of fault function related to intoxication may be activated.

Furthermore, if the psychotic episode can be characterized by uncontrollable bodily movements, and if the offender had control over entering into this state, the case definitely matches the defense of automatism as well, and therefore the transformation of fault function related to intoxication may again be activated. But if the situation is classified as pure insanity, no transformation of fault function is available, resulting in exemption from criminal liability. Thus, if the offender deliberately does not take his medication for mental balance, after which he commits an offense, no criminal liability can be imposed, as long as the insanity classification applies.

The rationale behind this legal outcome has to do with the social understanding of insanity as an uncontrollable situation, similar to infancy. The roots of this understanding are religious, as insanity was believed to be divine punishment or the result of some other divine act.[15] Therefore, if the unfortunate person thus afflicted cannot control his condition, transformation of fault is irrelevant. But even despite these religious convictions, at least in some cases the offender was believed to deliberately enter into a state of insanity by sinning, so that transformation of fault could not have been *entirely* irrelevant.

When insanity was freed from its religious connotations, individuals learned how to control their mental deficiencies and their symptoms, with or without medication (e.g., through self-training). This brought insanity closer to automatism and intoxication, and distanced it from infancy. Indeed, in many situations individuals have the capability to control mental disorders, which raises again the question of the extent to which transformation of fault refers to insanity.

This question also brings us back to that of the accurate demarcation between insanity, automatism, and intoxication, discussed above.[16] The answer to this question may be quite simple. If insanity is understood in current criminal law as uncontrollable, whenever the circumstances of the case indicate that it was controllable, the insanity defense is not applicable; the applicable defenses may be intoxication or automatism.

In relation to the transformation of fault, it is irrelevant whether the defense that applies is intoxication or automatism because in both cases the transformation of fault is triggered. In legal systems that adopted different transformation of fault functions for intoxication and automatism, the distinction between intoxication and automatism may be and the correct function activated.

Thus, only when the relevant symptoms of insanity, if indeed they are related to insanity, are in practice beyond control, is the insanity defense applicable without triggering the transformation of fault. The test for controlling the symptoms is, naturally, based on the circumstances of the case. For example, if the offender is medicated and mentally balanced, it may not be easy to apply the insanity defense, but if the offender became aware of his mental disorder for the first time when offense was committed, the insanity defense is more likely to be applicable. A second episode of the symptoms of his mental deficiency, however, would probably not be considered insanity but intoxication or automatism after the offender has received treatment.

[15] See above at Sect. 1.1.1.

[16] Above at Sects. 3.1.4, 3.2.3, and 3.3.4.

Conclusion

Our investigation of the insanity defense began with an exploration of the evolution of defense in criminal law. As a general defense in criminal law, insanity is defined socially rather than medically, and functionally rather than categorically. Insanity shares with other general defenses in criminal law their legal structure of absolute legal presumption, and has both legal and social consequences. The legal consequences are both substantial and procedural.

Insanity is part of the negative fault elements in criminal law. As such, it implements the principle of fault in criminal law and completes, together with other general defenses, the positive fault elements that are expressed by the mental element requirement. Insanity is related to *in personam* general defenses because it refers to the offender's personal characteristics rather than to the objective factual characteristics of the case.

Insanity is not alone in the *in personam* category of general defenses. This category contains, among others, the tangential general defenses of infancy, automatism, and intoxication. Because these general defenses share some common outlines, it is necessary to distinguish between them. The infancy vs. insanity, automatism vs. insanity, and intoxication vs. insanity tangents help define insanity more accurately. These tangents serve as the external definitions of insanity, by outlining its boundaries.

Finally, after achieving a clear definition of the boundaries of insanity, it is possible to examine the applicability of the transformation of fault function in relation to insanity. But because in practice some cases of insanity refer to automatism or intoxication, the transformation of fault function related to automatism and intoxication must be integrated into the insanity defense when the symptoms of insanity are controllable, as for example, through medication.

Following the foregoing journey through the elements of insanity, we have achieved a clearer image of what insanity is within modern criminal law.

G. Hallevy, *The Matrix of Insanity in Modern Criminal Law*,
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Cases

Anglo-American Cases

- Abrams v. United States, 250 U.S. 616, 63 L.Ed. 1173, 40 S.Ct. 17 (1919)
- Adams v. State, 8 Md.App. 684, 262 A.2d 69 (1970)
- Addington v. State, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)
- Allen v. United States, 239 F.2d 172 (6th Cir. 1956)
- Almon, (1770) 5 Burr. 2686, 98 Eng. Rep. 411
- Ann v. State, 30 Tenn. 159, 11 Hum. 159 (1850)
- Anthony, [1965] 2 Q.B. 189, [1965] 1 All E.R. 440, [1965] 2 W.L.R. 748, 49 Cr. App. Rep. 104, 129 J.P. 168
- Arnold, (1724) 16 How. St. Tr. 695
- Aszman v. State, 123 Ind. 347, 24 N.E. 123 (1890)
- Attorney-General for Northern Ireland v. Gallagher, [1963] A.C. 349, [1961] 3 All E.R. 299, [1961] 3 W.L.R. 619, 45 Cr. App. Rep. 316
- Attorney-General for the State of South Australia v. Brown, [1960] A.C. 432, [1960] 1 All E.R. 734, [1960] 2 W.L.R. 588, 44 Cr. App. Rep. 100
- Attorney-General's Reference (No. 3 of 1998), [2000] Q.B. 401, [1999] 3 All E.R. 40, [1999] 3 W.L.R. 1194, 49 B.M.L.R. 124, [1999] 2 Cr. App. Rep. 214, [1999] Crim. L.R. 986
- B., [2008] E.W.C.A. Crim. 4, [2008] All E.R. (D) 85
- B. v. Director of Public Prosecutions, [2000] 2 A.C. 428, [2000] 1 All E.R. 833, [2000] 2 W.L.R. 452, [2000] 2 Cr. App. Rep. 65, [2000] Crim. L.R. 403
- Bailey, [1983] 2 All E.R. 503, [1983] 1 W.L.R. 760, 77 Cr. App. Rep. 76, 99 L.Q.R. 511, 147 J.P. 558
- Barbour v. State, 262 Ala. 297, 78 So.2d 328 (1954)
- Barnes v. State, 19 Conn. 398 (1849)
- Barnfather v. Islington London Borough Council, [2003] E.W.H.C. 418 (Admin), [2003] 1 W.L.R. 2318, [2003] E.L.R. 263
- Bateman, [1925] All E.R. Rep. 45, 94 L.J.K.B. 791, 133 L.T. 730, 89 J.P. 162, 41 T.L.R. 557, 69 Sol. Jo. 622, 28 Cox. C.C. 33, 19 Cr. App. Rep. 8
- Beason v. State, 96 Miss. 165, 50 So. 488 (1909)
- Beckett v. Cohen, [1973] 1 All E.R. 120, [1973] 1 W.L.R. 1593
- Beltran v. United States, 302 F.2d 48 (1st Cir. 1962)

G. Hallevy, *The Matrix of Insanity in Modern Criminal Law*,
DOI 10.1007/978-3-319-20597-7

- Birmingham, &c., Railway Co., (1842) 3 Q. B. 223, 114 Eng. Rep. 492
- Birney v. State, 8 Ohio Rep. 230 (1837)
- Blake v. United States, 407 F.2d 908 (5th Cir. 1969)
- Blaker v. Tillstone, [1894] 1 Q.B. 345
- Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959)
- Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961)
- Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968)
- Borland v. State, 158 Ark. 37, 249 S.W. 591 (1923)
- Bowen v. State, 25 Fla. 645, 6 So. 459 (1889)
- Boyett, 136 N.C. 415, 48 S.E. 789 (1904)
- Bradley v. State, 102 Tex.Crim.R. 41, 277 S.W. 147 (1925)
- Brancaccio v. State, 698 So.2d 597 (Fla. App. 1997)
- Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386, [1961] 3 All E.R. 523, [1961] 3 W.L.R. 965, 46 Cr. App. Rep. 1
- Brown v. Commonwealth, 575 S.W.2d 451 (Ky. 1978)
- Burgess, [1991] 2 Q.B. 92
- Burnett, (1815) 4 M. & S. 272, 105 Eng. Rep. 835
- Burns, (1973) 58 Cr. App. Rep. 364
- Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931)
- Burton, (1863) 3 F. & F. 772, 176 Eng. Rep. 354
- Byrne, [1960] 2 Q.B. 396, [1960] 3 All E.R. 1, [1960] 3 W.L.R. 440, 44 Cr. App. Rep. 246
- C, [2007] E.W.C.A. Crim. 1862, [2007] All E.R. (D) 91
- C. v. Director of Public Prosecutions, [1996] 1 A.C. 1, [1995] 2 All E.R. 43, 159 J.P. 269, [1995] 2 W.L.R. 383, [1995] 1 F.L.R. 933, [1995] Fam. Law 401, [1995] Fam. Law 401, [1995] 2 Cr. App. Rep. 166, [1995] R.T.R. 261
- Caldwell, [1982] A.C. 341, [1981] 1 All E.R. 961, [1981] 2 W.L.R. 509, 73 Cr. App. Rep. 13, 145 J.P. 211
- Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968)
- Carroll, (1835) 7 Car. & P. 145, 173 Eng. Rep. 64
- Carter v. State, 376 P.2d 351 (Okl. Crim. App. 1962)
- Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957)
- Carter v. United States, 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000)
- Charlson, [1955] 1 All E.R. 859, [1955] 1 W.L.R. 317, 39 Cr. App. Rep. 37
- Cheng v. Wheaton, 745 F.Supp. 819 (1990)
- Chiswibo, 1960 (2) S.A. 714
- Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970)
- Christie v. Commonwealth, 193 Ky. 799, 237 S.W. 660 (1922)
- Chrystal v. Commonwealth, 72 Ky. 669, 9 Bush. 669 (1873)
- Church, [1966] 1 Q.B. 59, [1965] 2 All E.R. 72, [1965] 2 W.L.R. 1220, 49 Cr. App. Rep. 206, 129 J.P. 366
- City of Minneapolis v. Altimus, 306 Minn. 462, 238 N.W.2d 851 (1976)
- City of Seattle v. Hill, 72 Wash.2d 786, 435 P.2d 692 (1967)
- Clark, 86 Kan. 539, 121 P. 492 (1912)
- Clark v. State, 12 Ohio Rep. 483 (1843)

- Clay v. State, 143 Fla. 204, 196 So. 462 (1940)
- Clifton (Inhabitants), (1794) 5 T.R. 498, 101 Eng. Rep. 280
- Cochran v. State, 65 Fla. 91, 61 So. 187 (1913)
- Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895)
- Commonwealth v. Boynton, 84 Mass. 160, 2 Allen 160 (1861)
- Commonwealth v. Fortner L.P. Gas Co., 610 S.W.2d 941 (Ky. App. 1980)
- Commonwealth v. Goodman, 97 Mass. 117 (1867)
- Commonwealth v. Harrison, 342 Mass. 279, 173 N.E.2d 87 (1961)
- Commonwealth v. Herd, 413 Mass. 834, 604 N.E.2d 1294 (1992)
- Commonwealth v. Hicks, 483 Pa. 305, 396 A.2d 1183 (1979)
- Commonwealth v. Kichline, 468 Pa. 265, 361 A.2d 282 (1976)
- Commonwealth v. McIlwain School Bus Lines, Inc., 283 Pa.Super. 1, 423 A.2d 413 (1980)
- Commonwealth v. Mead, 92 Mass. 398 (1865)
- Commonwealth v. New York Cent. & H. River R. Co., 206 Mass. 417, 92 N.E. 766 (1910)
- Commonwealth v. Phillips, 16 Mass. 423 (1820)
- Commonwealth v. Pierce, 138 Mass. 165 (1884)
- Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. 339 (1854)
- Commonwealth v. Rogers, 48 Mass. 500 (1844)
- Commonwealth v. Shumway, 72 Va.Cir. 481 (2007)
- Commonwealth v. Thompson, 6 Mass. 134, 6 Tyng 134 (1809)
- Commonwealth v. Twitchell, 617 N.E.2d 609 (1993)
- Commonwealth v. Walensky, 316 Mass. 383, 55 N.E.2d 902 (1944)
- Compton v. Commonwealth, 22 Va.App. 751, 473 S.E.2d 95 (1996)
- Continental Banking Co. v. United States, 281 F.2d 137 (6th Cir. 1960)
- Coston v. State, 144 Fla. 676, 198 So. 467 (1940)
- Creighton, (1909) 14 C.C.C. 349
- Crown Prosecutions Service v. P., [2007] E.W.H.C. 946 (Admin.), [2007] 171 J.P. 349
- Dalloway, (1847) 2 Cox C.C. 273
- Darnell v. Cameron, 348 F.2d 64 (D.C. Cir. 1965)
- Davis, (1881) 14 Cox C.C. 563
- DeVeau v. United States, 483 A.2d 307 (D.C. App. 1984)
- Devon T., 85 Md.App. 674, 584 A.2d 1287 (1991)
- Dincer, (1983) 1 V.R. 461
- Director of Public Prosecutions v. Beard, [1920] All E.R. Rep. 21, [1920] A.C. 479, 89 L.J.K.B. 437, 122 L.T. 625, 84 J.P. 129, 36 T.L.R. 379, 64 Sol. Jo. 340, 26 Cox C.C. 573, 14 Cr. App. Rep. 159
- Director of Public Prosecutions v. Kent and Sussex Contractors Ltd., [1944] K.B. 146, [1944] 1 All E.R. 119
- Director of Public Prosecutions v. Majewski, [1977] A.C. 443, [1976] 2 All E.R. 142, [1976] 2 W.L.R. 623, 62 Cr. App. Rep. 262, 140 J.P. 315, 100 L.Q.R. 639

- Director of Public Prosecutions v. Morgan, [1976] A.C. 182, [1975] 2 All E.R. 347, [1975] 2 W.L.R. 913, 61 Cr. App. Rep. 136, 139 J.P. 476
- Director of Public Prosecutions v. Shannon, [1975] A.C. 717, [1974] 2 All E.R. 1009, [1974] 3 W.L.R. 155, 59 Cr. App. Rep. 250, 138 J.P. 587
- Dixon, (1814) 3 M. & S. 11, 105 Eng. Rep. 516
- Dodd, (1736) Sess. Cas. 135, 93 Eng. Rep. 136
- Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954)
- Dyke v. Gower, [1892] 1 Q.B. 220
- Eckert v. State, 114 Wis. 160, 89 N.W. 826 (1902)
- Edwards v. State, 202 Tenn. 393, 304 S.W.2d 500 (1957)
- Embry v. State, 310 P.2d 617 (Okl. Crim. App. 1957)
- Evans v. Bartlam, [1937] A.C. 473, 479, [1937] 2 All E.R. 646
- Evans v. State, 322 Md. 24, 585 A.2d 204 (1991)
- Fagan v. Metropolitan Police Commissioner, [1969] 1 Q.B. 439, [1968] 3 All E.R. 442, [1968] 3 W.L.R. 1120, 52 Cr. App. Rep. 700, 133 J.P. 16
- Fain v. Commonwealth, 78 Ky. 183 (1879)
- Farmer v. People, 77 Ill. 322 (1875)
- Finegan v. Heywood, (2000) 2000 S.C.C.R. 460, 2000 S.C. (J.C.) 444
- Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001)
- Finney, (1874) 12 Cox C.C. 625
- Fitzpatrick v. Kelly, [1873] 8 Q.B. 337
- Fogossa, (1550) 1 Plowd. 1, 19, 75 Eng. Rep. 1
- Ford v. State, 330 Md. 682, 625 A.2d 984 (1993)
- Foucha v. State, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)
- Fowler v. Padget, (1798) 7 T.R. 509, 101 Eng. Rep. 1103
- G., [2003] U.K.H.L. 50, [2004] 1 A.C. 1034, [2003] 3 W.L.R. 1060, [2003] 4 All E.R. 765, [2004] 1 Cr. App. Rep. 21, (2003) 167 J.P. 621, [2004] Crim. L. R. 369
- G., [2008] U.K.H.L. 37, [2009] A.C. 92
- Gallagher, [1963] A.C. 349, [1961] 3 All E.R. 299, [1961] 3 W.L.R. 619, 45 Cr. App. Rep. 316
- Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong, [1985] 1 A.C. 1, [1984] 2 All E.R. 503, [1984] 3 W.L.R. 437, 80 Cr. App. Rep. 194, 26 Build L.R. 159
- Gladden v. State, 273 Md. 383, 330 A.2d 176 (1974)
- Godfrey v. State, 31 Ala. 323 (1858)
- Gore, (1611) 9 Co. Rep. 81a, 77 Eng. Rep. 853
- Government of the Virgin Islands v. Smith, 278 F.2d 169 (3rd Cir. 1960)
- Government of the Virgin Islands v. Wallace, 679 F.2d 1066 (3rd Cir. 1982)
- Government of Virgin Islands v. Smith, 278 F.2d 169 (3rd Cir. 1960)
- Granite Construction Co. v. Superior Court, 149 Cal.App.3d 465, 197 Cal.Rptr. 3 (1983)
- Great Broughton (Inhabitants), (1771) 5 Burr. 2700, 98 Eng. Rep. 418
- Grout, (1834) 6 Car. & P. 629, 172 Eng. Rep. 1394
- Hales v. Petit, (1563) 1 Plowd. 253, 259a, 75 Eng. Rep. 387
- Hardie, [1984] 3 All E.R. 848, [1985] 1 W.L.R. 64, 80 Cr. App. Rep. 157

- Hartson v. People, 125 Colo. 1, 240 P.2d 907 (1951)
- Heard, [2007] E.W.C.A. Crim. 125, [2008] Q.B. 43, [2007] 3 All E.R. 306
- Heard v. United States, 348 F.2d 43 (D.C. Cir. 1964)
- Heideman v. United States, 259 F.2d 943 (D.C. Cir. 1958)
- Heilman v. Commonwealth, 84 Ky. 457, 1 S.W. 731 (1886)
- Hennessy, [1989] 2 All E.R. 9, [1989] 1 W.L.R. 287, 89 Cr. App. Rep. 10, [1989] R.T.R. 153, [1989] Crim. L.R. 356
- Hentzner v. State, 613 P.2d 821 (Alaska 1980)
- Hermanson v. State, 570 So.2d 322 (1990)
- Hermanson v. State, 604 So.2d 775 (1992)
- Hill v. Baxter, [1958] 1 Q.B. 277, [1958] 1 All E.R. 193, [1958] 2 W.L.R. 76, 56 L.G.R. 117, 42 Cr. App. Rep. 51
- Hobbs v. Winchester Corporation, [1910] 2 K.B. 471
- Hopt v. People, 104 U.S. 631, 26 L.Ed. 873 (1881)
- Huckerby, [2004] E.W.C.A. Crim. 3251, [2004] All E.R. (D) 364
- Hui Chi-ming, [1992] 1 A.C. 34, [1991] 3 All E.R. 897, [1991] 3 W.L.R. 495, 94 Cr. App. Rep. 236
- Hull, (1664) Kel. 40, 84 Eng. Rep. 1072
- Humphreys, [1965] 3 All E.R. 689, 130 J.P. 45
- Hunter v. State, 30 Tenn. 160, 1 Head 160 (1858)
- Hunter v. State, 489 So.2d 1086 (Miss. 1986)
- Hussain, [1969] 2 Q.B. 567, [1969] 2 All E.R. 1117, [1969] 3 W.L.R. 134, 53 Cr. App. Rep. 448
- I.C.R. Haulage Ltd., [1944] K.B. 551, [1944] 1 All E.R. 691
- J., [1999] 2 F.C.R. 345, [1999] 2 F.L.R. 678, [1999] Fam. Law 543
- Jack, [1985] 2 S.C.R. 332
- Jackson v. Commonwealth, 100 Ky. 239, 38 S.W. 422 (1896)
- Jamison v. State, 53 Okl.Crim. 59, 7 P.2d 171 (1932)
- Jarvis, (1837) 2 Mood. 40, 174 Eng. Rep. 207
- Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930)
- Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923)
- Johnson v. State, 43 Ala.App. 224, 187 So.2d 281 (1966)
- Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983)
- Kaitamaki, [1985] 1 A.C. 147, [1984] 2 All E.R. 435, [1984] 3 W.L.R. 137, [1984] Crim. L.R. 564, 79 Cr. App. Rep. 251
- Kamipeli, [1975] 2 N.Z.L.R. 610
- Kane v. United States, 399 F.2d 730 (9th Cir. 1968)
- Kay v. Butterworth, (1945) 173 L.T. 191
- Kemp, [1957] 1 Q.B. 399, [1956] 3 All E.R. 249, [1956] 3 W.L.R. 724
- Kimoktoak v. State, 584 P.2d 25 (Alaska 1978)
- Kingston, [1995] 2 A.C. 355, [1994] 3 All E.R. 353, [1994] 3 W.L.R. 519, [1994] Crim. L.R. 846, 99 Cr. App. Rep. 286, 158 J.P. 717
- Kingston, [1995] 2 A.C. 355, [1994] 3 All E.R. 353, [1994] 3 W.L.R. 519, [1994] Crim. L.R. 846, 99 Cr. App. Rep. 286, 158 J.P. 717
- Knight, (1828) 1 L.C.C. 168, 168 Eng. Rep. 1000

- Kopsch, (1925) 19 Cr. App. Rep. 50
- Krasniqi v. Dallas County Child Protective Services Unit of the Texas Department of Human Services, 809 S.W.2d 927 (1991)
- Kumar, [2004] E.W.C.A. Crim. 3207, [2005] 1 Cr. App. Rep. 566, [2005] Crim. L.R. 470
- Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957)
- Langforth Bridge, (1635) Cro. Car. 365, 79 Eng. Rep. 919
- Le Brun, [1992] Q.B. 61
- Leach, [1937] 1 All E.R. 319
- Lee v. State, 41 Tenn. 62, 1 Cold. 62 (1860)
- Leet v. State, 595 So.2d 959 (1991)
- Leicester v. Pearson, [1952] 2 Q.B. 668, [1952] 2 All E.R. 71, 50 L.G.R. 534, [1952] W.N. 317
- Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., [1915] A.C. 705
- Lester v. State, 212 Tenn. 338, 370 S.W.2d 405 (1963)
- Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979)
- Lipman, [1970] 1 Q.B. 152, [1969] 3 All E.R. 410, [1969] 3 W.L.R. 819, 53 Cr. App. Rep. 600, 133 J.P. 712
- Little v. State, 261 Ark. 859, 554 S.W.2d 312 (1977)
- Liverpool (Mayor), (1802) 3 East 82, 102 Eng. Rep. 529
- Majewski, [1977] A.C. 443, [1975] 3 All E.R. 296, [1975] W.L.R. 401, 62 Cr. App. Rep. 5, 139 J.P. 760
- Marshall, (1830) 1 Lewin 76, 168 Eng. Rep. 965
- Marshall v. Kort, 690 P.2d 219 (Colo. 1984)
- Martin v. State, 90 Ala. 602, 8 So. 858 (1891)
- Masciantonio, 129 A.L.R. 575 (1995)
- Masilela, 1968 (2) S.A. 558 (A.D.)
- Matthews, [1950] 1 All E.R. 137, 48 L.G.R. 190, 66 T.L.R. (Pt. 1) 153, 114 J.P. 73, 34 Cr. App. Rep. 55
- Matudi, [2004] E.W.C.A. Crim. 697
- Mayweather v. State, 29 Ariz. 460, 242 P. 864 (1926)
- McCall v. State, 120 Fla. 707, 163 So. 38 (1935)
- McClain v. State, 678 N.E.2d 104 (Ind. 1997)
- McCook v. State, 91 Ga. 740, 17 S.E. 1019 (1893)
- McCormack v. State, 102 Ala. 156, 15 So. 438 (1894)
- McDaniel v. State, 356 So.2d 1151 (Miss. 1978)
- McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962)
- McNeil v. United States, 933 A.2d 354 (2007)
- Meade, [1909] 1 K.B. 895
- Meakin, (1836) 7 Car. & P. 297, 173 Eng. Rep. 131
- Menniss, [1973] 2 N.S.W.L.R. 113
- Michael, (1840) 2 Mood. 120, 169 Eng. Rep. 48
- Millard v. State, 8 Md.App. 419, 261 A.2d 227 (1970)
- Miller, [1983] 2 A.C. 161, [1983] 1 All E.R. 978, [1983] 2 W.L.R. 539, 77 Cr. App. Rep. 17

- Miller v. State, 3 Ohio St. Rep. 475 (1854)
- Miller v. Superintendent, 198 Md. 659, 80 A.2d 898 (1951)
- Minor v. State, 326 Md. 436, 605 A.2d 138 (1992)
- Mitchell, [1983] 1 Q.B. 741, [1983] 2 All E.R. 427, [1983] 1 W.L.R. 938, 76 Cr. App. Rep. 293
- M'Naghten, (1843) 10 Cl. & Fin. 200, 8 Eng. Rep. 718
- Montgomery v. State, 68 Tex.Crim.App. 78, 151 S.W. 813 (1912)
- More, [1987] 3 All E.R. 825, [1987] 1 W.L.R. 1578, 86 Crim. App. Rep. 249, [1988] Crim. L.R. 176
- Myers v. State, 1 Conn. 502 (1816)
- Nelson, [2004] E.W.C.A. Crim. 333
- New York & G.L.R. Co. v. State, 50 N.J.L. 303, 13 A. 1 (1888)
- New York Cent. & H.R.R. v. United States, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909)
- Nutt, (1728) 1 Barn. K.B. 306, 94 Eng. Rep. 208
- Oakley, (1986) 24 C.C.C. (3rd) 351
- Occhicone v. State, 768 So.2d 1037 (Fla. 2000)
- Overholser v. Leach, 257 F.2d 667 (D.C. Cir. 1958)
- Oxford, (1840) 9 Car. & P. 525, 173 Eng. Rep. 941
- Parnerkar, [1974] S.C.R. 449, 10 C.C.C. (2nd) 253
- Parsons v. State, 81 Ala. 577, 2 So. 854 (1887)
- Pearson, (1835) 2 Lewin 144, 168 Eng. Rep. 1108
- People v. Alrich Restaurant Corp., 53 Misc.2d 574, 279 N.Y.S.2d 624 (1967)
- People v. Borrero, 19 N.Y.2d 332, 280 N.Y.S.2d 109, 227 N.E.2d 18 (1967)
- People v. Campbell, 237 Mich. 424, 212 N.W. 97 (1927)
- People v. Clark, 8 N.Y.Cr. 169, 14 N.Y.S. 642 (1891)
- People v. D'Angelo, 13 Cal.2d 203, 88 P.2d 708 (1939)
- People v. Davis, 33 N.Y.2d 221, 351 N.Y.S.2d 663, 306 N.E.2d 787 (1973)
- People v. Decina, 2 N.Y.2d 133, 157 N.Y.S.2d 558, 138 N.E.2d 799 (1956)
- People v. Eggleston, 186 Mich. 510, 152 N.W. 944 (1915)
- People v. Estep, 39 Colo. App. 132, 566 P.2d 706 (1977)
- People v. Freedman, 4 Ill.2d 414, 123 N.E.2d 317 (1954)
- People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435 (1943)
- People v. Furlong, 187 N.Y. 198, 79 N.E. 978 (1907)
- People v. Garcia, 250 Cal.App.2d 15, 58 Cal.Rptr. 186 (1967)
- People v. Goedecke, 65 Cal.2d 850, 56 Cal.Rptr. 625, 423 P.2d 777 (1967)
- People v. Grant, 71 Ill.2d 551, 17 Ill.Dec. 814, 377 N.E.2d 4 (1978)
- People v. Guillett, 342 Mich. 1, 69 N.W.2d 140 (1955)
- People v. Haney, 30 N.Y.2d 328, 333 N.Y.S.2d 403, 284 N.E.2d 564 (1972)
- People v. Harris, 29 Cal. 678 (1866)
- People v. Higgins, 5 N.Y.2d 607, 186 N.Y.S.2d 623, 159 N.E.2d 179 (1959)
- People v. Hoy, 380 Mich. 597, 158 N.W.2d 436 (1968)
- People v. Hubert, 119 Cal. 216, 51 P. 329 (1897)
- People v. Jarvis, 135 Cal.App. 288, 27 P.2d 77 (1933)
- People v. Johnson, 32 Ill.App.3d 36, 335 N.E.2d 144 (1975)

- People v. Jones, 263 Ill. 564, 105 N.E. 744 (1914)
- People v. Kirst, 168 N.Y. 19, 60 N.E. 1057 (1901)
- People v. Koch, 250 App.Div. 623, 294 N.Y.S. 987 (1937)
- People v. Koerber, 244 N.Y. 147, 155 N.E. 79 (1926)
- People v. Leonardi, 143 N.Y. 360, 38 N.E. 372 (1894)
- People v. Lisnow, 88 Cal.App.3d Supp. 21, 151 Cal.Rptr. 621 (1978)
- People v. Newton, 8 Cal.App.3d 359, 87 Cal.Rptr. 394 (1970)
- People v. Register, 60 N.Y.2d 270, 469 N.Y.S.2d 599, 457 N.E.2d 704 (1983)
- People v. Sakow, 45 N.Y.2d 131, 408 N.Y.S.2d 27, 379 N.E.2d 1157 (1978)
- People v. Sanchez, 26 Cal.4th 834, 111 Cal.Rptr.2d 129, 29 P.3d 209 (2001)
- People v. Savoie, 419 Mich. 118, 349 N.W.2d 139 (1984)
- People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915)
- People v. Scott, 146 Cal.App.3d 823, 194 Cal.Rptr. 633 (1983)
- People v. Sommers, 200 P.3d 1089 (2008)
- People v. Townsend, 214 Mich. 267, 183 N.W. 177 (1921)
- People v. Wells, 33 Cal.2d 330, 202 P.2d 53 (1949)
- People v. Whitfield, 7 Cal.4th 437, 27 Cal.Rptr.2d 858, 868 P.2d 272 (1994)
- People v. Wilson, 66 Cal.2d 749, 59 Cal.Rptr. 156, 427 P.2d 820 (1967)
- People v. Wu, 235 Cal. App. 3d 614, 286 Cal. Rptr. 868 (1991)
- Perryman v. State, 12 Okl.Cr. 500, 159 P. 937 (1916)
- Pigman v. State, 14 Ohio 555 (1846)
- Polston v. State, 685 P.2d 1 (Wyo. 1984)
- Poole, [2003] All E.R. (D) 448
- Pope v. United States, 372 F.2d 710 (8th Cir. 1970)
- Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)
- Prather v. Commonwealth, 215 Ky. 714, 287 S.W. 559 (1926)
- Price v. State, 50 Tex.Crim.R. 71, 94 S.W. 901 (1906)
- Provincial Motor Cab Company Ltd. v. Dunning, [1909] 2 K.B. 599
- Quick, [1973] Q.B. 910, [1973] 3 All E.R. 347, [1973] 3 W.L.R. 26, 57 Cr. App. Rep. 722, 137 J.P. 763
- Rabey, (1981) 114 D.L.R. (3rd) 193
- Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960)
- Ramsay, [1967] N.Z.L.R. 1005
- Rangel v. State, 2009 Tex.App. 1555 (2009)
- Ray v. State, 13 Neb. 55, 13 N.W. 2 (1882)
- Read v. People, 119 Colo. 506, 205 P.2d 233 (1949)
- Redmond v. State, 36 Ark. 58 (1880)
- Reed v. State, 693 N.E.2d 988 (Ind. App. 1998)
- Revitt v. Director of Public Prosecutions, [2006] E.W.H.C. 2266 (Admin), [2007] Crim. L.R. 238, [2006] 170 J.P. 729, [2007] 1 Cr. App. Rep. 266
- Rice v. State, 8 Mo. 403 (1844)
- Richards, [2004] E.W.C.A. Crim. 192
- Roach, [2001] E.W.C.A. Crim. 2698
- Roberts v. People, 19 Mich. 401 (1870)
- Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)

- Rooney v. United States, 203 F. 928 (9th Cir. 1913)
- Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966)
- Rowley, [1948] 1 All E.R. 570, 46 L.G.R. 224, 112 J.P. 207, 32 Cr. App. Rep. 167
- Rucker v. State, 119 Ohio St. 189, 162 N.E. 802 (1928)
- S.C. v. United Kingdom, [2005] Crim. L.R. 130
- Saintiff, (1705) 6 Mod. 255, 87 Eng. Rep. 1002
- Salisbury, (1553) 1 Plowd. 100, 75 Eng. Rep. 158
- Saunders, (1576) 2 Plowd. 473, 75 Eng. Rep. 706
- Scott, [1967] V.R. 276
- Scott v. State, 71 Tex.Crim.R. 41, 158 S.W. 814 (1913)
- Seaboard Offshore Ltd. v. Secretary of State for Transport, [1994] 2 All E.R. 99, [1994] 1 W.L.R. 541, [1994] 1 Lloyd's Rep. 593
- Seattle v. Hill, 72 Wash.2d 786, 435 P.2d 692 (1967)
- Severn and Wye Railway Co., (1819) 2 B. & Ald. 646, 106 Eng. Rep. 501
- Sheehan, [1975] 2 All E.R. 960, [1975] 1 W.L.R. 739, 60 Cr. App. Rep. 308
- Shelburne v. State, 446 P.2d 56 (Okl. Cr. 1968)
- Singh, [1974] 1 All E.R. 26, [1973] 1 W.L.R. 1444, 138 J.P. 85
- Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959)
- Sodeman, [1936] 2 All E.R. 1138
- Spiers & Pond v. Bennett, [1896] 2 Q.B. 65
- State v. Aaron, 4 N.J.L. 269 (1818)
- State v. Anderson, 141 Wash.2d 357, 5 P.3d 1247 (2000)
- State v. Andrews, 187 Kan. 458, 357 P.2d 739 (1960)
- State v. Barrett, 768 A.2d 929 (R.I. 2001)
- State v. Boan, 235 Kan. 800, 686 P.2d 160 (1984)
- State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991)
- State v. Bono, 128 N.J.Super. 254, 319 A.2d 762 (1974)
- State v. Brady, 745 So.2d 954 (Fla. 1999)
- State v. Brown, 122 N.M. 724, 931 P.2d 69 (1996)
- State v. Brown, 38 Kan. 390, 16 P. 259 (1888)
- State v. Brown, 389 So.2d 48 (La. 1980)
- State v. Burns, 215 Minn. 182, 9 N.W.2d 518 (1943)
- State v. Cain, 9 W. Va. 559 (1874)
- State v. Cameron, 104 N.J. 42, 514 A.2d 1302 (1986)
- State v. Campbell, 536 P.2d 105 (Alaska 1975)
- State v. Campos, 122 N.M. 148, 921 P.2d 1266 (1996)
- State v. Carney, 347 N.W.2d 668 (Iowa 1984)
- State v. Case, 672 A.2d 586 (Me. 1996)
- State v. Cegelis, 138 N.H. 249, 638 A.2d 783 (1994)
- State v. Chong Sun France, 379 S.E.2d 701 (1989)
- State v. Clardy, 73 S.C. 340, 53 S.E. 493 (1906)
- State v. Clottu, 33 Ind. 409 (1870)
- State v. Coates, 107 Wash.2d 882, 735 P.2d 64 (1987)
- State v. Cote, 560 A.2d 558 (Me. 1989)

- State v. Craig, 52 Wash. 66, 100 P. 167 (1909)
- State v. Crenshaw, 98 Wash.2d 789, 659 P.2d 488 (1983)
- State v. Curry, 45 Ohio St.3d 109, 543 N.E.2d 1228 (1989)
- State v. Davies, 146 Conn. 137, 148 A.2d 251 (1959)
- State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970)
- State v. Dubina, 164 Conn. 95, 318 A.2d 95 (1972)
- State v. Duncan, 28 N.C. 98 (1845)
- State v. Elsea, 251 S.W.2d 650 (Mo. 1952)
- State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969)
- State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984)
- State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988)
- State v. Foster, 91 Wash.2d 466, 589 P.2d 789 (1979)
- State v. Galvin, 147 Vt. 215, 514 A.2d 705 (1986)
- State v. Ganal, 81 Haw. 358, 917 P.2d 370 (1996)
- State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (App. 1999)
- State v. George, 20 Del. 57, 54 A. 745 (1902)
- State v. Gish, 17 Idaho 341, 393 P.2d 342 (1964)
- State v. Graham, 190 La. 669, 182 So. 711 (1938)
- State v. Great Works Mill. & Mfg. Co., 20 Me. 41, 37 Am.Dec.38 (1841)
- State v. Hadley, 65 Utah 109, 234 P. 940 (1925)
- State v. Hamann, 285 N.W.2d 180 (Iowa 1979)
- State v. Hartley, 90 N.M. 488, 565 P.2d 658 (1977)
- State v. Hayes, 105 Mo. 76, 16 S.W. 514 (1891)
- State v. Henry, 253 Conn. 354, 752 A.2d 40 (2000)
- State v. Herro, 120 Ariz. 604, 587 P.2d 1181 (1978)
- State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996)
- State v. Holder, 15 S.W.3d 905 (Tenn. Crim. App. 1999)
- State v. Huey, 14 Wash.2d 387, 128 P.2d 314 (1942)
- State v. I. & M. Amusements, Inc., 10 Ohio App.2d 153, 226 N.E.2d 567 (1966)
- State v. J.P.S., 135 Wash.2d 34, 954 P.2d 894 (1998)
- State v. Jackson, 346 Mo. 474, 142 S.W.2d 45 (1940)
- State v. Jenner, 451 N.W.2d 710 (S.D. 1990)
- State v. Johnson, 233 Wis. 668, 290 N.W. 159 (1940)
- State v. Jones, 50 N.H. 369 (1871)
- State v. Kargar, 679 A.2d 81 (Me. 1996)
- State v. Keerl, 29 Mont. 508, 75 P. 362 (1904)
- State v. Lawrence, 97 N.C. 492, 2 S.E. 367 (1887)
- State v. Lockhart, 208 W.Va. 622, 542 S.E.2d 443 (2000)
- State v. Martin, 119 N.J. 2, 573 A.2d 1359 (1990)
- State v. McBride, 215 Minn. 123, 9 N.W.2d 416 (1943)
- State v. McDowell, 312 N.W.2d 301 (N.D. 1981)
- State v. McGee, 631 Mo. 309, 234 S.W.2d 587 (1950)
- State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975)
- State v. Mishne, 427 A.2d 450 (Me. 1981)
- State v. Mitts, 81 Ohio St.3d 223, 690 N.E.2d 522 (1998)

- State v. Narich, 92 Mont. 17, 9 P.2d 477 (1932)
- State v. Nickelson, 45 La.Ann. 1172, 14 So. 134 (1893)
- State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997)
- State v. Peel, 23 Mont. 358, 59 P. 169 (1899)
- State v. Pike, 49 N.H. 399 (1870)
- State v. Pincus, 41 N.J.Super. 454, 125 A.2d 420 (1956)
- State v. Richardson, 495 S.W.2d 435 (Mo. 1973)
- State v. Robinson, 20 W.Va. 713, 43 Am.Rep. 799 (1882)
- State v. Sasse, 6 S.D. 212, 60 N.W. 853 (1894)
- State v. Schulz, 55 Ia. 628 (1881)
- State v. Sette, 259 N.J.Super. 156, 611 A.2d 1129 (1992)
- State v. Shine, 193 Conn. 632, 479 A.2d 218 (1984)
- State v. Shipman, 354 Mo. 265, 189 S.W.2d 273 (1945)
- State v. Smith, 219 N.W.2d 655 (Iowa 1974)
- State v. Smith, 256 Neb. 705, 592 N.W.2d 143 (1999)
- State v. Smith, 260 Or. 349, 490 P.2d 1262 (1971)
- State v. Sopher, 70 Iowa 494, 30 N.W. 917 (1886)
- State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979)
- State v. Stepniewski, 105 Wis.2d 261, 314 N.W.2d 98 (1982)
- State v. Strong, 294 N.W.2d 319 (Minn. 1980)
- State v. Thompkins, 220 S.C. 523, 68 S.E.2d 465 (1951)
- State v. Thompson, Wright's Ohio Rep. 617 (1834)
- State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925)
- State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977)
- State v. Ward, 284 Md. 189, 396 A.2d 1041 (1978)
- State v. Watts, 223 N.W.2d 234 (Iowa 1974)
- State v. Welsh, 8 Wash.App. 719, 508 P.2d 1041 (1973)
- State v. White, 27 N.J. 158, 142 A.2d 65 (1958)
- State v. Wilchinski, 242 Conn. 211, 700 A.2d 1 (1997)
- State v. Wilson, 234 Iowa 60, 11 N.W.2d 737 (1943)
- State v. Wooster, 293 Mont. 195, 974 P.2d 640 (Mont. 1999)
- State v. Zegeer, 170 W.Va. 743, 296 S.E.2d 873 (1982)
- Stein v. State, 37 Ala. 123 (1861)
- Stenzel v. United States, 261 Fed. 161 (8th Cir. 1919)
- Stephens, [1866] 1 Q.B. 702
- Stewart v. Waterloo Turn Verein, 71 Iowa 226, 32 N.W. 275 (1887)
- Stingel, (1990) 171 C.L.R. 312, 97 A.L.R. 1
- Stoneberg v. State, 106 Idaho 519, 681 P.2d 994 (1984)
- Stratford-upon-Avon Corporation, (1811) 14 East 348, 104 Eng. Rep. 636
- Stripp, (1979) 69 Cr. App. Rep. 318
- Sullivan, [1984] 1 A.C. 156, [1983] 2 All E.R. 673, [1983] 3 W.L.R. 123, 77 Cr. App. Rep. 176, 148 J.P. 207
- Sunair Holidays, [1973] 2 All E.R. 1233, [1973] 1 W.L.R. 1105
- Surujpaul, [1958] 3 All E.R. 300, [1958] 1 W.L.R. 1050, 42 Cr. App. Rep. 266

- Sweet v. Parsley, [1970] A.C. 132, [1969] 1 All E.R. 347, [1969] 2 W.L.R. 470, 133 J.P. 188, 53 Cr. App. Rep. 221, 209 E.G. 703, [1969] E.G.D. 123
- T, [2008] E.W.C.A. Crim. 815, [2008] All E.R. (D) 215
- Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935)
- Taylor v. Commissioner, 481 A.2d 139 (Me. 1984)
- Texaco Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982)
- Thabo Meli, [1954] 1 All E.R. 373, [1954] 1 W.L.R. 228
- Thomas, (1837) 7 Car. & P. 817, 173 Eng. Rep. 356
- Thompson v. State, 44 S.W.3d 171 (Tex. App. 2001)
- Tibbs v. Commonwealth, 138 Ky. 558, 128 S.W. 871 (1910)
- Torres v. State, 585 S.W.2d 746 (Tex. Crim. App. 1979)
- Treacy v. Director of Public Prosecutions, [1971] A.C. 537, 559, [1971] 1 All E.R. 110, [1971] 2 W.L.R. 112, 55 Cr. App. Rep. 113, 135 J.P. 112
- Tribby v. Cameron, 379 F.2d 104 (D.C. Cir. 1967)
- True, (1922) 16 Cr. App. Rep. 164
- Tyvonne, 211 Conn. 151, 558 A.2d 661 (1989)
- Underwood v. People, 32 Mich. 1 (1875)
- United States v. Alaska Packers' Association, 1 Alaska 217 (1901)
- United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3rd Cir. 1970)
- United States v. Azadian, 436 F.2d 81 (9th Cir. 1971)
- United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)
- United States v. Carbonell, 737 F.Supp. 187 (1990)
- United States v. Carter, 311 F.2d 934 (6th Cir. 1963)
- United States v. Chandler, 393 F.2d 920 (4th Cir. 1968)
- United States v. Currens, 290 F.2d 751 (3rd Cir. 1961)
- United States v. Dominguez-Ochoa, 386 F.3d 639 (2004)
- United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975)
- United States v. Fornez-Espinoza, 241 Fed. Appx. 398 (2007)
- United States v. Freeman, 25 Fed. Cas. 1208 (1827)
- United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966)
- United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986)
- United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999)
- United States v. Harry L. Young & Sons, 464 F.2d 1295 (10th Cir. 1972)
- United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972)
- United States v. John Kelso Co., 86 F. 304 (Cal. 1898)
- United States v. Kabat, 797 F.2d 580 (8th Cir. 1986)
- United States v. Khang, 36 F.3d 77 (9th Cir. 1994)
- United States v. Koua Thao, 712 F.2d 369 (1983)
- United States v. Kunack, 17 C.M.R. 346 (1954)
- United States v. LaFromboise, 836 F.2d 1149 (8th Cir. 1988)
- United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973)
- United States v. Navarrete, 125 F.3d 559 (7th Cir. 1997)
- United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967)
- United States v. Short, 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954)

- United States v. Smith, 404 F.2d 720 (6th Cir. 1968)
- United States v. Sullivan, 406 F.2d 180 (2nd Cir. 1969)
- United States v. Thompson-Powell Drilling Co., 196 F.Supp. 571 (N.D. Tex. 1961)
- United States v. Warner, 28 Fed. Cas. 404, 6 W.L.J. 255, 4 McLean 463 (1848)
- Vann v. Commonwealth, 35 Va.App. 304, 544 S.E.2d 879 (2001)
- Vantandillo, (1815) 4 M. & S. 73, 105 Eng. Rep. 762
- Vasquez, [1994] 3 All E.R. 674, [1994] 1 W.L.R. 1304, [1994] Crim. L.R. 845
- Vick v. State, 453 P.2d 342 (Alaska 1969)
- Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941)
- Walker v. Superior Court, 47 Cal.3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988)
- Walter, (1799) 3 Esp. 21, 170 Eng. Rep. 524
- Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967)
- Welfare of C.R.M., 611 N.W.2d 802 (Minn. 2000)
- Willet v. Commonwealth, 76 Ky. 230 (1877)
- Williamson, (1807) 3 Car. & P. 635, 172 Eng. Rep. 579
- Windle, [1952] 2 Q.B. 826, [1952] 2 All E.R. 1, 36 Cr. App. Rep. 85, [1952] W.N. 283
- Wion v. United States, 325 F.2d 420 (10th Cir. 1963)
- Woodrow, (1846) 15 M. & W. 404, 153 Eng. Rep. 907
- Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957)

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European Court of Human Rights Cases

- Luberti v. Italy, (1984) 6 E.H.R.R. 440
- Salibaku v. France, (1998) E.H.R.R. 379
- T. v. United Kingdom, (2000) 30 E.H.R.R. 121
- Winterwerp v. Netherlands, (1979) 2 E.H.R.R. 387

[7] Bundesgerichtshof.

Bibliography

M. Adrian, *Substance Abuse and Multiculturalism*, 31 Substance Abuse and Misuse 1459 (1996)

Laura Maria Agustin, *A migrant world of services*, Woman and Immigration Law – New Variations on Classical Feminist Themes 104 (Sarah van Walsum and Thomas Spijkerboer eds., 2007)

Franz Alexander and Hugo Staub, The Criminal, The Judge, and the Public (1931)

Franz G. Alexander and Sheldon T. Selesnick, History of Psychiatry: An Evaluation of Psychiatric Thought and Practice from Prehistoric Times to the Present (1966)

Franz Alexander, Our Age of Unreason: A Study of the Irrational Forces in Social Life (rev. ed., 1971)

Francis A. Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 Marq. L. Rev. 494 (1962)

Michael Allen, Textbook on Criminal Law (9th ed., 2007)

Marc Ancel, *Les Doctrines Nouvelles de la Défense Social*, 1951 Rev. de Droit Pénal et de Criminologie 46 (1951)

Marc Ancel, Social Defense – A Modern Approach to Criminal Problems (J. Wilson and Marc Ancel trans., 1965, 1998, 2001)

Jos Andenaes, *Determinism and Criminal Law*, 47 J. Crim. L. Criminology & Police Sci. 406 (1957)

Michael R. Anderson, *Law and the Protection of Cultural Communities*, 9 Law and Policy 125 (1987)

Rutvica Andrijasevic, *Problematising Trafficking for the Sex Sector: A Case of Eastern European Women in the EU*, Woman and Immigration Law 86 (Sarah van Walsum and Thomas Spijkerboer eds., 2007)

John D. Appel, *Law as a Social Science in the Undergraduate Curriculum*, 10 J. Legal Educ. 485 (1958)

Andrew Ashworth, Principles of Criminal Law (5th ed., 2006)

Andrew Ashworth, Sentencing and Criminal Justice (4th ed., 2005)

Andrew Ashworth, *Sentencing Young Offenders*, Principled Sentencing: Readings on Theory and Policy 294 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009)

Frederick Levi Attenborough, The Laws of the Earliest English Kings 169 (1922)

Francis Bacon, Elements of the Common Laws of England (1636, 1969)

Mark Warren Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. Legal Educ. 311 (1998)

Nicholas Bala and Julian V. Roberts, *Restraining the Use of Custody for Young Offenders: The Canadian Approach*, Principled Sentencing: Readings on Theory and Policy 338 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009)

Fontan Balestra, La Mission de Garantie du Droit Pénal (1950)

Harry Elmer Barnes, The Repression of Crime (1926)

Cherif M. Bassiouni, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 DePaul L. Rev. 291 (1965)

G. Hallevy, *The Matrix of Insanity in Modern Criminal Law*,
DOI 10.1007/978-3-319-20597-7

Yaacov Bazak, Law and Psychiatry – Legal Responsibility and Mental Defects (2006)
David L. Bazelon, *Implementing the Right to Treatment*, 36 U. Chi. L. Rev. 742 (1969)
Peter Bellwood, First Farmers: The Origins of Agricultural Societies (2004)
Harold J. Berman and Charles J. Reid Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 Syracuse J. Int'l L. & Com. 1 (1994)
Virginia Berridge, *Drug Policy: Should the Law Take a Back Seat?*, Lancet 301 (1997)
John Biggs, The Guilty Mind (1955)
Kenneth Blum, Alcohol and the Addictive Brain (1991)
John J. Bonsignore, *Law as a Hard Science: On the Madness in Method*, 2 ALSA F. 49 (1977)
Addison M. Bowman, *Narcotic Addiction and Criminal Responsibility under* Durham, 53 Geo. L. J. 1017 (1965)
Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. Pa. L. Rev. 2245 (1992)
Henry de Bracton, De Legibus et Consuetudinibus Angliae (1260; G. E. Woodbine ed., S. E. Thorne trans., 1968–1977)
Samuel J. Brakel and Ronald S. Rock, The Mentally Disabled and the Law (1971)
Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 Wash. U. L. Q. 393 (1983)
Walter Bromberg, From Shaman to Psychotherapist: A History of the Treatment of Mental Illness (1975)
W. W. Buckland, A Text-Book of Roman Law: From Augustus to Justinian (2nd ed., 1932)
Kenneth J. Burke, *The "XYY Syndrome": Genetics, Behavior and the Law*, 46 Denv. L. J. 261 (1969)
Elizabeth Burney and Geoffrey Pearson, *Mentally Disordered Offenders: Finding a Focus for Diversion*, 34 Howard J. Crim. Justice 291 (1995)
Kenneth L. Campbell, *Psychological Blow Automatism: A Narrow Defence*, 23 Crim. L. Q. 342 (1981)
Lynn R. Campbell, *Law as a Social Science*, 9 Dalhousie L. J. 404 (1984)
J. M. Canals, *Classism, Positivism and Social Defense*, 50 J. Crim. L. & Criminology 541 (1959)
Nathaniel Cantor, *Measures of Social Defense*, 22 Cornell L. Q. 17 (1936)
W. G. Carson, *Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation*, 33 Mod. L. Rev. 396 (1970)
W. G. Carson, *The Conventionalisation of Early Factory Crime*, 7 Int'l J. of Sociology of Law 37 (1979)
Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse*, 64 Mo. L. Rev. 383 (1999)
Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 Cal. L. Rev. 1053 (1994)
Kristin Chapin, *Indian Fishing Rights Activists in an Age of Controversy: The Case for an Individual Aboriginal Rights Defense*, 23 Environmental Law 971 (1993)
John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalised Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981)
Sir Edward Coke, Institutions of the Laws of England – Third Part (6th ed., 1681, 1817, 2001)
George D. Collinson, Idiots, Lunatics, and Other Persons Non Compos Mentis 477 (1812)
Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 Yale L. J. 645 (1917)
Michele Cotton. *A Foolish Consistency: Keeping Determinism out of the Criminal Law*, 15 B. U. Pub. Int. L. J. 5 (2006)
Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Common Law*, 12 Cal. L. Rev. 105 (1924)
Isabel Crowhurst, *Socio-Political and Legal Representations of Migrant Women Sex Labourers in Italy: Between Discourse and Praxis*, Woman and Immigration Law 241 (Sarah van Walsum and Thomas Spijkerboer eds., 2007)

David Daube, *Defence of Superior orders in Roman Law*, 72 L.Q. Rev. 494 (1956)
Michael J. Davidson, *Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis*, 2000 Army Lawyer 5 (2000)
Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Offender*, 63 Minn. L. Rev. 1 (1978)
Paul R. Dimond and Gene Sperling, *Of Cultural Determinism and the Limits of Law*, 83 Mich. L. Rev. 1065 (1985)
George E. Dix, *Criminal Responsibility and Mental Impairment in American Criminal Law: Responses to the Hinckley Acquittal in Historical Perspective*, 1 Law and Mental Health: International Perspectives 1 (Weisstub ed., 1986)
Suzzane Dixon, *Infirmitas Sexus: Womanly Weakness in Roman Law*, 52 TR 343 (1984)
Joshua Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 Minn. L. Rev. 335 (1978)
Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 Rutgers L. J. 671 (1988)
Ronald Dworkin, Taking Rights Seriously (1977)
Ronald Dworkin, A Matter of Principle (1985)
Susan Easton and Christine Piper, Sentencing and Punishment: The Quest for Justice (2nd ed., 2008)
Henri F. Ellenberger, The Discovery of the Unconscious: The History and Evolution of Dynamic Psychiatry (1970)
Catherine Elliott, French Criminal Law (2001)
James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 Cath. U. L. Rev. 961 (1996)
Dwaine F. Emerich, Reginald L. Dean III and Paul R. Sanberg, Central Nervous System Diseases (2000)
Isaac Englard, *Law and Culture Heritage in Multicultural Societies*, Law in Multicultural Societies 1 (E. I. Cuomo ed., 1985)
Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 Hastings L. J. 1 (1988)
David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 Emory L. J. 1005 (1989)
Barry C. Feld, *The Transformation of the American Juvenile Court*, Principled Sentencing: Readings on Theory and Policy 331 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009)
Robert P. Fine and Gary M. Cohen, *Is Criminal Negligence a Defensible Basis for Criminal Liability?*, 16 Buff. L. Rev. 749 (1966)
Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 Yale L. J. 413 (1975)
Arthur E. Fink, Causes of Crime: Biological Theories in the United States, 1800–1915 (1938)
George P. Fletcher, Basic Concepts of Criminal Law (1998)
George P. Fletcher, Rethinking Criminal Law (1978, 2000)
George P. Fletcher, *The Nature of Justification*, Action and Value in Criminal Law 175 (Stephen Shute, John Gardner and Jeremy Horder eds., 2003)
Andreas Follesdal, *Minority Rights: A Liberal Contractualist Case*, Do We Need Minority Rights? 59 (Juha Raikka ed., 1996)
Keith Foren, *Casenote: In Re Tyvonne M. Revisited: The Criminal Infancy Defense in Connecticut*, 18 Q. L. Rev. 733 (1999)
Morris D. Forkosch, *Determinism and the Law*, 60 Ky. L. J. 350 (1952)
Michel Foucault, Madness and Civilization (1965)
Lionel H. Frankel, *Narcotic Addiction, Criminal Responsibility and Civil Commitment*, 1966 Utah L. Rev. 581 (1966)
K. W. M. Fulford, *Value, Action, Mental Illness, and the Law*, Action and Value in Criminal Law 279 (Stephen Shute, John Gardner and Jeremy Horder eds., 2003)

Edwin Fuller Torrey, The Death of Psychiatry (1975)
Peter T. Furst, Hallucinogens and Culture (1976)
Heinrich Gottfried Phillip Gengler, Germanische Rechtsdenkmäler : Leges, Capitularia, Formulae (1875, 1966)
Aisha Gill and Kaveri Sharma, *Response and Responsibility: Domestic Violence and Marriage migration in the UK*, Woman and Immigration Law 183 (Sarah van Walsum and Thomas Spijkerboer eds., 2007)
Sander L. Gilman, Seeing the Insane (1982)
Lawrence Ginnel, Brehon Law (1844)
Sheldon S. Glueck, Mental Disorders and the Criminal Law (1925)
George W. Goble, *Law as a Science*, 9 Ind. L. J. 294 (1934)
Stephen L. Golding, *Mental Health Professionals and the Courts: The Ethics of Expertise*, 13 Int'l J. L. & Psychiatry 281 (1990)
Abraham S. Goldstein, The Insanity Defense (1967)
Sir Gerald Gordon, The Criminal Law of Scotland (1st ed., 1967)
Denis Goulet, *In Defense of Cultural Rights: Technology, Tradition and Conflicting Models of Rationality*, 3 Human Rights Quarterly 1 (1981)
Richard L. Gray, *Eliminating the (Absurd) Distinction between Malum in se and Malum Prohibitum Crimes*, 73 Wash. U. L. Q. 1369 (1995)
Edward de Grazia, *The Distinction of Being Mad*, 22 U. Chi. L. Rev. 339 (1955)
John Richard Green, History of the English People (1896)
Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984)
Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 Law & Contemp. Probs. 89 (1986)
Samuel Greengus, *Legal and Social Institutions of Ancient Mesopotamia*, 1 Civilizations of the Ancient Near East 469 (Jack M. Sasson ed., 1995)
Manfred S. Guttmacher and Henry Weihofen, Psychiatry and the Law (1952)
Manfred S. Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. Chi. L. Rev. 325 (1955)
Matthew Hale, Historia Placitorum Coronae (1736) [Matthew Hale, History of the Pleas of the Crown (1736)]
Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045 (1944)
Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 Yale L. J. 761 (1956)
Jerome Hall, General Principles of Criminal Law (2nd ed., 1960, 2005)
Jerome Hall, *Negligent Behaviour Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632 (1963)
Seymour L. Halleck, *A Critique of Current Psychiatric Roles in the Legal Process*, 1966 Wis. L. Rev. 379 (1966)
Seymour L. Halleck, *The Historical and Ethical Antecedents of Psychiatric Criminology*, Psychiatric Aspects of Criminology 8 (Halleck and Bromberg eds., 1968)
Gabriel Hallevy, *Victim's Complicity in Criminal Law*, 2 Int'l J. Punishment & Sentencing 72 (2006)
Gabriel Hallevy, *Rethinking the Legitimacy of Anglo-American High Courts' Judicial Review of Determining Factual Findings in Courts of the First Instance in Criminal Cases*, 5 High Court. Q. Rev. 13 (2009)
Gabriel Hallevy, *The Impact of Defense Arguments Based on the Cultural Difference of the Accused in the Criminal Law of Immigrant Countries and Societies*, 5 J. of Migration & Refugee Issues 13 (2009)
Gabriel Hallevy, Theory of Criminal Law Vol. II (2009)
Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law (2010)
Gabriel Hallevy, The Matrix of Derivative Criminal Liability (2012)
Gabriel Hallevy, The Right to Be Punished – Modern Doctrinal Sentencing (2013)
Gabriel Hallevy, When Robots Kill – Artificial Intelligence under Criminal Law (2013)

Gabriel Hallevy, Liability for Crimes Involving Artificial Intelligence Systems (2015)
Valerie P. Hans and Nigel Vidmar, Judging the Jury (1986)
Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 414 (1958)
Herbert L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968)
Stephen W. Hawking, A Brief History of Time (1989)
William George Hawkins, A Treatise of the Pleas of the Crown (1716, 8th ed., 1824, 1972)
Ernest F. Henderson, Select Historical Documents of the Middle Ages (1912)
John L. Hill, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 Geo. L. J. 2045 (1988)
Warren P. Hill, *The Psychological Realism of Thurman Arnold*, 22 U. Chi. L. Rev. 377 (1955)
Andrew von Hirsch, *Reduced Penalties for Juveniles: The Normative Dimension*, Principled Sentencing: Readings on Theory and Policy 323 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009)
Michael Hirst, Jurisdiction and the Ambit of the Criminal Law (2003)
Edward D. Hoedemaker, *"Irresistible Impulse" as a Defense in Criminal Law*, 23 Wash. L. Rev. 1 (1948)
William Searle Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 Yale L. J. 382 (1922)
William Searle Holdsworth, A History of English Law (1923)
William Searle Holdsworth, History of English Law (3rd ed., 1927)
Winifred H. Holland, *Automatism and Criminal Responsibility*, 25 Crim. L. Q. 95 (1982)
August B. Hollingshead and Fredrick Redlich, Social Class and Mental Illness (1958)
Oliver W. Holmes, The Common Law (1881, 1923)
Kristen L. Holmquist, *Cultural Defense or False Stereotype? What Happens When Latina Offenders Collide with the Federal Sentencing Guidelines?*, 12 Berkeley Women's Law Journal 45 (1997)
Herbert Hovenkamp, *Insanity and Responsibility in Progressive America*, 57 N.D. L. Rev. 541 (1981)
Barbara Hudson, *Pushing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy and Practice*, Penal Theory and Practice 302 (Robin Antony Duff ed., 1994)
Drew Humphries, *No Easy Answers: Public Policy, Criminal Justice and Domestic Violence*, 2 Criminology & Pub. Pol'y 91 (2002)
Bishop Carleton Hunt, The Development of the Business Corporation in England 1800–1867 (1963)
Peter Barton Hutt and Richard A. Merrill, *Criminal Responsibility and the Right to Treatment for Intoxication and Alcoholism*, 57 Geo. L. J. 835 (1969)
Hans-Heinrich Jescheck und Thomas Weigend, Lehrbuch des Strafrechts – Allgemeiner Teil (5 Auf., 1996)
Jay Katz, *The Right to Treatment – An Enchanting Legal Fiction?*, 36 U. Chi. L. Rev. 755 (1969)
Wilber G. Katz, *Law, Psychiatry, and Free Will*, 22 U. Chi. L. Rev. 397 (1955)
A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 L. Q. Rev. 364 (1937)
Edwin R. Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. Pa. L. Rev. 956 (1952)
Anthony John Patrick Kenny, Freewill and Responsibility (1978)
Kristin Koptiuch, *"Cultural Defense" and Criminological Displacements: Gender, Race, and (Trans)nation in the Legal Surveillance of U.S. Diaspora Asians*, Displacement, Diaspora, and Geographies of Identity 215 (Smadar Lavie and Ted Swedenburg eds., 1996)
Nicola Lacey, Celia Wells and Oliver Quick, Reconstructing Criminal Law (3rd ed., 2003, 2006)
Wayne R. LaFave, Criminal Law (4th ed., 2003)
William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 Emory L. J. 647 (1994)
Jackson T. J. Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 American Historical Review 567 (1985)

Albert Levitt, *The Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117, 118 (1923)
W. D. Lewis, *The Law of England Considered as a Science*, 10 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 23 (1849)
Frederick J. Ludwig, *Rationale of Responsibility for Young Offenders*, 29 Neb. L. Rev. 521 (1950)
Kenneth Maddock, *Culture and Culpability: Notes towards a Belated Response*, Commission on Folk Law and Legal Pluralism Newsletter (1992)
Donna K. Maeda, *Subject to Justice: The "Cultural Defense" and Legal Constructions of Race, Culture, and Nation*, Postcolonial America 81 (Richard C. King ed., 2000)
Henry Sumner Maine, Early History of Institutions (7th ed., 1966)
George Mair, *Diversionary and Non-Supervisory Approaches to Dealing with Offenders*, Alternatives to Prison: Options for an Insecure Society 153 (Bottoms, Rex and Robinson eds., 2004)
Louise Mandell, *Native Culture on Trial*, Equality and Judicial Neutrality 358 (Sheila L. Martin and Kathleen E. Mahoney eds., 1987)
Herbert Marcuse, *Repressive Tolerance*, A Critique of Pure Tolerance 81 (Robert Paul Wolf ed., 1969)
Ronald Markman and Dominick Bosco, Alone with the Devil (1989)
Alison Matsumoto, *A Plea for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 Journal of International Law and Practice 507 (1995)
Peter McCandless, *Liberty and Lunacy: The Victorians and Wrongful Confinement*, Madhouses, Mad-doctors, and Madmen: The Social History of Psychiatry in the Victorian Era 339 (Scull ed., 1981)
Susan Mendus, The Politics of Toleration in Modern Life (2000)
Karl Menninger, Martin Mayman and Paul Pruyser, The Vital Balance (1963)
John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (1969)
Alan C. Michaels, *Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience*, Appraising Strict Liability 218 (A. P. Simester ed., 2005)
Dan Michel, Ayenbit of Inwyt, Or Remorse of Conscience (1340, Morris ed., 1866)
Steven Mithen, After the Ice: A Global Human History 20,000 – 5,000 BC (2003)
Michael Moore, Law and Psychiatry: Rethinking the Relationship (1984)
George Mora, *Historical and Theoretical Trends in Psychiatry*, 1 Comprehensive Textbook of Psychiatry 1 (Alfred M. Freedman, Harold Kaplan and Benjamin J. Sadock eds., 2nd ed., 1975)
Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. Crim. L. & Criminology 277 (1986)
Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 Res Judicatae 29 (1951)
Stephen J. Morse, *Diminished Capacity*, Action and Value in Criminal Law 239 (Stephen Shute, John Gardner and Jeremy Horder eds., 2003)
Gerhard O. W. Mueller, *Mens Rea and the Corporation – A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. Pitt. L. Rev. 21 (1957)
Stephen Murdoch, IQ: A Smart History of a Failed Idea (2007)
Yxta Maya Murray, *The Battered Woman Syndrome and the Cultural Defense*, 7 Federal Sentencing Reporter 197 (1995)
Michael Mylonas-Widdal, *Aboriginal Fishing Rights in New Zealand*, 37 International and Comparative Law Quarterly 386 (1988)
Judith S. Neaman, Suggestion of the Devil: The Origins of Madness (1975)
Edward Norbeck, Religion in Primitive Society (1961)
Alan Norrie, Crime, Reason and History – A Critical Introduction to Criminal Law (2nd ed., 2006)
David Ormerod, Smith & Hogan Criminal Law (11th ed., 2005)
David Ormerod, Smith and Hogan Criminal Law (12th ed., 2008)

Monrad G. Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L. F. 1 (1961)
Jill Peay, *Mentally Disordered Offenders, Mental Health and Crime*, Oxford Handbook of Criminology 746 (Maguire, Morgan and Reiner eds., 3rd ed., 2002)
Michael L. Perlin, The Jurisprudence of the Insanity Defence (1994)
Gregory J.O. Phillpotts and Leslie B. Lancucki, Previous Convictions, Sentence and Reconviction – Home Office Research Study No. 53 (1979)
Anthony Platt and Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. Hist. Behav. Sci. 355 (1965)
Anthony Platt and Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227 (1966)
M. Ploscowe, *An Examination of Some Dispositions Relating to Motives and Character in Modern European Penal Codes*, 21 J. of Crim. L. & Criminology 26 (1930)
Frederick Pollock and Frederic William Maitland, The History of English Law vol. 2 (2nd ed., 1923)
Sebastian Poulter, *Foreign Customs and the English Criminal Law*, 24 International and Comparative Law Quarterly 136 (1975)
Lee W. Potts, *Criminal Liability, Public Policy, and the Principle of Legality in the Republic of South Africa*, 73 J. Crim. L. & Criminology 1061 (1982)
James Cowles Prichard, A Treatise on Insanity and Other Disorders Affecting the Mind (1835)
George L. Priest, *Social Science: Theory and Legal Education: The Law School As University*, 33 J. Legal Educ. 437 (1983)
Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, The Rights of People (James Crawford ed., 1988)
Jacques M. Quen, *Isaac Ray and Charles Doe: Responsibility and Justice*, Law and the Mental Health Professions: Friction at the Interface 235 (Barton and Sanborn eds., 1978)
Hastings Rashdall, The Universities of Europe in the Middle Ages 135 (1935)
Isaac Ray, The Medical Jurisprudence of Insanity (1838)
Isaac Ray, Medical Jurisprudence of Insanity (5th ed., 1871)
Joseph Raz, The Morality of Freedom (1986)
Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 7 Southern California Review of Law and Women Studies 437 (1993)
Alison Dundes Renteln, The Cultural Defense (2004)
Wilhelm Reusch, Die historische Wert der Caracalla vita in den Scriptores historiae Augusta (1963)
Olivia F. Robinson, *Women and the Criminal Law*, 8 Ann. Perugia 527 (1985)
Olivia F. Robinson, The Criminal Law of Ancient Rome (1995)
Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. Rev. 266 (1975)
Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199 (1982)
Paul H. Robinson, *Testing Competing Theories of Justification*, 76 N.C. L. Rev. 1095 (1998)
Paul H. Robinson, *Should the Criminal Law Abandon the* Actus Reus – Mens Rea *Distinction?*, Action and Value in Criminal Law 187 (Stephen Shute, John Gardner and Jeremy Horder, 1993, 2003)
Nigel Rodley, *Conceptual Problems in the Protection of Minorities: International Legal Developments*, 7 Human Rights Quarterly 48 (1995)
Joseph H. Rodriguez, Laura M. LeWinn and Michael L. Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L. J. 397 (1983)
George Rosen, Madness in Society: Chapters in the Historical Sociology of Mental Illness (1969)
Richard Rudgley, The Alchemy of Culture: Intoxicants in Society (1993)
William Oldnall Russell, A Treatise on Crimes and Misdemeanors (1843, 1964)

Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974 (1932)
Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933)
William Robert Scott, The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720 (1912)
Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 Geo. L. J. 1371 (1986)
Andrew Sherratt, *Alcohol and Its Alternatives: Symbol and Substance in Pre-industrial Cultures*, Consuming Habits: Drugs in History and Anthropology 11 (Jordan Goodman, Paul E. Lovejoy and Andrew Sherratt eds., 1995)
Ian Shrank, *Determinism and the Law of Consent - A Reformulation of Individual Accountability for Choices Made without Free Will*, 12 Suffolk U. L. Rev. 796 (1978)
Jean Signorel, Le Crime et La Défense Social (1912)
James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation of Culture in the Criminal Law*, 108 Yale L. J. 1845 (1999)
R. U. Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 Law Q. Rev. 528 (1933)
Vieda Skultans, English Madness: Ideas on Insanity, 1580–1890 (1979)
John C. Smith, Justification and Excuse in the Criminal Law (1989)
John R. Spencer and Antje Pedain, *Approaches to Strict and Constructive Liability in Continental Criminal Law*, Appraising Strict Liability 237 (A. P. Simester ed., 2005)
Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 Vt. L. Rev. 1 (1980)
James Fitzjames Stephen, A History of the Criminal Law of England (1883, 1964)
Fons Strijbosch, *The Concept of Pela and Its Social Significance in the Community of Moluccan Immigrants in Netherlands*, 23 Journal of Legal Pluralism 177 (1985)
Frederic P. Stroke, *The Incestuous Marriage: Relic of the Past*, 36 U. Colo. L. Rev. 473 (1964)
G.R. Sullivan, *Knowledge, Belief, and Culpability*, Criminal Law Theory – Doctrines of the General Part 207 (Stephen Shute and A.P. Simester eds., 2005)
G. R. Sullivan, *Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights*, Appraising Strict Liability 195 (A. P. Simester ed., 2005)
L.S. Tao, *Psychiatry and the Utility of the Traditional Criminal Law Approach to Drunkenness of Offenses*, 57 Geo. L. J. 818 (1969)
Lawrence Taylor and Katharina Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 Cal. W. L. Rev. 269 (1983)
Benjamin Thorpe, Ancient Laws and Institutes of England (1840, 2004)
Lawrence P. Tiffany, *Pathological Intoxication and the Model Penal Code*, 69 Neb. L. Rev. 763 (1990)
Janet A. Tighe, *Francis Wharton and the Nineteenth Century Insanity Defense: The Origins of a Reform Tradition*, 27 Am. J. Legal Hist. 223 (1983)
Michael H. Tonry, Sentencing Matters (1996)
Austin Turk, Criminality and Legal Order (1969)
J.W.C. Turner, *The Mental Elements in Crimes at Common Law*, The Modern Approach to Criminal Law 195 (Radzinowicz and Turner eds., 1945)
Russ VerSteeg, Early Mesopotamian Law (2000)
John Barker Waite, *Irresistible Impulse and Criminal Liability*, 23 Mich. L. Rev. 443 (1925)
Patricia M. Wald, *Judicial Activism in the Law of Criminal Responsibility – Alcohol, Drugs, and Criminal Responsibility*, 63 Geo. L. J. 69 (1974)
Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. Rev. 503 (1984)
Martin Wasik, *Partial Excuses in the Criminal Law*, 45 Mod. L. Rev. 516 (1982)
Herbert Wechsler, *The Criteria of Criminal Responsibility*, 22 U. Chi. L. Rev. 367 (1954)
Henry Weihofen, *The Metaphysical Jargon of the Criminal Law*, 22 A.B.A.J. 267 (1936)

Henry Weihofen, Mental Disorder as a Criminal Defense (1954)
Francis Antony Whitlock, Criminal Responsibility and Mental Illness (1963)
John H. Wigmore, *Responsibility for Tortious Acts III*, 7 Harv. L. Rev. 441, 442 (1894)
Forbes Winslow, The Plea of Insanity in Criminal Cases (1843)
Wolf Wolfensberger, Normalization: The Principle of Normalization in Human Services (1972)
Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 International Journal of the Sociology of Law 403 (1989)
George E. Woodbine, Bracton De Legibus et Consuetudinibus Angliae (1942)
Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. Pa. L. Rev. 426 (1939)
Reuven Yaron, The Laws of Eshnunna (2nd ed., 1988)
Stanley Yeo, *Sex, Ethnicity, Power of Self-Control and Provocation Revisited*, 18 Sydney L. Rev. 304 (1996)
Lucia Zedner, *Sentencing Young Offenders*, Fundamentals of Sentencing Theory 176 (Andrew Ashworth and Mark Wasik eds., 1998)
George Zilboorg, A History of Medical Psychology (1941)
Franklin E. Zimring, *Rationales for Distinctive Penal Policies for Youth Offenders*, Principled Sentencing: Readings on Theory and Policy 316 (Andrew von Hirsch, Andrew Ashworth and Julian Roberts eds., 3rd ed., 2009)

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