THE EMERGENCE OF THE PSYCHICAL TEST OF GUILT IN HOMICIDE 1200-1550

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INTRODUCTION

Anglo-Saxon law, for the most part, knew of no psychical criterion on which to base liability, and in general the frailest causation-nexus was sufficient to join cause and effect.[1] A few exceptions to the crude maxim of strict liability—*Quia inscienter peccat, scienter emendet*—had, however, emerged by the eleventh century and in the Laws of Aethelred and Canute.[2] There are several instances of the use of discretion and clemency and of an ability to discriminate between voluntary and involuntary acts.[3] The responsibility for these flashes of enlightenment lay with the Christian Church in England which had, since the seventh and eighth centuries, stressed the element of moral wickedness in criminal activities and had thus introduced the element of punishment into the criminal law as distinct from the earlier Anglo-Saxon concept of compensation.[4]

'BORROWED ITALIAN TRAPPINGS'

The development of an ethical test of liability received considerable impetus during the eleventh and twelfth centuries owing to the work of

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1 See Sayre, 'Mens Rea' (1932) 45 Harv. L.R. 974, 982.

2 The laws of Aethelred, c. 1000; the laws of Canute between 1027 and 1034; see Pollock and Maitland, H.E.L. ii, p. 471; Kemble 'Anglo-Saxons,' p. 77; Maine, 'Ancient Law,' p. 337; Anglo-Saxon vocabulary would appear to be full of words relating to this matter; thus, besides the term murdrum, the terms morp or morpor and mannslyht are to be found; further, there are at least four terms denoting a killing, namely, aswebban, cwillan, drepan, and cwalu, whilst there are at least three terms denoting 'slayer,' namely, bana, slaja and cwellere. The existence of such a diversity of terms does not necessarily mean the existence of an equal diversity in technical meaning, but may be regarded as some evidence that the position is far from simple. This article is not, however, primarily concerned with the Anglo-Saxon period.

3 vi Aethelred, 52, 1 (translated by A. J. Robertson) embodied in II Canute 68, 3.

4 Pollock and Maitland, H.E.L. ii, p. 476, et seq. and cf. the stress laid by the early Christian Church on the mental element in 'sin'; see also Ayer, 'Source Book for Ancient Church History' (1913), p. 626, citing Vinnian—'If one has committed in his heart a sin of thought and immediately repents of it, let him smite his breast and pray God for forgiveness and perform satisfaction because he has sinned . . . if he has thought on a sin and determines to commit it, but is prevented in the execution so is the sin the same but not the penance.'

the flourishing school of canonists at Bologna, the members of which, in their writings, provided it with an added precision. Before, however, the learning of Accursius, Irnerius, Gratian, Azo and Bernard 'shone in a luminous revival'[5] in England in the late twelfth and thirteenth centuries, the psychical element in liability had been almost unexceptionally regarded as irrelevant. In only a few of the most obvious cases was a killing deemed to be justifiable, and archaic incidents (like sanctuary, deodand and appeals of felony) survived until the late thirteenth century, and even later, to hinder the administration of the law and to render more difficult the reception of the new test.

An early effort to achieve a definition of homicide was made in the *Leges Henrici Primi*.[6] The few principles which emerged from this unsystematic compilation owed their origins to civil, canon and Frankish laws. They did, however, constitute a conscious attempt at a classification of degrees of guilt, and, by comparison, the Anglo-Saxon laws were made to look rough indeed. A surprising feature of the *Leges Henrici* was the early enunciation[7] of the maxim *reum non facit nisi mens sit rea*, but its application was here confined to perjury alone and is considered to have been 'filched' from the *Sermones* of St. Augustine.[8]

It is apparent from the writings of Bracton[9] that he borrowed much, both in content and arrangement, from the Roman and canon lawyers. Posterity has not allowed the debt to pass unacknowledged, but Maitland, whilst admitting the overwhelming influence of Bernard de Pavia[10] on Bracton's treatise on homicide, denounces as 'a stupendous exaggeration' Sir Henry Maine's contention[11] that 'the entire form and one third of the contents' of Bracton's complete writings were 'directly borrowed' from the Corpus Juris and the glosses of the Italians. However, the accusation of plagiarism levelled at Bracton in relation to his treatise on homicide is incontrovertible,[12] for he not only copied Bernard in matters of substance but also calls in aid the canonist's method of treatment (that

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5 Sarfatti, 'Roman Law and Common Law: Forerunners of a General Unification of Law' (1954) 3 Int. and Comp. L.G. 102.

6 This book commenced with the coronation charter of Henry I, hence its title.

7 Leges Henrici 5, para 28.

8 S. Augustinus, 'Sermones' No. 180, c. 2, 'ream linguan non facit nisi mens rea.'

9 Plucknett is of the opinion that Bracton wrote before 1256 ('A Concise History of the Common Law, 4th Ed., p. 244). Bracton's great work was a treatise on the laws and customs of England ('De Legibus et Consuetudinibus Anglicae') which Maitland has said was 'incomparably the best work produced by any English lawyer in the middle ages.'

10 Bernard de Pavia. Born at Pavia. Studied law at Bologna and became Bishop of Faenza in 1191. Bishop of Pavia 1198. Died in 1213. At Lib. v. tit. 10 of his Breviarium is the passage on homicide 'De homicidio voluntario vel casuali.'

11 'Ancient Law,' chap. iv; cf. Sayre, op. cit.

12 See 'Bracton and Azo' (S.S. 1895) App. II. Strictly, two further steps remain to be established. First, Bracton's adoption of the Canonists may have also had a co-incidental basis in the contemporary English law. The probability is that there was no such co-incidence, although final judgment must await further evidence. Second, the extent to which Bracton has influenced the development of the English law is still a matter for debate.

is, in his division of homicide into *Corporeal* and *Spiritual* and in stating that it may be committed *facto, praecepto, consilio, et defensione*).[13]

Bracton wrote[14] *Crimen (homicidii) non contrahitur, nisi voluntas nocendi intercedat, et voluntas et propositum distinguunt maleficium, et furtum omnino non committitur sine affectu furandi,* and so the English law of the thirteenth century was introduced to the concept that the will to injure was a necessary prerequisite for the commission of the offence.[15]

This insistence on the presence of moral guilt in crime was not capable of immediate appreciation by the English criminal lawyer who was still preoccupied with the question: 'Has some definite offence been committed?' A consideration of the circumstances under which moral guilt was imputable was, to him, an almost entirely alien concept.[16] Neither did the existing legal process facilitate its reception for, with it, the new test brought a distinction between varying degrees of gravity.

In a system as well equipped as the canon law, with its wide range of punishments 'stretching from perpetual incarceration to that mere disablement from further promotion . . . the penalty of a clerk who had been but slightly careless',[17] the various shades of guilt were appropriately recognised. But the English law of Bracton's day could command a scale of only three alternatives: acquittal, pardon or the gallows.[18]

So the moral test was, throughout the early years of its introduction, 'floating on the surface of and scarcely mingling with the coarser English law'.[19] Yet the mere 'floating presence' of this principle in the general proximity of the native law was enough to bring about decisive changes.

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[13] Plucknett has stated that, with regard to marriage, Bracton's borrowing from Bernard de Pavia was second-hand, i.e., via Raymond de Penaforte. (Early English Legal Literature (1958), p. 53.

[14] f. 136 b.

[15] Bracton, f. 104 b. 'Item crimen homicidii, sive sit casuale sive voluntarium, licet poenam non contineat, quia in uno casu rigor in alio miseridordia.' This is another example of Bracton's sophistication whilst the law was still rude. See Potter, 'Historical Introduction to English Law,' 3rd ed. p. 349. See also 'De Legibus,' 101b, 120b, and cf. Fitzherbert, 'Abridgment, Corone Placita (1512) 412, which indicates the existing law at Bracton's time regarding madness. 'It was presented that a certain lunatic wounded himself with a knife, and, after he recovered from his infirmity and received the rites of the Church he died of his wounds: his chattels were confiscated,' i.e., he was adjudged a felon though in 1330 a Charter of Pardon was given. See 324, 3 Edw. 3 (1330); 412, 8 Edw. 2 (1314).

[16] Holdsworth, H.E.L. vol. iii, 4th Ed. at p. 311. 'No doubt Bracton's speculations . . . were too fine-drawn to suit the common law of this period, or indeed any system of merely human law'; though the very nature of several early offences necessarily involved 'criminal intent,' for instance, waylaying and robbery, house burning (boernet) and rape. It is also possible that the intent affected the fixing of the punishment, e.g., Laws of Alfred, c. 36 in 1 Thorpe; Ancient Laws and Institutes of England (1840), pp. 71 and 85. See Sayre, op. cit, 'even in the very earliest times the intent element could not be entirely disregarded.'

[17] Pollock and Maitland, H.E.L. ii, pp. 477-8.

[18] With the macabre addition of drawing and quartering in the case of Petit Treason:

(a) where a servant kills his master
(b) where a wife kills her husband
(c) where a man kills his lord.

[19] Pollock and Maitland, H.E.L. ii, p. 478.

The fact that this more civilised conception of the principles of liability had been countenanced and adopted by no less a personage than Bracton, a Royal Justice and friend of the King, caused attention to rivet on the glaring inadequacies in the prevailing system. The ethical test accommodated the rare instances of justifiable homicide then existing in English law but encountered difficulty in accounting for the identical treatment accorded to homicide whether committed in necessary self-defence or caused by accident. Both received, by the King's grace, a pardon, but the former was without culpability whilst the latter was invariably attended by some, however slight, moral blame. The influence of the new principle was instrumental in the later practice of acquitting in the case of self-defence.[20] Again where harm was the result of a *bona fide* mistake of fact, no blame was imputed to the actor.

But the enduring legacy of the ethical standard to the English law was that, by distinguishing between the various shades of guilt, it focussed attention on the working of the human mind. As such it can safely be regarded as the origin of the *mens* in crime. It was not without its defects, however, such as the specious distinctions between crimes *mala in se* and *mala prohibita*.

The canon and civil laws ceased to exert any appreciable influence on English law after the thirteenth century and English lawyers had thereafter to develop the principles of liability independently. However, the ethical test as derived from the Bolognese canonists had had its influence upon the English law of the twelfth and thirteenth centuries. In these words of Maitland:[21] 'In England the new learning found a small well conquered, much governed kingdom, a strong legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to the foreign dogma.'

THE DIVISION OF HOMICIDE INTO VARIOUS CATEGORIES AND THE DEVELOPMENT OF THE SUBJECTIVE TEST OF GUILT

In modern law a guilty mind is an essential ingredient of criminal responsibility. If such a state of mind is not proved[22] then the accused has committed no crime.[23] This subjective notion of guilt developed by devious means after attention had been directed to the workings of the human mind by the influence of the ethical standard. The 'transient . . . but all important . . . influence of the school of Bologna',[24] unacceptable in itself to the English, did, however, emphasize the need for a division of homicide into categories; the punishment for each of which should vary in severity with the gravity of the offence.

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20 The moral test was, of course, also responsible for the beginning of the Tort-Crime distinction thought to have been made during the reign of Edward 4. The distinction probably rested on the reasons given in this dictum from Lambert v. Bessey in 1681 'in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the person suffering.'

21 Maitland, 'A Prologue to the History of English Law' at pp. 32-3.

22 For the requirements of proof see Woolmington v. D.P.P. [1935] A.C. 378.

23 Except in certain statutory offences where the mens is irrelevant.

24 Maitland, "A Prologue to the History of English Law' at p. 33.

Even before the Norman Conquest the crime of *forsteall* (a killing by lying in wait or ambush)[25] had become a plea of the Crown and was recognised as the most serious form of homicide. It signified deliberate planning and, after the conquest, was described as 'slaying by assault prepense' or *assaultus premeditatus*. In time this became *malitia excogitata* and thus introduced the troublesome word 'malice,' a positive definition of which eluded English lawyers for many years.[26]

The secret unemendable[27] killing known to the Anglo-Saxons as *murdrum* also constituted a particularly aggravated type of homicide, but William I conferred on it the technical meaning of a fine exacted when a 'foreignor'[28] was slain in the territory of a hundred which failed to produce the killer. By the thirteenth century there had grown up a whole jurisprudence of *murdra*.[29]

At this period, almost all homicides were unemendable and punishable by death or mutilation. It had, however, been recognised before Bracton's time that less moral blame was imputable to the killer in necessary self-defence or by accident than to one who committed a deliberate homicide for motives of revenge or gain. So those who killed in self-defence or by accident were entitled to sue for the Royal mercy. The procedure in such cases was regulated by the Statute of Gloucester 1278,[30] whence it appeared that 'the King shall take him to his grace if it please him.' When the circumstances of the homicide pointed to accident or self-defence the prisoner was accused of homicide 'without felony' but he was forced to remain imprisoned until the justices in eyre or of gaol delivery visited the area. All other homicides (*i.e.*, except justifiable and pardonable) were deemed felonious. The forms of pardon[31] at this time stated that a felonious homicide was considered to be the result of a 'premeditated assault' or of 'malice aforethought.' Death was the sole punishment for this crime, the only variation being in the manner of the affliction of the capital penalty.[32]

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25 By the beginning of the thirteenth century 'forsteal' had lost this meaning. It came to mean forestall, or the interception of sellers on the road to market and trying to raise prices artificially.

26 It is still impossible to frame any such general definition as would show what legally constitutes 'malice' in particular cases.

27 Murdrum is not a plea of the crown. The payments of wer and wite could not take place in the case of murdrum.

28 Usually a Norman, many of whom were assassinated immediately following the Conquest, but due to intermarriage the distinction between Norman and Englishmen was largely an anomalous one by the thirteenth and fourteenth centuries.

29 The whole of the murdrum was thought to have gone to the King. Some counties were exempt from murdra fines, e.g., Cornwall as appears from Y.B. 30 and 31 Edw. 1 (Rolls series) 240 and Kent from the same Year Book at p. xl.

30 6 Edw. 1.

31 Quoted by Maitland in Pollock and Maitland, H.E.L. ii, p. 480, from the Patent Rolls of Henry III.

32 In the case of felonious homicide by hanging. In the case of Petit Treason by hanging, drawing and quartering.

The only flexibility known to the mediaeval criminal law lay in this Royal pardon which came to be issued quite arbitrarily to mitigate the severity of the penal system. The most common cases, apart from accident or self-defence, were those involving unsound mind,[33] tender age,[34] and cases at the suit of some great person of the realm.[35]

By the reign of Edward III excess in the dispensation of pardons (an administrative service which the King had delegated to the Chancellor and his court) had become notorious, and a statute[36] was passed in 1328 calling for restraint. Many forms of homicide and other felonies were pardonable during the fourteenth century.

In 1390, by another statute,[37] pardons issued by the Chancery for necessary self-defence or misadventure became pardons of course. The formal ease with which they were obtained contrasted directly with the nigh impossible conditions which had to be fulfilled before a killing 'in await, assault or malice prepense' could be excused.

So from 'mere mitigations' the pardons 'flower into more precise principles.' In time the justices dispensed with the formality of asking jurors to find a special verdict as to misadventure or self-defence and, instead, allowed them to acquit the accused.

Meanwhile, *murdrum* had been freed from its technical Anglo-Norman meaning[38] by a statute of 1340[39] which abolished 'presentment of Englishry.' Within eight years of its release *murdrum* denoted[40] that most aggravated form of felonious homicide with which the expression 'malice aforethought' came to be associated. The emergence of murder as the most serious of felonious homicides because it was accompanied by a preconceived malice and, at the other end of the scale, the establishment of the pardon of course[41] in cases of misadventure and self-defence, brought a new precision to the law of homicide in the latter fourteenth and early fifteenth centuries. It also drew attention to the dark and uncharted void which existed between murder and excusable homicide: that occupied by felonious homicide committed without malice aforethought. So the grounds of distinction between murder and what was to become manslaughter were to be discovered in the meaning of 'malice.'

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33 e.g., Fitz. Ab. Corone pl. 244.

34 e.g., Northumberland Assize Rolls 323, Hale P.C. i 20-9, Eyre of Kent (Selden Soc.) i, 148-9, and Y.B. 30-1 Edw. 1, p. 511.

35 e.g., Rot. Pat. Henry 3 m. 3, from the Queen of Scotland, the King's sister.

36 2 Edw. 3, c. 2.

37 13 Rich. 2 stat. 2 c. 1.

38 The Statute of Marlborough 1267 said that homicide by misadventure was not murdrum, leading Coke (2nd. inst. 148) and other writers to mistakenly conclude that before 1267 a slayer in misadventure or necessary self-defence was hanged.

39 14 Edw. 3 stat. 1 c. 4.

40 In Y.B. 31 Edw. 3 Hil. pl. 23. N.B.: Murdrum before taking on the meaning of a fine had stood for the most heinous pre-conquest homicide, as secret as opposed to open homicide.

41 The Pardon, of course, was accompanied by forfeiture. Forfeiture was not abolished until Statute 9 Geo. 4 c. 31 s. 10, which removed any distinction which existed between justifiable and excusable homicide.

The mediaeval mind was capable of determining what did *not* amount to 'malice aforethought' as is evident from the old form of pardon for homicide by self-defence,[42] but the positive meaning of 'malice' was still most uncertain. It wavered with the dicta of the judges from hatred, spite and wickedness of mind to mere intention. In fact not only was there vacillation and vagueness on the question of what constituted 'malice' but there existed, in the highest circles, controversy as to whether such a test should be applied at all. Brian C.J., passing judgment in 1468,[43] is reported to have said: 'The thought of man shall not be tried, for the devil himself knoweth not the thought of man.' But no such lack of confidence in the accuracy of the subjective test inspired Fairfax J., who in the previous year had stated[44] categorically that 'felony is of malice prepense, and when an act is done against a man's will there is no felonious intent'.[45]

An unexpected and helpful influence on the development of more precise categories of homicide was provided by the doctrine of 'benefit of clergy.' Until the early Tudors 'clergy' was available for all forms of felonious homicide and most other felonies. As such it served to mitigate the harshness of the penal law. But in 1497 one Grame killed his master and thus committed the offence of Petit Treason. At his trial he sought to avail himself of 'clergy' but such was the popular indignation aroused by his crime that a statute[46] was passed excluding benefit of clergy in all cases of Petit Treason. In 1532 another statute[47] made unclergyable cases of wilful murder by malice aforethought. An added precision was thus given to the law of homicide by these statutes which ousted 'clergy' in those cases which had become recognised as the gravest cases of killing.

During the fifteenth century an attempt had been made to classify all felonious homicides which did not amount to murders under the heading of Chaud or Chance medley. The distinction drawn was one between a premeditated killing (murder) and a killing in the heat of blood during a sudden affray. But there still existed a large residuary class comprising felonious homicides which, though not the result of deliberate and premeditated malice, were nevertheless deserving of the capital penalty. To consider such cases as chance-medleys and done 'on a sudden' or in the heat of an affray was stretching that defence far beyond its limits.

The Bench, for not the first time in its history, found itself in a dilemma, escape from which was possible only by an extension of the

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[42] See Pollock and Maitland, H.E.L. ii, p. 480, which quotes from the Patent Rolls of Henry III.

[43] In Y.B. 7 Edw. 4 f. 2 pl. 2.

[44] 1467 Y.B. 6 Edw. 4 Mich. pl. 18.

[45] See also per Brian C.J. in Y.B. 12 Edw. 4 pl. 28: 'the intent of a man is triable in robbery'; Y.B. 13 Edw. 4 pl. 5.

[46] 12 Hen. 7 c. 7 (1497).

[47] 23 Hen. 8 c. 1 (1532).

loose formula of 'malice.' Sir James Fitzjames Stephen[48] described their subsequent action thus: 'When a particular state of mind came under their notice the judges called it "malice" or not according to their view of the propriety of hanging particular people.' Therefore in some cases it was not surprising to find that the concept of 'malice' coincided with the manifestation of a mere intention to kill, however rapidly this intention might have been formed. This judicial extention of the concept of 'malice'[49] thus brought the more serious cases of the remaining felonious homicide into the category of murder. But as late as 1548 Staunford, one of the more reliable authorities of his time, could still contrast *homicide par voy de murder* only with *homicide par chance-medley*. Sir Edward Coke, writing a little later, recognised the existence of a form of intentional felonious homicide which, although not sufficiently grave to be punished as murder, was yet more morally culpable than a killing by chance-medley. He classed such homicides under the heading of manslaughter.[50] The question of what actually constituted manslaughter was to occupy the analytical skill of writers throughout the seventeenth century.

'Manslaughter' as a popular term had been in use since the end of the thirteenth century.[51] It had signified criminal homicide and had usually coincided with the definition of murder, but in its modern meaning it stood in contradistinction to murder and this corresponded generally with the 'simple homicide' of early law French and law Latin writers.

One of the earliest instances[52] in which manslaughter was used in this sense was in a statute passed in 1547.[53] Lambard was quick to appreciate the potentialities of its scope when in 1581[54] he defined manslaughter as 'a sort of Felonie that comprehendeth under it all manner of Felonious homicide whatsoever.' The view that the distinction between murder and manslaughter turned upon the distinction between killing or waylaying and premeditation as opposed to killing upon a sudden falling out was

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[48] Royal Commission on Capital Punishment 1866. Minutes of Evidence Q. 2110.

[49] Further such extensions of malice took place, e.g., implied malice which is included in Coke's classic definition of murder in a more severe form than today. Death caused in furtherance of an unlawful act was murder according to Coke. As the law now stands the act which brings about death must be in furtherance of a felony of violence. See D.P.P. v. Beard [1920] A.C. 479.

For an early case of implied malice see R. v. Halloway (1628) Cro. Car. 131.

For 'transferred malice' see R. v. Salisbury (1553) Plowden 100.

[50] Coke's views corresponded broadly with the modern conception of manslaughter.

[51] See Cursor, M. 25457, 'O man-slaughter had i na mak' ante 1300; c. 1374. Former Age 64, 'In owre dayes nis but covetyse . . . Poyson and manslawhte.' 1462 Lett II 83, 'I herd nevyr sey of so myche robry and manslawter in thys contre as is now within a lytyll tyme.'

[52] 1 Edw. 6 c. 15.

[53] Though in 1503 Marowe, De Pace, in Putnam, Early Treatises' p. 378, mentions manslaughter.

[54] Eirenarcha ii, vii (1581).

held as late as the middle of the sixteenth century. It was displaced by the definition supported by Sir Edward Coke and Sir Matthew Hale in the seventeenth century, as comprising an intentional slaying in the heat of blood and sudden passion aroused by provocation.[55]

'Malice' thus degenerated into a term of art and the manifestation of an intention to kill was deemed sufficient to constitute murder. But if such an intention were formed *non sedato animo* as the result of grave provocation then a verdict of manslaughter could be returned.

The following table shows the types of homicide recognised at the end of the sixteenth century.

Neither excusable nor justifiable	Excusable, i.e., no corporal punishment but forfeiture until 1870	Justifiable
SUICIDE MURDER (including Petit Treason as an aggravated form) MANSLAUGHTER	CHANCE MEDLEY Killing in the course of a sudden affray and killing by misadventure in the course of a lawful act	(1) In the execution of justice (2) In the necessary defence of life (which became justifiable at the end of the sixteenth century)

[55] Coke, 3 Inst. p. 50.