THE NORMATIVE CONCEPT OF MENS REA—A NEW DEVELOPMENT IN GERMANY

By

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THE doctrine of *Finalismus*, or the doctrine of the " purpose-orientated act." was evolved in German criminal law round about 1930, and has since been adopted by the majority of German writers on criminal law.[1] The doctrine has brought about a radical re-appraisal of such fundamental concepts as the criminal act and *mens rea* or fault in German criminal law science. It has already received the attention of criminal lawyers from the Italian, Spanish and French-speaking legal systems, yet, as far as this author could ascertain, there is a glaring absence of even an introductory discussion of this important doctrine in the legal literature of the English-speaking countries.[2] A comprehensive critical analysis of this doctrine is beyond the scope of the present article. What is envisaged, however, is to focus attention on the important conclusions reached by the followers of this doctrine regarding the *mens rea* of a wrongdoer. This may be of interest to English lawyers grappling with that rather unruly horse in English criminal law, namely the concept of *mens rea*. To understand the true meaning of *mens rea* according to the doctrine of *Finalismus*, it is first of all necessary to explain briefly (as far as this is possible) the contents of the doctrine itself.

The doctrine, of which the most important progenitor in Germany has been Professor Hans Welzel, is in the first and foremost instance a doctrine concerning the criminal act, and is usually depicted as a doctrine radically opposed to the earlier so-called " causal theory of an act " (*kausaler Handlungsbegriff*). This latter theory regarding the act in criminal law resembles in broad outline the concept of an act still maintained today in English criminal law. According to this theory, an

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The present article is the result of research done by the author in Germany, with the aid of a grant by the Alexander von Humboldt Foundation in that country. The author wishes to express his gratitude to this foundation for its financial support.

[1] A discussion of the doctrine (also called *Die finale Handlunglehre*) can be found in most contemporary standard German textbooks on criminal law, but see especially H. Welzel, *Das Deutsche Strafrecht* (11th ed., 1969), pp. 33 *et seq.*; the same author, *Das neue Bild des Strafrechtssystems* (1961), *passim*; H.-H. Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil* (2nd edn., 1972), pp. 160–168; *Schönke-Schröder, Strafgesetzbuch, Kommentar* (18th edn., 1976), pp. 114–116; R. Maurach, *Deutsches Strafrecht, Allgemeiner Teil* (4th edn., 1971), pp. 180 *et seq.*

[2] A possible exception is the valuable article by H.-H. Jescheck, " The doctrine of *mens rea* in German criminal law—its historical background and present state " (1975) 8 Comp. and Int. Law. J of South Africa 112, where the author, *inter alia*, gives a short summary of the doctrine (see p. 117).

" act," for the purposes of the criminal law, is any conduct perceivable by the senses, whereby a person brings about some change in the outside world, as a result of the operation of the mechanical laws of cause and effect.[3] In its crudest form, as stated by Austin,[4] Holmes [5] and by the nineteenth-century German criminal lawyer von Liszt,[6] it is a willed or at least voluntary muscular contraction of the human body, resulting in a state of affairs forbidden by the law through a criminal sanction. It has, of course, been recognised that the mere muscular contraction in itself is an insufficient description of the criminal act, and that any description of the " act " must also include references to the circumstances and consequences surrounding the act.[7] Nevertheless, it is clear that this theory totally disregards the purpose with which the act was performed. It leads to a sharp distinction between the so-called " objective " and " subjective " elements in criminal responsibility. Broadly speaking, all the subjective or mental elements of the crime are transferred to the inquiry regarding the *mens rea* of the offender. In English criminal law, all the elements in the definition of the crime apart from *mens rea* (or the wrongdoer's so-called " state of mind ") are conveniently grouped together under the concept of *actus reus*, and it has become customary to differentiate rather facilely between *actus reus* and *mens rea*, by describing the first as a purely objective element, and the second as a purely subjective element of liability. This view is in line with that of the so-called " classical theory " of criminal liability expounded in Germany towards the end of the last century.[8] According to this classical theory, a sharp distinction was drawn between the *actus reus* (or the definitional elements of a specific type of crime, described as *Tatbestand*) together with unlawfulness (*i.e.* the absence of grounds of justification for the conduct) on the one hand, and *mens rea* on the other hand. The *actus reus* and unlawfulness formed the objective side of liability, and the *mens rea* the subjective side. This simplistic distinction between the objective and subjective elements of liability leads to a purely psychological concept of *mens rea*; it merely involves an inquiry into the psyche or mental processes of the offender. Did he intend to bring about the forbidden consequence? Did he know, in the

[3] Jescheck, *op. cit. supra*, n. 1, pp. 165–166; Schönke-Schröder, *op. cit. supra*, n. 1, p. 113; Maurach, *op. cit. supra*, n. 1, pp. 173–174; Welzel, *Das Deutsche Strafrecht*, pp. 39–41.

[4] J. Austin, *Lectures on Jurisprudence*, Vol. 1 (5th ed., 1885), Lect. XVIII and XIX, especially pp. 414–415. For criticism of Austin's definition, see H. L. A. Hart, *Punishment and Responsibility* (1968), pp. 99 *et seq.*

[5] O. W. Holmes, *The Common Law* (1881), p. 45.

[6] Franz v. Liszt, *Lehrbuch des Deutschen Strafrechts* (11th edn., 1902), pp. 105 *et seq.*

[7] Holmes, *op. cit. supra*, n. 5, p. 46; Salmond, *Jurisprudence* (12th edn., 1966), pp. 353–354; P. J. Fitzgerald, " Voluntary and Involuntary Acts " in *Oxford Essays in Jurisprudence* (ed. by A. G. Guest), (1961), p. 9.

[8] Jescheck, *op. cit. supra*, n. 1, pp. 154–156, and see also the article by the same author referred to in n. 2 *supra*, at p. 115.

case of rape, that the complainant was not a consenting party, or, in the case of theft, that the consent of the owner or possessor of the article was not forthcoming?

It is this relatively simple classical theory of criminal law, involving, as stated earlier, the so-called causal theory of a criminal act, which came under such heavy attack from the adherents of the doctrine of *Finalismus*. To begin with, it was convincingly shown that the simplistic separation of the preconditions of criminal liability between purely objective and purely subjective elements could no longer be maintained. On the contrary, it was pointed out that the intention or subjective knowledge of the offender may sometimes be of cardinal importance in ascertaining whether there has been an *actus reus*.[9] This is especially the case when one deals with offences requiring some intention additional or ulterior to the ordinary intention to perform an act: the mere intentional entry into a building as a trespasser only becomes burglary once it is established that the trespasser further intends to steal or commit some other crime therein; the intentional taking of another's property only becomes theft once it is clear that the taker intends to deprive the other permanently of such property. Furthermore, in cases of attempt, the outward conduct of a person may, judging by appearances, be quite innocent, yet nevertheless constitute criminal attempt, and that only because of the intention of such person to commit a crime. Examples of such cases where an *actus reus* can only be said to be present with reference to the intention of the wrongdoer, can be multiplied.[10] All this shows that the distinction between *actus reus* as the outward manifestation, and *mens rea* as the inward or mental manifestation of the crime, is rather arbitrary, and affords but a shaky foundation upon which to construct a sound and scientific doctrine of criminal responsibility.

Yet the main respect in which the doctrine of *Finalismus* differs, in its description of the grounds of criminal liability, from the above-mentioned conventional system, is the crucial role assigned to the intention or purpose of the wrongdoer. It has removed intention from the realm of *mens rea* or fault, and has incorporated it within the concept of a criminal act. The doctrine of *Finalismus* is, in fact, in the first and foremost place, a doctrine regarding the concept of a criminal

[9] Jescheck, *op. cit. supra*, n. 1, p. 158; Welzel, *Das neue Bild*, pp. 19–20.

[10] *Cf.* for example the offence created in ss. 18 and 20 of the Offences against the Person Act 1861, as amended by s. 18 of the Criminal Law Act 1967, *viz.* causing grievous bodily harm " with intent to do some grievous bodily harm . . ."; perjury offences, where knowledge of the falsity of the statement forms part of the definition of the offence; contravention of s. 22 of the Theft Act 1968, *i.e.* handling stolen goods, where, in addition to the intentional receiving or removal of the goods, the offender must also know or believe that the goods were stolen. The point here under discussion is well understood by Glanville Williams, *Criminal Law, The General Part* (2nd edn., 1961) p. 18, who points out that *actus reus* " even includes a mental element in so far as that is contained in the definition of the act." *Cf.* also *Russell on Crime* (12th edn. by J. W. C. Turner, 1964), p. 23.

act (*Handlung*), although this conception of an " act " necessarily also has far-reaching consequences regarding *mens rea*. The doctrine is based upon a particular psychological view of human behaviour. All human action, according to this doctrine, is directed towards a certain goal. Man can direct his actions in such a way as to steer them knowingly towards a preconceived aim, and because of his knowledge of the laws of cause and effect, he knows what means to employ in order to achieve his end.[11] In short, all human action is purpose-orientated. This insight into the character of human behaviour is also applied in the designation of an " act " in the criminal law. An act in criminal law cannot be circumscribed in terms of mere mechanical causation (for then it would be virtually impossible to delimit the definition: where does the chain of causation begin, and where does it end?) It derives its true character from the purpose which the wrongdoer had in mind. Thus one can only describe an act as " killing " (of a human being) if it was executed with the purpose of killing (another human being). " Killing " is no apt description of the act where a person accidentally shoots and kills another whilst, say, exercising with a rifle in a wood, unaware of the presence of the victim. This can at most be described as an " act of exercising " or an " act of shooting," but not as an " act of killing." A criminal act is therefore a manifestation of the will, and it follows that intention is therefore part and parcel of the concept of a criminal act.[12] Even crimes which (according to the traditional phraseology) require no *mens rea* in the form of intention, but merely negligence, are explained by the followers of the doctrine of *Finalismus* (though not all [13]) in similar terms: even in the case of these crimes the act of the wrongdoer was purpose-orientated, although his aim or intention happens to be irrelevant, as falling outside the definitional elements of the specific type of crime.

At this stage the question can legitimately be asked: if intention (or intentionality) invariably belongs to the structure of the criminal act, and hence to the *actus reus*, what, then, is left of the concept of *mens rea*? The answer to this question will reveal that the notion of *mens rea* or fault contains much more than merely " an intention on the part of the wrongdoer to do the act," as the term is sometimes described. It is by no means merely a description of the psychological processes taking place in the mind of the wrongdoer. On the contrary, as the doctrine of *Finalismus* stresses, it is normative in character, in the sense that it is the expression of a value judgment of the wrongdoer's conduct, a certain *appraisal* of it. It amounts to a *reproach* of the wrongdoer for performing

[11] Welzel, *op. cit. supra*, n. 9, p. 1; Jescheck, *op. cit. supra*, n. 1, p. 161.

[12] Intention here, as elsewhere, includes both direct intention and indirect intention (*dolus eventualis*), which is similar to " recklessness " in English law.

[13] *Cf. infra*, n. 21.

a certain act, despite the fact that he was aware of its wrongful character, and despite the fact that he was personally in a position to refrain from his unlawful conduct.[14] The two basic components of *mens rea*, and the two basic grounds for flinging a reproach at the wrongdoer, are, therefore (i) awareness of the unlawfulness, and (ii) criminal capacity.

Chronologically, it should actually first of all be established that the wrongdoer is equipped with the necessary criminal capacity, before the question is asked whether he was aware of the unlawfulness of his conduct. " Criminal capacity " (*Zurechnungsfähigkeit*) is a concept conspicuously absent in the traditional description of the grounds of criminal liability in English law. This does not mean, though, that people who, in continental terminology, lack " criminal capacity," are therefore held criminally responsible for their conduct in England, whereas they would have been acquitted had they been tried in Germany. By " criminal capacity " is merely understood the ability of a wrongdoer to recognise the unlawfulness of his act, and to direct his actions in accordance with this insight. The most obvious cases in which criminal capacity is lacking, are infancy and insanity. These cases, just as cases of mistake, drunkenness and provocation, are treated rather casuistically in English law as " general defences " or " excuses " whereas continental jurisprudence seeks to relate these defences dogmatically to the fundamental concepts of *actus reus* and *mens rea* by an examination of the common underlying *ratio* for the non-liability of children and insane people. Young children and insane people are perfectly able to commit a criminal act, which is intentional or directed at a preconceived goal, and their conduct may also be unlawful in the sense that grounds of justification for it are lacking. Nevertheless they can never act with *mens rea*, for the simple reason that they cannot be *reproached* for acting as they did; the law cannot expect them to conduct themselves in the same way as grown-up, sane people.

The second ground upon which the normative reproach for the wrongdoer's fault is based, is his knowledge of the unlawful character of his conduct. This does not mean that he should know the law or the legal description of the offence he is committing. The concept of " unlawfulness " (*Rechtswidrigkeit*) is a cornerstone in the dogmatics of the continental criminal law, yet this concept, as it is known in most continental systems, does not form a separate ground of criminal liability in English law. It is usually included within the concept of *actus reus*, and, more particularly, it is the word *reus* in this expression which expresses the similar idea. Knowledge of unlawfulness can, in general, be described as knowledge of all the constituent elements in the legal description of a crime, as well as awareness of the fact that

[14] Welzel, *op. cit. supra*, n. 3 pp. 138–139; Jescheck, *op. cit. supra*, n. 1, pp. 314 3 Maurach, *op. cit. supra*, n. 3, p. 410.

the otherwise unlawful conduct is not justified by a ground of justification such as self-defence or consent. In the case of theft, for example, the wrongdoer must (apart from the intentional taking or appropriation of the property) be aware of the fact that the property belongs to another; he must not labour under the misconception that the object he is appropriating is something falling outside the definition of " property " in section 4 (1) of the Theft Act 1968, or that he has obtained the consent of the owner to the taking; he must further intend to deprive the possessor permanently of the property. In the case of murder, he must know that it is a fellow human being he is killing. In short, the wrongdoer must not be able to rely on the defence commonly known in English law as " mistake." Of course, ignorance of the law cannot be pleaded under the guise of this defence of mistake.[15]

The reproach inherent in the idea of *mens rea*, according to the doctrine of *Finalismus*, is directed at the wrongdoer personally. The wrongdoer carries the blame for not directing his conduct according to the norms of the law, whilst he was in a position to do it.[16] He *could* have acted lawfully, he *could* have refrained from his unlawful conduct, because he was endowed with the necessary mental capabilities fully to appreciate the wrongful character of his conduct, and because he did not labour under any misconception that his conduct fell outside the legal description of the crime, or was otherwise justified. This is the sole content of *mens rea*, as the intention of the wrongdoer (the direction of his will) is a constituent element of the criminal act itself, as it is by definition present in every criminal act. For this reason *mens rea* is described as normative, in contrast to the psychological description which sees in *mens rea* merely a description of the mental state of the wrongdoer. *Mens rea*, according to the doctrine here under discussion, is not a mere mental state or attitude; it is the expression of a certain relation between the wrongdoer personally and the legal order in society—an appraisal of the wrongdoer's conduct by the legal order, personified by the judge, magistrate or jury. Though a certain mental state, in the sense of mental capacity and awareness of the circumstances of the act, is required of the wrongdoer, this mental state, in itself, is not synonymous with *mens rea* or fault.[17] The object of the reproach inherent in the concept of *mens rea*, is the unlawful materialisation of the wrongdoer's will or intention [18] (which includes his awareness of the circumstances of his act, as intention always implies a cognitive element).

[15] See, however, the remarks concerning ignorance of the law as a defence at the end of this article.

[16] Welzel, *op. cit. supra*, n. 3, p. 138; Jescheck, *op. cit. supra*, n. 1, pp. 303, 320.

[17] Welzel, *op. cit. supra*, n. 9, p. 40: " Ein Seelenzustand kann (mehr oder minder) Schuld *haben*, aber er kann nicht (mehr oder minder) Schuld *sein*."

[18] Welzel, *ibid.*, p. 39; Jescheck, *op. cit. supra*, n. 1, p. 319; " Gegenstand des Schuldurteils ist die rechtswidrige Tat mit Rücksicht auf die in ihr aktualisierte, rechtlich mißbilligte Gesinnung."

Just as the idea of " praise " implies a personal responsibility of the person for his achievement (one would not earnestly praise an insane person for an act which accidentally happens to be correct or of value), so does the idea of " blameworthiness " imply that the wrongdoer can be held personally responsible for his wrongful act.[19] This personal responsibility is founded upon the wrongdoer's insight into the circumstances of his act which make it unlawful, coupled with the fact that the mental capabilities were such that he *could* have refrained from the unlawful act. His insight into the unlawfulness of his conduct could or should have formed a counter-motive militating against his decision to carry through the prohibited act.[20]

It should be noted that in the case of offences which require only *mens rea* in the form of negligence, somewhat different, albeit comparable, considerations apply. Not all German criminal lawyers apply the doctrine of *Finalismus* to offences requiring negligence, and even those who do sometimes place the emphasis differently in their exposition of the basis of criminal liability in these crimes.[21] Professor Welzel, however, who is the main figure in the movement, maintains that in these offences, just as in offences requiring intention, the act of the wrongdoer is intentional, though his aim falls outside the definition of the offence. Where, for example, he drives a motor-car and through negligent driving causes the death of a pedestrian, one can still say that his act of driving was a wilful act. The *mens rea* or blameworthiness of the wrongdoer in these cases consists in the fact that he did not execute or perform this wilful act in accordance with a certain minimum standard of care exacted by the legal norms of society, whilst he *could* have done so, having regard to his personal capabilities and knowledge.[22]

It must be admitted that the above scheme does not correspond with the accepted scheme of criminal responsibility in English law. On the other hand, if one looks at the history of *mens rea* in English law, and more particularly at the original purpose and interpretation of the crucial rule *actus non facit reum nisi mens sit rea*, the purely normative approach to *mens rea* does not seem quite so foreign to English law as

[19] Welzel, *op. cit. supra*, n. 3, p. 139.

[20] Welzel, *ibid.*, p. 164.

[21] Jescheck, *e.g.* restricts his acceptance of the doctrine of *Finalismus* to crimes requiring *mens rea* in the form of intention. In the case of crimes requiring merely negligence, he departs from the doctrine, and bases criminal liability in these cases on other considerations stemming from the realities of social life (*op. cit. supra*, n. 1, pp. 426 *et seq.*). According to Jescheck, negligence does not fit into the *finale Handlungslehre*, as the lack of care with which an intentional act is performed is no element of the direction of the wrongdoer's will, and falls outside the concept of the " finalistic act " (*ibid.*, pp. 167–168). Baumann, *Strafrecht, Allgemeiner Teil* (11th ed., 1975), p. 197, likewise criticises the *finale Handlungslehre* in so far as it endeavours to apply its theories also to crimes of negligence. See also the criticism in this regard of C. Roxin " Zur Kritik der finalen Handlungslehre " (1962) 74 *Zeitschrift für die gesamte Strafrechtswissenschaft* 515 at p. 529.

[22] Welzel, *op. cit. supra*, n. 3, p. 175; and the same author's, *Das neue Bild*, pp. 55–57. Also Maurach, *op. cit. supra*, n. 3, p. 529, applies the doctrine of *Finalismus* to crimes of negligence.

would at first sight appear. Originally, liability depended solely on two objective facts, namely that a deed had been performed which was prohibited by the law, and that it was the accused person who had done it. It was only later that, as a result of influences emanating from ecclesiastical sources, this form of strict liability was departed from.[23] The maxim *actus non facit reum nisi mens sit rea* stressed the importance of some form of moral blameworthiness as a prerequisite for liability. In the words of Turner, " Wickedness exists in men's minds and moral blame can only be laid upon one whose thoughts or intentions have been bad." [24] It was only later still that, perhaps as a result of the positivistic trend in legal thought during the nineteenth century, the idea of responsibility or blame in *mens rea* more and more lost its appeal, and the concept of *mens rea* came to be more formalistically understood as a mere psychological state of mind. Yet the original idea behind the rule *actus non facit reum nisi mens sit rea* was to exclude from liability, for example, cases of killing by misadventure, or in self-defence—in other words, to restrict liability to cases where there was more than a mere intentional act which happened to cause harm forbidden by law; there must have been, in addition, circumstances justifying society or the legal order *morally* to reproach or blame the wrongdoer for his act.[25]

There is much to be said for the view that at least the deterrent and retributive theories of punishment presuppose moral, or at least, normative guilt. Inherent in the idea of retribution is the idea of " just desert," which the offender is supposed to receive for his crime, and " just desert " can only be imposed for reproachful or blameworthy conduct. In the case of the deterrent theory, how can the public be deterred from crime, if conduct entailing no reproach or blame is criminally punishable?

A possible argument against this normative concept of *mens rea* is that there are many crimes in our modern technological age which are not viewed by society (or at least not by the majority of people in society) as containing any element of " immorality." The answer to this argument is that the concept of " reproach," which is such a fundamental characteristic of the normative concept of *mens rea*, is not necessarily synonymous with " moral reproach." It is a legal reproach, or appraisal of the wrongdoer's conduct by the legal order in society,

[23] Russell, *op. cit. supra*, n. 10, pp. 19–24, and *cf.* Jerome Hall, *General Principles of Criminal Law* (2nd edn., 1960), pp. 77–83.

[24] Russell, *op. cit.* p. 21. *Cf.* also Peter Brett, *An Inquiry into Criminal Guilt* (1963), pp. 38–40; and Harris's *Criminal Law* (22nd edn., 1973), p. 29.

[25] *Cf.* M. Hale, *Pleas of the Crown* (1678, reprint 1972), pp. 28–42; W. Hawkins, *A Treatise of the Pleas of the Crown* (1716), Vol. 1, p. 1: " The Guilt of offending against any Law whatsoever, necessarily supposing a wilful disobedience thereoff, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it."

whether the offence be a " wrong " in terms of morality, or not. The wrongdoer is not blamed for any immoral intentions on his part, but for deciding to proceed with an act (however " moral " it may be) while fully aware of the circumstances making it unlawful, and while in a position to refrain from such conduct. It is for *this* that he is reproached.

There are two rules in English law which, to a greater or lesser extent, stand in the way of a purely normative concept of *mens rea*. The first is the rule according to which responsibility in some cases, notably the so-called public welfare offences, may be " strict " or " absolute," in the sense that *mens rea* is no prerequisite for liability. Upon a closer scrutiny of these cases, however, it will be seen that it is not quite correct to say that no *mens rea* is required for liability. Usually *mens rea* is only discarded as to one of the elements or circumstances in the definition of the crime, whilst active or constructive knowledge is still required as to another or other elements.[26] For example, in a case of selling meet unfit for human consumption, though it need not be established that the offender knew the meat to be unfit for consumption, he must at least still have had the intention to *sell* the meat. Apart from this consideration, in many of these types of cases some element of blameworthiness (usually as a result of the wrongdoer's negligence) can still be imputed to the offender: these offences are usually of a technical character, and created for a specific category of people in society, such as certain categories of businessmen or industrialists; by choosing to engage in a business for profit involving the sale of goods which may in certain circumstances be injurious to the public health or welfare, he undertakes a deliberate risk, which ought to imply that he should take special precautions to prevent the prohibited act from being committed. It is in this failure of his to take such precautions, that an element of blame or reproach can be imputed to him. In any event, even if crimes of strict liability cannot be fitted into the normative concept of *mens rea*, the fact remains that they represent but a small minority of the crimes in English law, and are often of a much less serious character; being exceptions to the rule, they ought not to distract from the general rule itself.

In conclusion, the second impediment to the introduction of a normative concept of *mens rea* in English law may be dealt with briefly. This is the rule of English law that ignorance of the law can never be an excuse. Even if it is impossible for the " wrongdoer " to know the law, he still cannot raise his ignorance of it as a defence. The rigid and uncompromising attitude of English law in this respect is an impediment to the acceptance of a normative concept of guilt: on what grounds can such a *bona fide* ignorant offender be *reproached* for not complying

[26] Smith and Hogan, *Criminal Law* (2nd edn., 1969), p. 58.

with the norms of the law? To uphold the normative concept of *mens rea* even in these cases of ignorance of the law, it is imperative to make allowance for the relaxing of the present stringent rule in certain circumstances. One such possibility is to differentiate between offences (such as almost all common law offences) the criminal character of which is known to almost the whole of society (such as murder, rape, theft), and the more technical offences relating to the necessary bureaucratic functioning of modern government, which are generally only known to a certain category of people. In the first case the defence ought not to be allowed, whereas it ought, in certain circumstances, to be allowed in the case of the second type of offence, where the offender does not belong to the group of people at whom the legislation is primarily aimed. An alternative possibility—and one, it is submitted, which has more appeal—is to differentiate between avoidable and unavoidable error concerning the law. This is the present legal position in Germany according to their Penal Code,[27] and a solution which is perfectly in accordance with the doctrine of *Finalismus*. Unavoidable mistake concerning the law is a ground for excluding *mens rea*, such as in the English case of *R.* v. *Bailey*,[28] where the accused was charged with an offence created by statute while he was on the high seas and committed before the end of the voyage when he could not possibly have known of the statute. Bailey was convicted, but according to the present German law he should have been acquitted. What blameworthiness was there on Bailey's part, considering that it was completely impossible for him to know that his conduct amounted to a criminal offence? After all, *lex non cogit ad impossibilia*. Avoidable error is still punishable in Germany, though usually more leniently.[29] Perhaps it is still not too late for English law to adapt its present *error juris*-rule to more enlightened modern ideas of criminal responsibility, thereby making it possible for the concept of *mens rea* to assume a more normative character.

[27] ss. 16 and 17 of the German Penal Code. It is noticeable that, according to s. 17, unavoidable error as to the law excludes *Schuld* (*mens rea*), and not merely intention.
[28] (1800) Russel and Ryan 1.
[29] s. 17 of the German Penal Code.