Conceptions of Culpability in Contemporary American Criminal Law

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The constant progress of psychology, psychiatry, anthropology, and other sciences enables the contemporary lawyer to understand better the mental state of a criminal offender and the offender's psychological relation to his act. This general scientific advance helps criminal law theory to explain these psychological problems more fully from the legal point of view and leads courts and legislative bodies towards better solutions. The question of culpability is, together with the question of responsibility, one of the two main problems in the study of the criminal offender. The great importance of this question makes it one of the first for which a continental European lawyer will seek an answer when he attempts to become acquainted with the contemporary criminal law of the United States of America. It will be easier for a European or "romanist" lawyer (instead of "civil," to avoid confusing the civil law system with the civil law as opposed to the criminal law) than for an American lawyer to find a basis for comparison of romanist and American notions of culpability. While there are in Europe many theories dealing with culpability and related problems, the differences between them are generally about secondary questions, so that more or less uniform attitudes dominate in the statutes, as well as in legal theory, which has a great influence on the formation of rules on culpability. The decisions of the courts are usually not a source of criminal law and the duty of the courts consists only in correct application and exact explanation of the legal rules.

In Europe the terms dolus and culpa were not unknown even in the Roman law, but the real examination of the problems of culpability was begun by medieval Italian jurists.¹ This work was carried forward in the last decades of the nineteenth century and the first decades of this century by different European jurists who refined the doctrine to such a high degree that even the most recent penal codes use the notions and definitions fixed

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¹LISZT, LEHRBUCH DES DEUTSCHEN STRAFECHTS 10, 11 (1908).
at that time. The European jurists, especially the Germans, gave definitions the precision of which might really be described as perfect. Still, it is important to examine the imprecise and heterogeneous American criminal law, which sometimes just because of its imprecision and heterogeneity gives the world useful and progressive innovations.  

Romanist lawyers usually divide culpability into two main kinds, intent and negligence. Intent is further divided into direct and eventual intent and negligence into conscious and unconscious negligence. The majority of these lawyers will not, like their common law colleagues, start with the assumption that there are two components of every crime, the objective and the subjective, but they will usually accept the doctrine of the so-called "being of the criminal offense," either the "general being" or the "special being." The general being is the entirety of the elements or characteristics of the criminal offense in general, i.e., of all criminal offenses (act with result and causation—illicitness—menace of criminal sanction—culpability—and according to some conceptions: social danger—and responsibility), and the special being is the entirety of the specific elements of each particular crime (e.g., larceny: abstraction—of a chattel—which belongs to another—with the intention to appropriate it—and by appropriating it—to make a material gain for oneself or another—which gain must be unlawful). Both general elements and special elements may, according to the majority of writers, be divided into objective and subjective ones, and culpability is a general subjective element of the crime.

The best way to get short and clear definitions of notions related to culpability will be to quote the corresponding rules from an up-to-date European criminal code. Ordinarily one would expect to look at the codes of the largest European states for such texts. But the Germans have left the definition of these notions to their legal theory, and their Penal Code of 1871 has

5. KRIVICNI ZAKONIK art. 249 (Slubnovi list FMRJ No. 30/59). See also English translation of the Criminal Code, published by the Union of Jurists' Associations of Yugoslavia, Beograd 1960.
no provisions on culpability.\textsuperscript{7} The same must be said about the French Penal Code of 1810,\textsuperscript{8} with the further remark that French legal theory has not the same emphasis on the problem of culpability and has mostly limited itself to separate examination of problems such as will, motive, intention, negligence, and mistake.\textsuperscript{9} In the Soviet Union the recent criminal legislation contains provisions on culpability which do not differ essentially from the conceptions of pre-revolutionary Russian writers or those of the majority of western European jurists. The “Law of the U.S.S.R. on the Establishment of the Basis of the Criminal Legislation of the U.S.S.R. and of the Federated Republics” in articles 8 and 9 and, as a particular example, the “Criminal Code of the Russian SFSR” in articles 8 and 9, define intent and negligence in the same way as the Yugoslav text quoted below.\textsuperscript{10} These articles, however, will not be used here as a basis for comparison in order to avoid the false impression that the definitions contained in them were the result of some other development than that which began in ancient Rome and passed through the medieval north Italian cities into contemporary romanist law. The Italian Penal Code contains provisions on culpability, and mentions in article 42 intentional, preterintentional, and culpable performance of a crime, but the notion of preterintentional is composed of two different mental relations between the perpetrator and his act, so that these provisions might not be considered typical of European views.\textsuperscript{11} The Swiss Federal Criminal Code contains in article 18 provisions on intent and negligence, but defines intent only in a general way.\textsuperscript{12}

The meaning of the word culpability is not given in any code. The codes simply consider culpability to be intent as well as negligence. For theoretical purposes culpability might be ex-

\textsuperscript{7} VON SCHÖNKE UND SCHRÖDER, STRAFGESETZBUCH KOMMENTAR 305 (1957). See also GERMAN PENAL CODE (Müller & Burgenthal’s transl. 1961).
\textsuperscript{8} FRENCH PENAL CODE (Muller’s transl. 1960).
\textsuperscript{9} DE VABRES, TRAITÉ DE DROIT CRIMINEL ET DE LEGISLATION PÉNALE COMPARÉE 75 (3d ed. 1947).
\textsuperscript{10} ZAKON SSSR OB UTVERJEDENII OSNOV UGALEVNOGO ZAKONODATEL’STVA SOVUZAS SRR, I SOVUZNIKH REPUBLIK, and Ugalovniy kodeks RSFSR in the book UGALEVNOE ZAKONODATEL’STVO SOVUZAS SRR I SOVUZNIKH, Tom I (Gosudarstvennoe izdatelstvo juridiceskoj literaturi, Moskva 1963).
\textsuperscript{11} CODICE PENALE 19.X.1930, 42. Responsabilita per dolo o per colpa o per delitto preterintenzionale, Responsabilita obiettiva, in 1 CODICI PENALI ANOTATI CON LA GIURISPRUDENZA DELLA CASSAZIONE (1956).
\textsuperscript{12} CODE PENAL SUISSE ANNOTÉ (2d ed. 1962). THE SWISS FEDERAL CRIMINAL CODE art. 18 (Eng. transl. in Supp. to J. CRIM. L., C. & P.C. (1939)). Art. 18:
plained as the mental relation between the perpetrator and his act defined by his consciousness and his will. The Europeans usually think that they are more correct than their American colleagues when they say "mental relation" and not "mental state," because a "mental state" is something that might exist independently of the criminal act and would be responsibility in criminal law rather than culpability.

For the reasons given, the above-mentioned codes would not provide a complete romanist base for comparison. Therefore the base to be used will be the well-formulated article 7 entitled "Intent and negligence" of the new and up-to-date Yugoslav Criminal Code enacted in 1951 and supplemented in 1957. This article, with certain explanatory material added in parentheses, states: "1/ An offender shall be criminally liable for a criminal offense only when he has committed it with intent or by negligence (culpability). 2/ A criminal offense is committed with intent when the offender was conscious of his act and wanted to commit it (direct intent); or when he was conscious that a prohibited consequence might result from his activity or omission and had consented to its occurring (eventual intent). 3/ A criminal offense is committed by negligence when the offender was conscious that a prohibited consequence might occur but had wantonly assumed that it would not occur or that he would be able to prevent it (conscious negligence); or when he was not conscious of the possibility of a prohibited consequence occurring whereas under the circumstances and by his personal qualities he should and could have been conscious of that possibility (unconscious negligence). 4/ For a criminal offense committed by negligence the offender shall be criminally liable only when so provided by law."13

Thus the above will constitute the basis for the comparative approach to the problem of culpability in contemporary American law. However, the romanist lawyer should realize that by definition of the romanist conception he has overcome only one of the initial problems. The main difficulties are presented when he wants to elucidate and to comment upon the American conceptions. First of all, the American law which he intends to study is not one law, but fifty-one jurisdictions which do not have identical criminal laws. The basic conceptions do not

fundamentally differ from state to state, but each of the fifty states has its own penal law, and the federal government, while it has no general authority to legislate in this field, has also enacted penal statutes under its commerce, taxing, and other constitutional powers. The great majority of convictions are founded on state regulations, tried by state courts, and executed by state penal institutions. In 1959, for example, federal penal institutions received just under 14,000 prisoners from the federal courts, while state institutions received nearly 74,000 from the state courts.\textsuperscript{14}

The fact that the criminal law in the United States is mainly a statutory law will facilitate the task of the romanist lawyer. But the existence of statutes will offer only a partial help in the explanation of the conceptions of culpability, because only a few states have true codes dealing with general problems of criminal law, and in some states there are still the so-called "common law crimes" defined by case law and punishable even if not mentioned by statute.\textsuperscript{15}

This situation obliges the European researcher to look into the second main source of American criminal law, the judicial decisions. These judicial decisions are authoritative and if they give explanations of legal concepts these explanations carry great weight. However, there is not in America any national supreme tribunal to unify the basic principles of criminal law. It is also well known that judges usually do not give abstract and general definitions in their judgments. Although recent developments have led to more systematized basic legal conceptions, the American law provides a formidable diversity of authoritative sources. As early as 1917, when the number of volumes of American reports was 17,000, the cases cited by a court in any volume ran into hundreds and frequently into thousands and the law was beyond the power of any layman to discover or to comprehend.\textsuperscript{16} So the judgments too give no more than a partial answer to the question of the conceptions of culpability in contemporary American criminal law.

This situation will oblige the European lawyer, if he wants an approximate completion of the picture of culpability, to ad-

\textsuperscript{14} Farnworth, An Introduction to the Legal System of the United States 164 n.44 (1963).
\textsuperscript{15} Ibid.
\textsuperscript{16} Philbrick, American Law, in 1 Encyclopedia Britannica 779 (1957).
dress himself to American legal theory. Actually, apart from legislative formulations like the ones from Europe to which reference has been made, legal theory in nearly every country is the main source of information about abstract conceptions of general legal principles. But in the United States legal theory seems to offer more than in most other countries. This is not because of individual writings, which usually do not give a complete answer, but because of the existence of the so-called Model Penal Code. This Model Penal Code was elaborated through a decade of work by a group of progressive American lawyers, wanting uniform and up-to-date conceptions in the field of criminal law, and was approved in 1962 by lawyers gathered at the American Law Institute, a private institution contributing to the advancement of American law. So the conceptions of the Model Penal Code might in some way be considered as a communis opinio doctorum on culpability and other questions.¹⁷

The explanation of the conceptions of culpability in contemporary American criminal law will here be given according to all the three mentioned sources, but discussion will be limited to the Model Penal Code and the most important recent writings on legal theory, to some of the more interesting decisions of the highest American court, the Supreme Court of the United States, in judicial practice, and to those newer statutes which contain interesting prescriptions on culpability.

How have the conceptions of culpability in contemporary American law developed to their present stage? There are many factors which influence the development of a body of law. Some of them, such as political structure and judicial organization, have been adverted to. But it is considered that the development of the penal laws of the United States bears the marks of three pervasive influences: the common law, puritanism, and the frontier.¹⁸

The influence of the English common law has the greatest importance for elucidation of the problem. Since the American conceptions of culpability developed from, and are even sometimes identified with, the older common law notion of mens rea (guilty mind), this term must be explained. It will, however, not be easy for the romanist lawyer to find out its exact mean-

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ing, because it does not correspond entirely to any of the familiar romanist notions. As it is an old term, one may try to find some explanation in the history of the English common law; as it is a Latin term, even in Roman law.

From the 12th century the renewed Roman law influenced English law directly with its notions dolus and culpa and indirectly through the ecclesiastical law. The ecclesiastic emphasis on the notion of sin induced a stronger consideration of the mental states of the perpetrators of crimes. But the term mens rea does not seem to be used in the Roman law. In the Leges Henrici Primi, V, 28, from about the year 1118, reference is made to the works of Saint Augustine, where, speaking about perjury, he says: "ream linguam non facit nisi mens rea." Linguam later became actus, and the maxim "actus non facit reum nisi mens sit rea" was formulated. This maxim remains till today the basic principle of criminal responsibility and culpability in the common law. In the middle of the thirteenth century the idea of guilt was further developed in Bracton's book, De legibus et consuetudinibus Angliae. Speaking about different crimes he underlined the necessity of guilt for constituting a crime. By the end of the middle ages it was usually recognized that the existence of a certain mens rea makes the decisive difference between punishable and unpunishable acts. With the exception of the animus furandi for larceny, there was no distinction between the mentes reae of particular crimes. Mens rea was the blame-worthy state of mind directed towards crime in general. But later the existing conception of mens rea began to change into the conception of many mentes reae. For example the great authority on the English criminal law, Sir James Stephen, says in one of his judgments towards the end of the nineteenth century, speaking about the existence of a general mens rea: "This is obviously not the case, for the mental elements of different crimes differ widely. 'Mens rea' means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intent to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to

20. Id. at 33, 35, 36.
notice a signal. It appears confusing to call so many dissimilar states of mind by one name.”21

The confusion still exists. This is obvious when one knows that in England there are nearly no statutory regulations of the so-called general part of the criminal law; in the treatises of the classical English writers the weight is put on the so-called special part; and the instructions of the judges to the jury and the court decisions, often perfectly adapted to their particular role, do not give complete opinions on basic principles.22 For the purposes of a work on American law it is not necessary to undertake an exhaustive discussion of the complex English mens rea notion; but it should be described at least in a general way. So it might be said that it has some features of a mental state but is more a mental relation between the perpetrator and his act, or a psychological position towards his act; it has similarities with the romanist notions of general and special subjective elements of a crime, but is identical with neither the general nor the special subjective elements nor with both of them together. It is the mental element of a criminal offense, which is defined more by the consciousness than by the will of the offender. That consciousness always embraces the act but need not always embrace the consequence of the act and the causation. Mens rea includes some concepts of moral guilt. Mens rea is sometimes in England marked by the term intention, but it contains not only the cases of intent but also some cases of negligence.23

A more detailed comparison between corresponding European notions and mens rea will be given with the exposition of the American conceptions. The common law concepts, although imprecise and irregular, were after American independence in 1776 the basis on which the American conceptions of mens rea developed, and they have continued to influence it since.

This is certainly the main aspect of the influence of the English common law on the problem of mens rea. The other important influence is the system of using judicial precedents as a source of law, but that is a general influence affecting all the branches of the law including criminal law.

Besides the influence of the common law, the second important influence upon the criminal law of the United States is that of puritanism. The theocratic and moralistic conceptions of the seventeenth century Puritan colonists in America seemed not only to prevent removal of the useless concept of moral guilt inside culpability, but even sometimes to strengthen these moral considerations. These conceptions also influenced the definitions of some specific mentes reae for certain crimes like adultery and gambling.

The third main influence is the influence of the frontier. This means the past American situation where "in a thousand settlements, far from court, books, judges, and lawyers, miscreants had to be dealt with summarily, by informal tribunals, to the satisfaction of a crowd of onlookers," so that "lay law, lay police, lay judges, lay critics of the legal process, unavoidable in primitive social groups, left permanent imprint" on the penal system. This lay element is especially felt in the "readiness of lay legislators to pass new criminal laws without study or expert counsel" and in "the institution of the jury," which is not as much the invention of the frontier. In the jury a group of twelve laymen has to determine all facts about the criminal offense including whether the defendant intended to commit the act or was only reckless or careless.24 This influence of the frontier, supplemented and complicated by the binding power of judicial precedents, keeps a great part of American criminal legislation casuistic, and, for other reasons already noted, obliges the researcher to construct the definition of the American notion of mens rea out of concepts which are often neither in mutual accord nor in accord with scientific conceptions.

The meanings of culpability and mens rea have recently become almost synonymous, so that both terms may have a parallel application. Only recently in America has the term culpability been applied to define the mental relation of the perpetrator towards his act, and it has received its best definition in article 2, section 2.02, of the Model Penal Code. Before this definition even the newest criminal codes either avoided the use of that term25 or gave it the inadequate meaning of responsibility.26 In the theoretical writings a similar meaning was attributed to

25. ILL. CRIM. CODE of 1961, including 1961 amend., art. 4.
the term liability. Since here the contemporary American con-
ceptions will be divided into the older and the newer ones, mens
rea will usually be applied as a name for the older and culpability
for the newer contemporary conceptions. Not only will the
obligatory rules of law be considered, but also the criminal law
science which explains these rules.

One important issue of culpability, which should be mentioned
at the very beginning, is that in the American criminal law
there are some offenses for the existence of which culpability
is not indispensible. These are usually the so-called Public
Welfare Offenses, which are characterized by strict liability.
In some cases American courts found punishable, for example,
unintentional possession of automobile with serial number re-
moved, unintentional exceeding of speed limit in automobile,
unintentional absence of automobile taillight, unintentional sale
of oleomargarine for butter, unintentional sale of adulterated
food products and milk in violation of city ordinance, and other
incipably committed offenses.\textsuperscript{27} But some courts find punish-
able even unintentional bigamy and statutory rape (intercourse
with a minor).\textsuperscript{28} A few state criminal codes contain adequate
provisions. So, for example, in section 4(a) entitled “Absolute
liability” the 1961 Illinois Criminal Code says: “A person may
be guilty of an offense without having, as to each element
thereof, one of the mental states described in Section 4-4 through
4-7 if the offense is a misdemeanor which is not punishable by
incarceration or by a fine exceeding $500, or the statute defining
the offense clearly indicates a legislative purpose to impose
absolute liability for the conduct described.” Similar are the
attitudes of other codes and of the practice of the Supreme Court
of the United States, but this practice will later be referred to.

In European legislation, also, provision is sometimes made
for offenses which may be punishable without culpability, but
they are much rarer than in America. These are usually minor
violations, \textit{e.g.}, so-called police violations, like traffic offenses,
or some offenses against the customs or taxation where the per-
petrator may be unaware of some of the elements of the offense.\textsuperscript{29}
The general principle of the criminal law should always be that
there can be no criminal offense without culpability. The

\textsuperscript{28} Wechsler, On Culpability and Crime: The Treatment of “Mens Rea” in
\textsuperscript{29} Acimovic, Krivijno pravo, Opsti deo 87 (1937).
punishment of an innocent person can be criticized from several points of view, but here it will be said only that such a punishment is, on one side, unjust and that, on the other, it contradicts the progressive American notion of the "rehabilitative ideal" which is to change the behavior of the convicted person in his own interest and in the interest of society, as well as the progressive European notion of "social defense" through resocialization, rehabilitation, and reclassification of an offender. Unfortunately, even the Model Penal Code was obliged to compromise with the out-of-date conceptions of absolute liability, so that in section 2.05(1) it says: "The requirements of culpability prescribed in section 2.01 and 2.02 do not apply to: (a) offenses which constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or (b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears." The Model Penal Code tries indeed to stress a certain difference between these "violations" and real crimes (felonies and misdemeanors). But the Code could have probably found a better solution for the concept of strict liability. Usually negligence was not sufficiently defined in American criminal law and this was one of the main reasons for the development of the concept of strict liability. But the Model Penal Code has paid sufficient attention to negligence. If it is considered that strict liability really must exist for certain petty offenses, then these offenses should be excluded from the criminal law in the narrower sense and, following the example of some European countries, put into another branch of the law, e.g., law of violations or similar category. A modern criminal code should not include in its rules the punishment of those who are not culpable persons.

In accordance with the division of the contemporary conceptions of culpability in American criminal law and legal theory into the older mens rea concepts and the newer concepts, the former will be explained first. Americans themselves emphasize that neither courts nor legislatures have done enough to clarify the extraordinarily difficult problems of the mental element and

that their deficiencies have not until quite recently been adequately exposed by legal scholarship.  

As a complete account of the court practice concerning mens rea cannot be given in short compass, the issue will be illustrated only by a short survey of the United States Supreme Court's attitude on mens rea. "The history of the problem in the Supreme Court is an unedifying example of how constitutional doctrine comes to be fashioned. There are two lines of decision that bear on the issue, one of them apparently establishing that mens rea has no constitutional significance, or very little, and the other suggesting that in some situations, at least, it has considerable significance."  

There are a few cases which are usually discussed in order to show the Court's attitude towards the question of culpability during the past decades of this century.  

In the first line of decisions there is a 1910 case in which a corporation was accused of cutting timber on state lands without a permit to do so. The Court rejected the corporation's defense, stating that criminal punishment could be visited upon persons ignorant of the circumstances making their conduct criminal. In another case from 1922 the indictment charged the defendants with the sale of narcotics without the requisite order form. The defendants demurred to the indictment on the ground that it failed to charge that they had sold the narcotics knowing them to be such. Referring to the previous case, the Supreme Court maintained its position that in some cases unawareness of some circumstances making conduct criminal is not a defense. The doctrine of strict liability was applied again in 1943 against the president of a corporation unaware of the shipment by his company of misbranded or adulterated products in interstate commerce. Then in 1952 the Supreme Court recognized that there might be cases of statutory redefinition of common law offenses in which mens rea would be a requisite element even though not expressly mentioned. This recognition favored a defendant who had taken used bomb casings that he had found upon a government reservation, regarding them as abandoned.  

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31. Packer, Mens Rea and the Supreme Court, Supreme Court Rev. 137 (1962).
32. Id. at 110.
In a 1957 case the Court decided that the defendant should be excused for the failure to register with the police of Los Angeles, when according to a municipal ordinance she was obliged to do so because of a prior felony conviction. The Supreme Court accepted her defense of unawareness of her duty, but with the extraordinary explanation that the decisive criterion was that her conduct was only passive omission.\(^{38}\)

The second line of decisions of the Supreme Court is drawn by certain other cases. In these cases, specially concerned with civil rights, the Court has repeatedly relied on mens rea to limit the applicability of state and federal criminal sanctions to conduct which is thought to require constitutional protection.\(^{39}\) It seems that not only the other courts, but even the Supreme Court of the United States, may be reproached for having accomplished little in elucidating the difficult problems of mens rea.\(^{40}\)

Nor have penal statutes more successfully clarified the problem of the mental element. They usually do not contain any definition of mens rea or of any kind of culpability. Of those that do speak about subjective elements, the former Illinois Code is a good example. In Illinois in the previous Code at least fourteen different terms were used for marking various mental states required to establish criminal liability. They were nowhere defined in the statutes, they overlapped, lacked precision, and produced confusion.\(^{41}\) The State of Illinois now has a new Criminal Code which is probably the only one that can without hesitation be considered a modern one, but in the majority of other codes confusion still exists.

Thus only the Illinois Code has complete provisions on culpability; other relatively new codes from the group, here called the "mens rea group," show the development and refinement of the problem of the mental element in American legislation. In order not to go too far into the past, one might choose as the first example the Penal Law of the State of New York of 1939. This law defines crime only broadly and then under the title

\(^{40}\) Packer, Mens Rea and the Supreme Court, SUPREME COURT REV. 137 (1962).
"Construction of Terms" in article 1, paragraph 3, explains the meaning of certain terms such as "corrupt" ("imports a wrongful desire to acquire or cause some pecuniary or other advantage"), "negligent," "maliciously," "knowingly," etc. The use and definition of terms do not cover all the necessary psychological positions of an offender; nor do they correspond either to the system of romanist law or to a complete inward system of their own. The partial solution it gives might also be criticized from the point of view of auxiliary sciences like psychology and criminology.

The Criminal Code of Wisconsin of 1955 is another example. In its article 939-23 entitled "Criminal intent" the Code explains quite systematically the different mental relations of the perpetrator to his act. The Code provides no definition of negligence, but this should not be considered a serious defect as negligent offenses usually are not punishable. But it is remarkable that even the definitions of intent that are given do not include what is known in Europe as conscious negligence and which in the common law is usually included in intent. The notion of intent in the Code includes both forms of intent—direct intent and eventual intent; the terms, however, are not as precise as they might be. Direct intent is well defined as the "purpose to cause the result"; but there is then introduced the unhappy phrase "the purpose to do the thing" (what thing?). Eventual intent (plus conscious negligence) is not badly defined by saying that "the actor must have knowledge of those facts which are necessary to make his conduct criminal." But by saying that "in addition" he has to "believe that his act if successful, will cause the result," the Code excludes conscious negligence from the definition and makes the notion of intent even narrower than in contemporary romanist law. The American notion of intent was usually broader than the European one, but the concept of "belief" that the result will occur is narrower than the concept of "consent" to the result, which is in romanist law the characteristic of eventual intent. The Wisconsin Code says that the notion of knowledge requires only the belief, but still the use of psychological terms in the Code is such that, if, for example, somebody locks another person into a cellar consenting that this person die of starvation, he will not be guilty of murder if he did not believe that the death might occur.

42. N.Y. PEN. LAW.
43. Wis. CRIM. CODE ch. 939-23 (1955).
The mental relations of offenders towards their acts are better defined in the somewhat older Criminal Code of Louisiana of 1942. In its articles 8 to 12 the Code defines nearly all the important psychological relations between the perpetrator and his act. The terms differ from the romanist ones insofar as direct intent is in the Code called specific criminal intent; eventual intent—general criminal intent; and both kinds of negligence represent only so-called criminal negligence. Essentially, intent is here the same as in European law. But negligence, which might be conscious or unconscious, is defined in a less precise way more appropriate to private law. It is a "disregard of the interests of others" measured among other tests by the care of a "reasonably careful man," which is a standard that cannot be adapted to all negligent offenders with their different mental capacities.

These three relatively new penal statutes show the progress from the older statutes still in force, which usually have insufficient general provisions on mens rea and are not consistent in using terms and applying notions. The point this progress has reached is marked by article 4, Criminal Act and Mental State, sections 3, 4, 5, 6, 7, 8, 9, of the Illinois Criminal Code of 1961. But the latter provisions belong to the other contemporary group of conceptions, which will be dealt with after a survey of the explanations given by legal theory of the older but still contemporary notions of mens rea.

Having to deal with the extremely subtle and obscure notion of mens rea, lacking precise statutory definitions, and being bound by the various explanations of terms given by the courts, American legal scholarship found itself nearly helpless in explaining the meaning of mens rea. Nor did the tendency of some common lawyers to get closer to the romanist criminal law in their conceptions and essentially to identify the notion of intention with the romanist notion of direct intent, recklessness with eventual intent and conscious negligence, and negligence with unconscious negligence, help to solve this problem. Showing what mens rea should be, these writers do not answer what it is and what it was.

44. LA. CRIM. CODE arts. 740-8—740-12 (1942).
45. ILL. CRIM. CODE art. 4, § 4-3—4-9 (1964).
The difficulty of the task of explaining the existing conceptions of mens rea in statutes and judicial decisions leads to the conclusion that "the logical starting point in the search for the mental element required for conviction of any particular crime is the intent to do the deed which constitutes the actus reus of that offence. Frequently, however, the mens rea will be found to be something other than this. For various offences, assuming the absence of any special circumstance of exculpation, such as extreme youth or insanity, the mens rea may consist of (a) this intent, (b) something distinctly less than this intent, (c) something distinctly more than this intent or (d) something other than this intent which cannot be designated as distinctly either more or less than the intent itself." 47 To the European it will facilitate the understanding of mens rea if he considers that the notion of intent is more or less identical with all the three romanist mental states which include consciousness (direct intent, eventual intent, and conscious negligence). But the question is what is mens rea less, what is it more, or what is it other than this intent. However the answer in each particular case might be so different that no rule could be formulated which would cover all of them. So with the risk of overgeneralization it might be said that mens rea could be less than intent (which is here defined by the consciousness of the elements of crime), when mens rea does not include consequence and causation. 48 (E.g., actor was aware of the elements of battery, but victim's death accidentally resulted, and actor is condemned for homicide.) Mens rea will be more than intent in the case where its content is defined not only by the consciousness or perhaps by the will of the actor, but also by other psychological concepts. Such is the case when it is considered that responsibility also enters into the framework (e.g., actor had a diminished capacity of reasoning which is not observed as minimized responsibility but is used for the estimation of his mens rea); and also when, exceptionally, it includes the motive as a condition for culpability (e.g., the actor has in mind a seduction, without knowing that the subject is a minor; his general motive renders him culpable of the seduction of a minor). Mens rea is different from intent in the cases when, besides the psychological meaning, it comes to have an objective ethical meaning—the premise being that actual harms

47. PERKINS, CRIMINAL LAW 661 (1957).
48. TIDOW, DER SCHULDBEGRIFF IM ENGLISCHEN UND NORDAMERIKANISCHEN STRAFRECHT 146 (1952).
are proscribed.49 (Similarly to the previous example, actor was
found guilty for seducing a minor without knowing her to be
such, but knowing that he seduces, and such a psychological rela-
tion is bad.) However, these differences between consciousness
of the elements of crime and mens rea are regarded as excep-
tional even among the older contemporary conceptions.

There is too much to be said on the content and nature of
mens rea for the subject to be investigated completely here. For
this reason there is omitted any discussion of notions relevant
only to the special subjective elements of particular crimes; and
of notions, general as well as particular, which may not be a
part of any logical system.

It may, however, be added that some writers, in order to
solve the confusion created by putting special subjective ele-
ments into the concept of mens rea, have tried to analyze the
notion into a general mens rea,50 which in some way corresponds
to the general subjective element of a crime, and special mentes
reae, corresponding to the entity of special subjective elements of
particular crimes.51

Since here the notion of mens rea is considered to be the
older synonym of culpability, it must be explained that negli-
gence (unconscious negligence) usually does not enter into mens
rea in American criminal law, and ordinarily negligent offenders
may be punished only by the application of the institution of
strict liability. But as European conscious negligence enters
into the American notion of intent, negligence will be used here
to mean only unconscious negligence.

It is probably not superfluous to mention that in Europe too,
among outstanding jurists, there has existed the so-called "theory
of consciousness" which, as opposed to the so-called "theory of
will," defined intent only by the offender's consciousness.52 But
in the majority of codes, as well as in legal science, the theory
of consciousness was replaced by a mixed theory which draws the
boundaries between intent and negligence and between culpa-
bility and innocence not only according to the consciousness of
the offender but also according to his will. There exist in Europe
also some so-called normative and normative-psychological con-

49. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 104 (2d ed. 1960).
50. PERKINS, CRIMINAL LAW 655 (1957).
51. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 141 (2d ed. 1960).
52. ACIMOVIC, KRIVICNO PRAVO, OPSTI DEO 87 (1937).
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Conceptions of culpability, which do not consider the psychological criteria to be sufficient for the definition of culpability, but they are usually not accepted in legislation.

Speaking of the conceptions of mens rea in American legal scholarship it may be added that the relation between culpability and responsibility is correctly understood. Responsibility is considered to be a condition for the existence of culpability, but the relation between them was not analyzed more deeply. Because of this, elements of responsibility were sometimes included in the notion of mens rea, where they do not belong. The circumstances in which irresponsibility can be an excuse in American criminal law are in general the same as in romanist law (mental disease, mental derangement, mental defect, and according to some conceptions, immaturity).

The newer conceptions of culpability in contemporary American criminal law are much clearer and more precise than the older contemporary conceptions of mens rea. These newer conceptions were crystallized in the Model Penal Code and in the Illinois Criminal Code of 1961. It may also be mentioned that revision of penal codes is now under way in Maryland, Minnesota, New Mexico, New York, and Washington, and is seriously planned in other states.53

In a comparative survey these modern conceptions will best be explained, first, by the presentation of different kinds of culpability and by setting their respective limits; second, by some remarks on the content of culpability; and third, by a short view of the defenses based on non-culpability.

The Model Penal Code in its article 2, section 2.02, entitled "General Requirements of Culpability" names and defines four kinds of culpability. These are: purpose, knowledge, recklessness and negligence. The Illinois Criminal Code (paragraphs 4-3 to 4-7) also contains four kinds of culpability, which correspond to the kinds of the Model Penal Code, only here they are called intent, knowledge, recklessness, and negligence. The differences between the Model Penal Code notions and the Illinois notions are slight, and the differences between them and the romanist notions (direct and eventual intent and conscious and unconscious negligence) also are not great. But it should be emphasized

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that in Europe there are in fact two main kinds of culpability, intent and negligence, and that the division into direct intent and eventual intent is considered more as a subdivision of the notion of intent into its two forms. The division into conscious and unconscious negligence is also considered more as a subdivision of the notion of negligence into its two forms. The majority of romanists consider that the will is as important for the definition of the kind of culpability as consciousness itself, but the common law lawyers assign a greater importance to consciousness. Thus in romanist law only the division between eventual intent and conscious negligence is really important. In American law, on the other hand, an important division is between recklessness, which is conscious, and negligence, which is considered in a narrower sense as always unconscious. This has a great practical importance, because the different setting of the important divisions makes conscious negligence or recklessness in European law punishable only as an exception, while in American law it is punished more often.

Defining purpose (or intent) section 2.02 (2) (a) of the Model Penal Code says: "A person acts purposely with respect to a material element of an offense when: (i) If the element involves nature of his conduct or a result thereof, it is his conscious object to engage in a conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist." The Illinois Code gives the same meaning to the notion of "intent" which is characterized by the conscious objective or purpose to accomplish a forbidden result or to engage in forbidden conduct. So these two notions are identical with the notion of direct intent which, as said above, exists when the offender was conscious of his act (the notion of act also includes the result) and wanted to commit it. In practical application the shorter Illinois version would give the same result as the broader Model Penal Code version, but the Model Penal Code provision has greater theoretical value. The Code recognizes that the material elements of offenses vary in that they may involve the nature of the forbidden conduct, the attendant circumstances, and the result of the conduct. With respect to each of these three types of element, the Code attempts to define each of the kinds of culpability that may arise.54 This is an original attitude the importance of which will later be

referred to. By defining purpose as it has done, the Model Penal Code gives in short and clear terms an interesting explanation of a subtle psychological question and shows that modern American conceptions of culpability are created on the basis of legal achievements in different countries as well as on the basis of advanced American psychological science.

Knowledge is the next kind of culpability defined in section 2.02(2)(b) of the Model Penal Code. According to the Code: “A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” The formulation of the Illinois Criminal Code differs very little from this quoted formulation. However, the romanist definition of eventual intent is shorter and clearer. The offender is simply “conscious that a prohibited consequence might result from his activity or omission and consents to its occurring.” These definitions indicate that knowledge is still a little narrower than eventual intent and that the lower margin of “practical certainty” is higher than the lower margin of “consent.” This question might be better explained by drawing the upper margin of recklessness or conscious negligence.

Speaking about recklessness section 2.02(2)(c) the Model Penal Code says: “A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” The Illinois Code gives essentially the same definition. The model “law-abiding person” with his “standard of conduct” is in the Illinois Code called “a reasonable person” with a “standard of care” which he exercises. And so recklessness resembles very much the conscious negligence of the romanist criminal law. But as was suggested above, the lower margin of the notion of knowledge is higher than the lower margin of eventual intent, so that this retreat of the American notion had
to be followed by the expansion of the notion of recklessness. Conscious negligence is precisely defined when it is said that it exists "when the offender was conscious that a prohibited consequence might occur but had wantonly assumed that it will not occur or that he will be able to prevent it." Nevertheless European lawyers had great difficulties in defining the border between eventual intent and conscious negligence as long as they did not accept the so-called Frank's formula. This is a test according to which the perpetrator acted intentionally if it might be considered that he had said to himself: "It may be either so or different, it may happen either so or differently; anyhow I shall act." If it is considered that he would not have acted if he had known all of the circumstances, then he was only negligent. The American scholars did not follow the romanist distinction, but expanded recklessness by the indistinct notion of "gross deviation" from the unfortunate "standard of conduct (or 'standard of care') that a law-abiding person (or 'a reasonable person') would observe in the actor's situation." These objective standards were considered to be a better way of putting the issue of the actor's subjective position to the lay jury. However, as this model person was not in the actor's situation, it is more correct and more in accord with auxiliary sciences to define the kinds of mental relation of the actor towards his act, not by objective standards, but by subjective criteria like will and consciousness. These two criteria have to be applied not to an imaginary model person, but to the actor himself, by taking into account his own personal qualities.

Negligence in section 2.02 (2) (d) of the Model Penal Code is defined as follows: "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." The Illinois Code ideas of negligence do not differ from the quoted ones. The corresponding romanist notion of unconscious negligence is characterized by unawareness which

55 FRANK, DAS STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH, XVIII Aufl. parr. 59, V, p. 190 (1931).
is justified neither by the objective circumstances nor by the actor's personal qualities. Therefore, romanist criticism of the notion of negligence will be nearly the same as the criticism of recklessness. This criticism probably would be less if in the provisions on recklessness and on negligence the Model Penal Code had dropped the second sentences in which the nature and the degree of the risk are defined.

In the above comparative view of the different kinds of culpability in contemporary American criminal law it was suggested that the romanist criminal law (or the cited example from the Yugoslav Criminal Code) is more consistent in defining psychological notions by psychological criteria, and not by objective standards. Such standards for defining guilt can sometimes be applied in the law of torts, but should not be applied in criminal law. Forms of will and consciousness are sufficient to define all the kinds of culpability. (The requisite volition of the activity or omission is a separate notion.) The presence of consciousness characterizes direct intent, eventual intent, and conscious negligence, while the lack of consciousness of the possibility of the consequence occurring characterizes unconscious negligence. The two kinds of intent differ according to the form of the existing will. By direct intent the offender wants the consequence to occur, while by eventual intent he only consents to its occurring. In both kinds of negligence there is no will to commit the crime.

Though it has not been quite consistent in the choice of criteria for defining different kinds of culpability, section 2.02(5) of the Model Penal Code has defined the "Substitutes for Negligence, Recklessness and Knowledge" well. It says: "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."

The second task in analyzing the newer conceptions of culpability in contemporary American criminal law consists of scrutinizing the content of culpability, i.e., the real content of that will and consciousness which characterize culpability. In the two legal systems this content is rather similar; it embraces
nearly the same general and special elements of the offense. In European law the actor's consciousness includes the act with consequence and causation and also all the specific elements of the particular crime in question (object, place, time, way, and means of perpetration, etc.). The actor's will, which as mentioned may have the form of wish or consent, contains not only the fulfilment of his activity, but also the occurrence of the prohibited consequence. The rule is general but the consequences are different for each crime; for example, in “Homicide” the consequence is deprivation of life, or, in “Endangering Public Traffic” the consequence is putting human lives in danger.

What is now the content of culpability in American criminal law? To what elements should the actor's consciousness and will relate? Of what should a culpable actor of an offense be conscious or what should he want? From the above-quoted definitions of the four different kinds of culpability in the Model Penal Code it is clear that the Code, like the European law, considers all the material elements of crime to be the content of culpability. Such material elements, according to the Code, may be: conduct of certain nature, a result of the conduct, and attendant circumstances. This content is very similar to the romanist law content of culpability. However, speaking of recklessness and negligence the Model Penal Code refers to a particular kind of result, and this is the “substantial and unjustifiable risk that the material element exists or will result” from the actor's conduct. The introduction of the state of risk as a result of the actor's conduct and as a cause of a material result supplements the causal chain in American criminal law with a useless link. (Otherwise, if the chain were not lengthened, the state of risk would be the final result, so that the main element, which is usually the material result, would not be included in the content of culpability.) This substantial and unjustifiable risk, as a content of the actor's disregard by recklessness or actor's awareness by negligence, makes the first difference between the American and the European content of culpability. The second difference logically results from the above criticism of the objective “standard of conduct of a law-abiding person.” This model person from the new rules on culpability may sometimes happen to take the place of a criminally responsible defendant who is either more stupid or more tempera-

57. TAHOVIC, KRIVICNO FRAVO-OPSTI DEO 172 (1961).
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mental or more passionate than the objective model. In such a case it may happen that, because of the use of the objective standard, the content of the perpetrator's culpability is loaded with elements which he neither disregarded nor could be aware of. From the legal and from the psychological point of view that cannot be considered correct.

The illegality and the punishability of an act do not enter the content of culpability, so that both systems accept the rule which section 2.02 of the Model Penal Code formulates in the following way: "Knowledge that conduct constitutes an offense or of the existence, meaning or application of the law determining the elements of an offense is not an element of such offense, unless the definition of the offense or the Code plainly so provides."

In spite of the two exposed distinctions, the difference of the content of culpability according to American and to European criminal law conceptions is not especially great. However, there is another difference having reference to the content of culpability. This is the difference of the manner in which the two systems define the content of culpability. The European criminal codes are usually divided into a general and into a special part, and the general rules on culpability belong to the general part, corresponding to all the particular criminal offenses from the special part and to all their objective elements. These offenses are as a rule punishable only if they are committed intentionally (in the romanist sense), and this is prescribed in that general rule. Offenses committed negligently are only exceptionally punishable, and these exceptions are expressly and separately mentioned in the special part for each respective offense. If there are special subjective elements in the "being" of a criminal offense (like intention to appropriate in larceny), they also are expressly prescribed.

The way in which the American Model Penal Code defines the content of the kinds of culpability is different. "The approach is based upon the view that clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of crime." 58 General definitions of purpose, knowledge, recklessness, and negligence are given in the

58. MODEL PENAL CODE § 2.02-1, Comment (Tent. Draft No. 4, 1955).
Code, but the requisite kind of culpability is separately marked, not only for each particular offense, but even for particular elements, if the necessary kind of culpability is different for elements of the same offense. Thus the content of a kind of culpability in the case of each particular offense is visible from the text of the definition of the offense (e.g., section 2.06.2 “a person deceives if he purposely: (a) creates or reinforces an impression which is false and which he does not believe to be true,” etc.). The repetition of the kinds of culpability for each offense is a disadvantage taken by itself, but this disadvantage is compensated for by a considerable advantage of the American method, which is however not quite consistently applied. First of all, the Model Penal Code has crystallized all the different subjective positions of the offender into only four sorts, which is clearer than in romanist law, where the special subjective elements sometimes differ from the kinds of culpability (e.g., the intention by larceny is not the same as intent). Then the Code has applied these four crystallized kinds of culpability not only to respective offenses but even, if necessary, to separate elements of one offense. Without using the romanist system of defining the content of culpability, the Code has applied a clear and logical system of its own.

After the presentation and limitation of the different kinds of culpability and after the above remarks on the content of culpability, the third and last task in the elucidation of the modern contemporary conceptions of culpability in American criminal law will be a short description of the defenses based on a denial of culpability. The numerous discrete European theories on the number and character of these defenses would give too broad a basis for a short review. Because of this, only a few remarks on the Model Penal Code defenses which exclude culpability will be given. These are: ignorance and mistake of fact, intoxication, ignorance and mistake of law, and mental disease or defect excluding responsibility.59

The Model Penal Code says in its interesting provision in section 2.04(1) that: “ignorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense;

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or (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.” In romanist law ignorance or mistake negative intent, but negligence might in some cases be attributed to the offender. In the Code all the four separate kinds of culpability (but why is “belief” there?) may be simultaneously applied and this, as was shown in the discussion on the content of culpability, allows a more precise definition of the actor’s mental relation towards his act. For example, if somebody mistakenly believed that it was necessary that he kill in self-defense, he might be either not culpable or culpable of a reckless or negligent crime.

The rule on intoxication in romanist law would be included among the rules on responsibility, but in the Model Penal Code it is included in the problem of culpability, so that section 2.08 says: “(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. (2) When recklessness establishes an element of the offense if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.” The authors of the Code are correct and up-to-date when they say: “there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.” To this one would remark only that intoxication is a mental derangement which belongs to the questions of responsibility. Concerning such derangements more will be said below. About culpability by intoxication it may be added that a way more correct than that of the Model Penal Code would be to examine the kind of culpability existing at the time when the defendant was bringing himself into a state of drunkenness. The content of this culpability will have to include also the causal connection between the defendant’s drinking and the material result which has occurred during the time he was irresponsible because of intoxication.

The defense of ignorance or mistake of law is in American law similar to the corresponding defense in romanist law. The

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Model Penal Code in its section 2.04 states: "(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct, when: (a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available to him prior to the conduct alleged; or (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." The remark which a European lawyer could make about this formulation would concern its limitation to a strict number of situations. Further, even the quoted situations should not be under any circumstances "justified reasons" for a defense.

*Mental disease or defect excluding responsibility* can here be considered only briefly. The vast problem of irresponsibility itself must be left out of a survey on culpability. Only two general remarks on responsibility are necessary. One is that mental disease or mental defect may not be the only conditions which deprive the actor of "substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law" (Model Penal Code, article 4, section 4.01). There exists a third condition which is mental derangement; for example, after the use of alcohol or narcotics or during a very strong state of *affekt*. However, the Model Penal Code does not acknowledge this third condition. The other remark is that the Model Penal Code does not acknowledge so-called minimized responsibility, which is indispensable at the present stage of development of criminal law, and of psychiatry and psychology. And so all the degrees of responsibility between a normal and an absolutely irresponsible person cannot be harmonized with the Model Penal Code provisions on responsibility. The failure to acknowledge mental derangement as a reason for irresponsibility and to take account of minimized responsibility led the Code: first, to introduce the psychiatric issue of irresponsibility by intoxication into the psychological field of culpability, where it only embarrasses right understanding of the perpetrator's relation towards his
act; and second, to try unsuccessfully to replace the gradation of responsibility by the introduction of the notion of risk and by gradation of the psychological notions of purpose, knowledge, recklessness, and negligence. As has been mentioned, responsibility is well understood in American criminal law as a condition for the existence of culpability, and the above inconsistencies in the setting of the mutual relations between responsibility and culpability cannot be justified even if those inconsistencies facilitate the task of the jury in deciding questions corresponding to the actor's mental state, or even if mental derangement is considered to be only a kind of mental disease.

In this survey of the conceptions of culpability in contemporary American criminal law an attempt has been made not only to give a comparative view of the actual conceptions, but also to give a description of their development. This development shows growing similarity in the concepts of the common law and the romanist law. The similarity is specially strong where American criminal law is concerned, and in particular, where it speaks about culpability and approximates the romanist views. This survey may also serve to illustrate through the example of culpability that, even though complete uniformity may not be desirable, the general development of cultures and civilizations leads nations to similar concepts and legal rules.