"DESIRE," "KNOWLEDGE OF CERTAINTY," AND DOLUS EVENTUALIS:

Intention Under the Ethiopian Penal Code

*by Ronald Sklar**

Within its description of criminal "guilt" or "fault," the 1957 Ethiopian Penal Code defines two mental elements, intention and negligence.[1] The prosecution must prove one of these two mental elements existed in the mind of an individual charged with an offence under the Code before a court may punish the individual.[2] When neither intention nor negligence is proved, the individual's act and any resultant harm, such as another person's death or the destruction of property, are an "accident"[3] and civil liability rather than criminal liability is the only possible legal consequence.[4]

This requirement of a guilty mind is central to the 1957 Ethiopian Penal Code,[5] to the European codes that served as its models,[6] and is also "in conformity with the tradition of the Fetha Nagast."[7] It marks Ethiopia's penal law off from

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1. Pen. C., Arts. 57, 58 and 59. Art. 23 (2) refers to this guilt or fault as the "moral ingredient" of the criminal offence.

2. Pen. C., Art. 57: "(1) No one can be punished for an offence unless he has been found guilty thereof under the law.
"A person is guilty if, being responsible for his acts, he commits an offence either intentionally or by negligence.
"(2) No one can be convicted under criminal law for an act penalised by the law if it was performed or occurred without there being any guilt on his part, . . "

3. Pen. C., Art. 57 (2).

4. Liability under the Civil Code often is imposed for damage caused without any proof of fault. Important instances of this are found in the Title on "Extra-Contractual Liability and Unlawful Enrichment," and include Art. 2069, liability for dangerous activities; Art. 2071, liability for animals; Art. 2081, liability for machines and motor vehicles; and Art. 2085, liability for manufactured goods. For the case of liability without fault in civil trespass actions, see the quote from the *Atsede Habte Sellassie* case, cited below at note 37.

5. J. Graven, "The Penal Code of the Empire of Ethiopia," *J. Eth. L.*, vol. 1 (1964), p. 284. See also the quote from the *Exposé des Motifs*, quoted below at note 75.

6. See, e.g., 1930 Italian Penal Code, Arts. 42, 45, translated (into French) in *Les Codes Pénaux Européans* (Paris, Le Centre Français de droit comparé), vol. 2, pp. 880, 881; 1942 Swiss Penal Code, Art. 18 (3rd ed., Panchaud, Lausanne, Librairie Payot, 1967); P. Bouzat & J. Pinatel, *Traité de Droit Pénal et de Criminologie* (Paris, Librairie Dalloz, 1963), vol. 1, pp. 181, 187.

7. *Exposé des Motifs* to Art. 23, quoted in P. Graven, *An Introduction to Ethiopian Penal Law (Arts. 1-84 Penal Code)* (Addis Ababa, Faculty of Law, 1965), p. 59. The drafter's statement is quoted in its entirety below at note 75.
Support for the drafter's view is contained in such passages as the following on arson from Chapter 50, Section 6, of the Fetha Nagast:
"One who puts fire to a city or to the countryside with the purpose of causing damage to its inhabitants shall be burned. . . . If it is known that a certain person has burned a dwelling place knowingly and voluntarily, he shall be punished. If someone burns a field

the penal law of some western countries, most notably England and the United States, where, for claimed reasons of protecting the public from certain kinds of harm, acts causing or threatening those harms are liable to punishment in the absence of a guilty mind.[8]

Of these two mental elements required for criminal liability, intention is the more important in the Penal Code if only because "a person who intentionally commits an offence is always liable to punishment," whereas the person who negli-

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entirely, and the fire burns the houses around it, the one to burn first has no fault. If one puts fire to his fields, and it spreads and burns the harvest of his neighbour, they shall examine whether he was as careful as possible lest the first spread to other places. [If he was not careful] he shall draw the judgment accorded to the negligent. But if he was careful in everything, and the wind overcame him and spread the fire, the person who lit the fire is not liable." *The Fetha Nagast (The Law of the Kings)* (Translation from the Ge'ez, Abba Paulos Tzadua, ed. by P. Strauss, Addis Ababa, Faculty of Law, 1968), pp. 305-306 (brackets in original).

8. An American writer has described this phenomenon, what he calls "public welfare offences," as follows:

> ". . We are witnessing today a steadily growing stream of offences punishable without any criminal intent [or negligence] whatsoever. Convictions may be had for the sales of adulterated or impure food, violations of the liquor laws, infractions of anti-narcotic acts, and many other offences based upon conduct alone without regard to the mind or intent of the actor.. . All criminal law is a compromise between two fundamentally conflicting interests, that of the public which demands restraint of all who injure or menace the social well-being and that of the individual which demands maximum liberty and freedom from interference. We are thinking today more of the protection of social and public interests; . . . As a direct result of this new emphasis upon public and social, as contrasted with individual interests, courts have naturally tended to concentrate more upon the injurious conduct of the defendant than upon the problem of his individual guilt.. . [T]he new emphasis being laid upon the protection of social interests fostered the growth of a specialized type of regulatory offence involving a social injury so direct and widespread and a penalty so light [usually only a fine, sometimes a short term of imprisonment] that in such exceptional cases courts could safely override the interests of innocent individual defendants and punish without proof of any guilty intent." F. Sayre, "Public Welfare Offences," *Columbia L. Rev.*, vol. 33 (1933), pp. 55, 68.

The Ethiopian Penal Code, it can be said, has continued to "think more" of the protection of the interests of the individual. It requires a "guilty mind" even for Petty Offences (see Art. 697), which roughly correspond to the "regulatory offences" described above by Sayre. The phenomenon of the "public welfare offence," said to be based upon "the growing complexities of twentieth century life [which demand] an increasing social regulation" (*id.*, p. 68), has been attacked by many on the basic ground that it does not achieve its purported goal, that of deterring through the threat of criminal sanctions these "social injuries." The threat of slight criminal punishment, it is argued, at least in the case of the legitimate businessman to whom many of these regulatory offences are directed, adds little by way of deterrence to the already existing controls, e.g., the possibility of civil actions for damages, the risk of loss of business and goodwill following upon a publicized instance of inefficiency, and the business' own pride in its product. See e.g., J. Hall, *General Principles of Criminal Law* (2d ed., Indianapolis, Bobbs-Merrill Co., Inc., 1960), pp. 346-47. And to the extent a criminal sanction might deter such offences, it is further argued that the punishment of the morally innocent "contributes to the dilution of the criminal law's moral impact. The ends of the criminal sanction are disserved if the notion becomes widespread that being convicted of a crime is no worse than coming down with a bad cold." H. Packer, *The Limits of the Criminal Sanction* (Stanford, Stanford University Press, 1968), p. 261. As this last quote suggests, the question ultimately boils down to one of selecting what purpose of the criminal law we wish to promote, its "expression of a community's moral indignation" or its "social aims and effects in protecting society and reforming the criminal." H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, Clarendon Press, 1968), pp. 176-77.

gently commits an offence is "not punishable unless the law makes specific provision to this effect."[9] This means in the case of negligence that "the word 'negligence' must be used somepläce in a statute if negligent offences are to be punished under it",[10] something occurring infrequently in the Code and generally only in statutes dealing with actual or threatened harm of a quite substantial nature.[11] It also means that on the relatively few occasions where a statute fails to specify whether

9. Pen. C., Arts. 58 (2), 59 (2); Graven, work cited above at note 7, pp. 158, 161. Liability for an intentional offence is excluded of course "in cases of justification or excuse expressly provided by law (Art. 64-78)." Art. 58 (2).

10. P. Strauss, "On Interpreting the Ethiopian Penal Code," *J. Eth. L.*, vol. 5 (1968), p. 396. The very opposite rule obtains under the Code of Petty Offences. There it is presumed that negligence is punishable under a statute unless that statute expressly *excludes* negligence from its coverage. Art. 697 (2). This reversal of the rule in the Penal Code is obviously inspired by the same thinking that in Anglo-American countries leads to criminal liability without any fault whatsoever. See above at note 8.

11. E. g., negligent homicide (Art. 526), negligent bodily injury (Art. 543), negligent arson (Art. 492), negligent "economic treason" (Art. 263 (2)), negligent spread or transmitting of communicable diseases (Art. 503 (3)), negligent manufacture or sale of food unfit for human consumption (Art. 511(3)).

The case for thus limiting the scope of negligent offences is that negligence involves much less moral guilt than does intention (see discussion below at pages 386-388) and is less susceptible to the deterrent effect of threatened punishment. The second point seems plain enough, but there is considerable controversy over *how much* less susceptible negligence is to the operation of deterrence. There is, in fact, a great deal of heated controversy over how effective the threat of criminal punishment is in deterring *any* undesirable conduct, with the battleground almost entirely the realm of theory. "It is a deplorable fact," the Norwegian jurist, Johannes Andenaes, has written, "that practically no empirical research is being carried out on the subject. In both current criminological debates and the literature of criminology, statements about general prevention are often dogmatic and emotional." J. Andenaes, "The General Preventive Effects of Punishment," *Univ. Pennsylvania L. Rev.*, vol. 114 (1966), p. 953. One reason for this is the number of different factors which influence the efficacy of punishment as a deterrent: the nature of the offence involved, the known effectiveness of the law enforcement agencies (i. e., the "risk of detection and apprehension"), the extent to which the prohibitions and the impositions of punishment are known by the persons to whom they are directed, and the differences that exist between persons, to name perhaps the most important. *Id.*, pp. 957-58, 960-64, 970. Yet to the extent the criminal sanction deters based upon the desire of persons to avoid punishment, it operates on the principle that men are rational, "that a potential offender weighs the advantage of his course of conduct against the evil of the sanction, and refrains on grounds of self-interest." Hall, work cited above at note 8, p. 137; and see Andenaes, work cited above, pp. 950-51; J. Michael & H. Wechsler, *Criminal Law and Its Administration* (Chicago, The Foundation Press, Inc., 1940), pp. 12-13. The negligent actor, it is submitted, is much less likely to engage in this kind of "weighing" process than the intentional actor. In one form of negligence, "advertent negligence," he foresees the possibility of harm resulting from his action and thus may weigh this possibility against the object of his conduct. Yet, since the essence of his negligence is in not believing the harm will occur, the weight given to this possibility and to the further fear of being punished for causing that harm has to be minimal. In the other form of negligence, "inadvertent negligence," the actor is not even aware of the possibility of the harm occurring. The fear of being punished can hardly play any role at all in the thinking of such an actor except, perhaps, where he has been punished once before for inadvertently causing harm, to make him more careful in the future. Compare in this connection the views of H. Wechsler and J. Michael, "A Rationale on the Law of Homicide," *Columbia L. Rev.*, vol. 37 (1937), pp. 749-51 and G. Williams, *Criminal Law: The General Part* (2nd ed., London, Stevens & Sons, Ltd., 1961), pp. 123-24, with the contrary view of Hall, work cited above at note 8, pp. 137-41.

intention or negligence is needed,[12] a person can be punished under that statute only if he acted intentionally.[13]

The present article examines and seeks to explain intention. As will be seen shortly, the Penal Code recognizes not one but three separate states of mind under intention. They are "desire," "knowledge of certainty or near certainty," and *dolus eventualis* (also called "indirect intention"[14]). The first two are found in Art. 58 (1), first paragraph of the Penal Code, and will be considered in Part I of this article. *Dolus eventualis* is found in Art. 58 (1), second paragraph, and will be considered in Part II.

Part II dealing with *dolus eventualis* will be considerably longer, first, because *dolus eventualis*, unlike the two states of mind considered in Part I, was unknown in Ethiopia prior to its introduction in the 1957 Penal Code and, second, because *dolus eventualis*, although declared a form of intention, has more in common with "advertent negligence" defined in Art. 59 (1) and hence needs careful delineation lest it be confused with this lower state of mind.

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"Desire."

This first kind of intention is the most familiar. The actor desires, that is, it is his conscious purpose in acting,[15] to produce the particular result (e.g., somebody's death, some property's destruction) or to engage in the particular conduct (e.g., falsely executing a legal document, falsely testifying in court) forbidden by a

12. E.g., Art. 523: "Whosoever commits homicide . ;" Art. 530 (1): "Whosoever performs an abortion on another, . . ;" Art. 557 (1): "Whosoever, contrary to law or without lawful order, arrests, confines or detains or otherwise restrains the freedom of another, . . ;" Art. 487 (1) (b): "Whosoever: . . . (b) violates or profanes the resting place of a dead person, . "

13. Graven, work cited above at note 7, p. 162. Though this rule of interpretation follows naturally enough from the requirement that the word "negligence" must appear in a statute in order for negligent offences to be punished under it, it would have avoided unnecessary confusion had the drafter, rather than leaving the matter to rules of interpretation, inserted the word "intentionally" or words of similar import in *all* statutes punishing only intentional action. Under Articles like Art. 523, for instance, it is possible for a court to overlook the vital fact that it is applicable only to intentional homicide and by mistake apply it also to negligent homicide. See below at note 124 and accompanying text.

14. See Graven, *id.*, at pp. 156, 157.

15. Modern psychology quite matter-of-factly informs us that unconscious urges, desires and purposes, as well as conscious ones, can be responsible for our visible behaviour, but the penal law has as yet taken no account of this phenomenon in formulating its definition of intention. The law, in the words of Oliver W. Holmes, Jr., "does not attempt to see men as God sees them." O.W. Holmes, *The Common Law* (Boston, Little, Brown & Co., 1881), p. 108. Glanville Williams adds: "Probably unconscious intention is to be ignored for legal purposes (1) because it is difficult to prove satisfactorily. (2) because we have little knowledge of how far the threat of a sanction can influence the unconscious." Williams, work cited above at note 11, p. 37. The unconscious is ignored only to the extent that a person is not punished for intention when an outwardly innocent act satisfies some criminal urge or desire (the soldier who faints or becomes genuinely hysterical because of a repressed wish to run away from the danger of battle is not punished for desertion even though his "neurotic symptom" in fact enables him to achieve his repressed criminal wish. *Id.*, p. 37). The unconscious is of course not ignored, however, when outwardly criminal acts are produced by unconscious conditions which render the actor irresponsible under Arts. 48 or 49 of the Penal Code.

statute in the Penal Code. Thus, taking homicide as an example, there is intention for the purpose of Arts. 522 to 524 of the Code when the actor acts (shoots a gun, stabs with a knife, clubs with a stick, etc.) with the desire or conscious purpose of killing another person. There is intention under Art. 653, damage to property, when the actor acts with the desire or conscious purpose of damaging or destroying property belonging to another person. There is intention under Art. 447, false testimony, when the actor, testifying as a witness in a judicial or quasi-judicial proceeding, desires, that is, it is his conscious purpose, to make a false statement. The essence of this kind of intention, thus, is goal-directed behaviour.

For that major category of criminal offences such as homicide, property destruction, fraudulent misrepresentation, theft and the like where a specific result is included in the definition of the offence, care must be exercised in distinguishing between the *desire to perform the act* and the *desire to cause the specific result.* The first can often be present without the second, especially where homicide is is concerned. A person, for example, may strike another a blow with his fist intentionally, that is, he desires to strike the blow. Should the person struck fall to the ground, hit his head and fracture his skull and die, it cannot be said that his death, the result required for homicide, was also desired.[16]

The basic distinction between intended acts and intended results has not always been observed by Ethiopia's courts. For instance, in *Public Prosecutor v. Assefa Bekele*, decided by the Addis Ababa High Court in 1964 and reported in this Journal,[17] a conviction for intentional homicide under Art. 523 was based only on testimony that the deceased, who had a prior injury on his head,[18] had been seen chasing the accused, that the deceased then fell or was knocked down by the accused and that the accused then "hit [the] deceased repeatedly with his fist on the back of neck." Death resulted, according to the medical witness, from a combination of over-accumulation of blood in the brain, and tetanus. The court acknowledged that "the fight was only accidental and it [was] not proved that the defendant had any revengeful motives."[19] Its finding of intentional homicide,

16. Williams offers this second example: "A motorist presses the accelerator of his car. He wishes to go faster, and his act is then intentional as to going faster. But if it should happen that through going faster he hits a pedestrian, it obviously cannot be deduced that his act is intentional as to this consequence. It is so only if he desired to hit the pedestrian. Otherwise his act is unintentional or accidental as to the impact." Williams, *id.*, p. 35. Another example involving the same point in the context of property destruction is discussed below at note 34 and accompanying text.

17. Addis Ababa High Court, 1964, Crim. Case No. 87/57, *J. Eth. L.*, vol. 5 (1968), p. 466.

18. There was no evidence in the case connecting the accused with this earlier head injury. Neither eye-witness to the fight between the accused and the deceased testified to seeing how this earlier injury was sustained. The doctor who performed the autopsy stated that it "could have been caused by a stone or a stick." Since it cannot be inferred that the accused caused this head injury, that injury can have no bearing upon the accused's intention.

19. The dispute between the accused and the deceased apparently concerned a new piece of cloth the deceased was selling, and the court was correct in holding that this was no motive for the accused to kill the deceased. The importance of lack of motive to the question of intention was stressed by the Supreme Imperial Court in the case of Public Prosecutor v. X, 1964, Crim. App. No. 8/57, translated in P. Strauss, *Supplementary Materials on Penal Law* (1967-68, unpublished, Library, Faculty of Law, Haile Sellassie I University) (unpaginated). In ordering the dismissal of a charge of attempt to kill, the court said: "Now, from the examination of the evidence produced by the prosecution, there is none which may show any homicidal intent, above all because the *motive* for which X might have fired shots at his wife [has] not been proved." (Emphasis by court.)

therefore, was erroneous. The proof showed only an intentionally administered beating and not desire on the part of the accused to cause the deceased's death.[20]

"Knowledge of certainty or near certainty."

Intention can also exist when the actor is certain or nearly certain that circumstances exist which make his act criminal (a girl with whom he is having sexual intercourse is certainly or nearly certainly below the age of fifteen, testimony he is giving in court is certainly or nearly certainly false, etc.) or that a result forbidden by law will occur (a person is certain or nearly certain to die because of his act). This knowledge of certainty or near certainty "is considered equivalent"[21] to desire and it does not matter that the actor hoped that the circumstance did not exist or that the result would not occur.

A series of simple examples will help to explain this second kind of intention. One, offered by Dr. P. Graven, is: "If A, with a view of hitting B, throws a stone through the window of B's bedroom, the two consequences he brings about (bodily injury and damage to property) must be regarded as having been intentionally produced."[22] The bodily injury in Graven's example is what A "desired," and hence is intentionally produced on that ground. The breaking of the window, assuming A had seen that the window was closed, is the result A knows to be "certain," and hence is intentionally produced on that ground. The Norwegian jurist, Johannes Andenaes, offers this example: "A person who sets fire to his house in order to collect the insurance is an intentional murderer if he thought it certain or preponderantly probable[23] that the tenant would burn to death. The fact that he may regret the death does not free him from full liability, since he foresaw what would occur as a result of his act."[24] A third example can easily be imagined under Art. 594, sexual outrage on infants or young persons. A man has sexual intercourse with a girl below the age of fifteen. Because of her appearance or other facts he knows about her, he is certain or nearly certain she is below that age. This knowledge renders his violation of Art. 594 intentional. A last example can be offered in connection with Art. 649, damage to property of another caused by herds or flocks. A person knows his cattle have knocked down a wooden fence that stood between his property and the property of his neighbor, but out of laziness he does nothing about it, neither informing his neighbor nor reconstructing the fence. The next day his cattle stray on to his neighbor's property. He is guilty

20. Strauss cites a number of cases decided under Art. 523 in which Ethiopian courts appear to have made this error. Strauss, work cited above at note 10, p. 396, n. 10.

21. H. Silving, *Constituent Elements of Crime* (Springfield, Illinois, Charles C. Thomas, 1967) p. 222.

22. Graven, work cited above at note 7, p. 156.

23. Various phrases are used to indicate some point on the scale of probability close to certainty. This writer has used the term "nearly certain." The term Andenaes uses is "preponderantly probable." Williams uses the terms "substantially certain" in one place in his treatise and "such a high degree of probability that common sense would pronounce it certain" in another. Williams, work cited above at note 11, pp. 38, 40. All these seem to mean roughly the same, though Andenaes' term might fall slightly lower on the scale. The main point is not so much the phrase used, but rather the recognition that absolute certainty is such a rare phenomenon—perhaps, in the philosophical sense, an impossibility (*id.*, p. 39)—that allowance must be made for a level of probability somewhat below absolute certainty.

24. J. Andenaes, *The General Part of the Criminal Law of Norway* (London, Sweet & Maxwell, Ltd., 1965), p. 211.

of intentionally violating Art. 649. He did not desire his cattle to stray as they did, but he knew to the point of certainty or near certainty that with the fence gone, his cattle, as cattle are wont to do, would stray on to his neighbor's property.

It is of course possible that the person who throws a rock at another standing behind his bedroom window might miss everything, the window as well as his human target. Similarly, the man who sets fire to a house might not succeed in burning down the house, much less in causing a person's death inside the house, because the fire department arrives to put out the fire or because the fire goes out by itself. This uncertainty as to success existing at the time the act is committed does not prevent the secondary result, the breaking of the window or the death of the tenant, from being intended. The actor knows that should he succeed in achieving his desired objective, hitting his target with the rock or burning down the house, the secondary result will certainly or nearly certainly occur. This secondary result "is a necessary feature of the desired goal" and is held to be intended along with that goal.[25]

Article 58 (1) first paragraph.

Common sense, the source of much of any country's sound laws, implies that no distinction be made for purposes of punishment between what a person desires to occur as a consequence of his voluntary action and what he knows is certain

25. The quoted phrase comes from this illuminating example offered by Andenaes:
"A situation may be assumed where it is uncertain whether a result will occur, but the actor knows that it will occur if he attains his goal. During an inflamed political situation there is a plan to derail a train in order to assassinate a prominent politician who is travelling on that train. The would-be assassin thinks it highly improbable that the plot will succeed at all, since he expects that the train crew will discover the attempt and prevent the accident. But he knows that if he succeeds, many other passengers will also be killed. In other words, this is a *necessary feature* of the desired goal. Here there is intent to kill not only the politician but also the other passengers." *Id.*, p. 212. (Emphasis in text.)

If he did not succeed, the assassin in Andenaes' example would clearly be guilty of an attempt to kill the politician (Art. 27/522), assuming his acts had gone far enough towards his goal to constitute an attempt. The rock-thrower who missed everything would clearly be guilty of an attempt to injure the man standing behind the window (Arts. 27/538 or 27/539). The home-owner whose fire was put out or went out would clearly be guilty of an attempt to defraud his insurance company (Art. 27/659 (a)). A further and more interesting question is whether there would also be attempts to kill the other passengers on the train with the politician, or to break the window, or to kill the tenant in the house; in other words, whether there can also be an attempt for those results the actor knows is certain or nearly certain to occur. The particular language used in Art. 27 and the ordinary understanding of "attempt" suggest a negative answer. They suggest that the offence of attempt should be limited to the failure to achieve one's *desired* end and not applied to the failure to bring about foreseen, but not necessarily desired, secondary consequences. Art. 27 (1) refers to "pursuing" (Amharic: ያልተከታተለ French: "poursuivre") one's activity "to its end" (Amharic: እስከ መጨረሻው French: "jusqu'au bout"). Foreseen secondary consequences are not, in the ordinary sense of the term, "pursued" by the actor. They "happen," and are not opposed by the actor, but in the course of "pursuing" another, primary, end. If such cases are to come under the offence of attempt, different language would have to be used in defining attempt, as, for example, was done in the American Model Penal Code's definition of attempt. That definition, in addition to covering the normal case of desire, specifically includes the person who "does or omits to do anything ... with the belief it will cause such result without further conduct on his part." Model Penal Code, Proposed Official Draft, (American Law Institute, 1962), Sec. 5.01.

or nearly certain to occur. This is probably why both the continental European and Anglo-American systems of Penal Law treat these two states of mind under intention or some equivalent label,[26] often in the absence of statutes on the subject.[27] It also means that the language chosen by a statutory provision to define intention should be deemed to include both of these states of mind unless that language clearly excludes one or the other from its coverage.[28]

The English version of Art. 58 (1), first paragraph, of the Ethiopian Penal Code reads: "A person intentionally commits an offence when he performs an unlawful and punishable act with full knowledge and intent." This definition admittedly says very little, either by way of inclusion or exclusion. Part of the trouble, the circularity of defining intention by the term "intent," can be ascribed to faulty translation. The French text of the Article reads "avec la conscience et *la volonté*," "with awareness and *will*."[29] More basically, however, the fault lies in the drafting. The drafter borrowed the phrase "avec la conscience et la volonté" from Art. 18 of the Swiss Penal Code where it, in particular the psychic concept of "volonté" or "will," had over the years been interpreted by Swiss courts and theorists to include the two states of mind of desire and knowledge of certainty or near certainty.[30] For Ethiopia, embarking on a modern and comprehensive Penal Code for the first time,[31] a more explicit provision was needed, one in which the notion of what constitutes intention would not depend upon interpretation. Such a provision is Art. 16 of the German Draft Penal Code of 1962: 'A person acts intentionally when he is bent on [i.e. he desires to] materializing the facts of crime as described in a statute or when he knows or foresees as certain that he is materializing the facts of crime as described in a statute."[32] The ambiguity of Art. 58 (1), first paragraph, poses no serious problem, however. Neither state of mind is excluded by that definition and, as pointed out in the preceding paragraph, both therefore, can be taken as included thereunder.

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26. The American Model Penal Code, for instance, calls the first "purposely" and the second "knowingly." The American Model Penal Code, *id.*, Sec. 2.02 (2) (a) and (b).

27. See, e.g., Andenaes, work cited above at note 24, pp. 209-12; Silving, work cited above at note 21, pp. 221-22; Williams, work cited above at note 11, pp. 34-36, 38-42; *German Draft Penal Code E* 1962, Art. 16, translated in *The American Series of Foreign Penal Codes* (G. Mueller, ed., South Hackensack, New Jersey, Fred B. Rothman & Co., 1966), vol. 11, p. 30; The American Model Penal Code, work cited above at note 26.

28 *Cf.* Elsasser c. Procureur Général du Canton de Berne (Trib. féd., Switz., May 21, 1943), *J. des trib.* (Droit pénal), pp. 76-77.

29. The controlling Amharic version of Art. 58 (1), first paragraph, ጥፋት መሆኑን ሕሊናው እየተረዳው is closer in meaning to the French.

30. P. Logoz, *Commentaire du Code Pénal Suisse: Partie Général* (Neuchatel, Editions Delachaux & Niestlé, 1939), pp. 62-65, excerpts thereof translated in S. Lowenstein, *Materials for the Study of the Penal Law of Ethiopia* (Addis Ababa, Faculty of Law, 1965), p. 136; *cf.* Elsasser c. Procureur Général du Canton de Berne, cited above at note 28.

31. The 1930 Penal Code, as the drafter of the 1957 Code has observed, "did not suit modern requirements. It presented still too many vestiges of the ancient system which were both formalistic and rigid according to the ancient universal tradition. " It further lacked the "systematically [formulated] general rules which conform to the present day legislative technique " J. Graven, work cited above at note 5, pp. 275, 276.

32. The translation above is from Silving, work cited above at note 21, p. 222. To the best knowledge of the writer, this definition was recently enacted into law in Germany. The writer, however, did not have access to the new German Penal Code.

The requirement of "awareness."

"Full knowledge" in Art. 58 (1), first paragraph ("awareness," i.e., "*conscience*," in the French text), refers to a basic principle repeated in Art. 76 of the Code, "mistake of fact." A person cannot commit homicide intentionally under the first paragraph of Art. 58 (1), if at the time of acting (e.g., shooting a rifle) he believes that his target is not a human being. He cannot commit the offence of sexual outrage on infants or young persons intentionally if he believes the girl with whom he is having sexual intercourse is above the age of fifteen.[33] He cannot commit the offence of bigamy intentionally if when marrying for a second time he is not aware that his first wife is still alive and legally still married to him. He cannot commit the offence of aggravated damage to property intentionally if at the time of destroying a valuable original object of art belonging to another person (see Art. 654 (b)) he thought that what he was destroying was only an inexpensive copy.[34]

Many such examples could be presented. The principle is a simple one: intention presupposes awareness. A person who is not aware he is shooting at a human being cannot thereby be seeking to kill that human being or know that his death is certain or nearly certain to occur. A person who marries for a second time without being aware his first wife is still alive and legally still married to him cannot thereby be seeking to have two wives at the same time or know that such a dual state of matrimony is certain or nearly certain to occur. Because the element of "awareness" is so implicity a part of intention, most definitions of intention in fact do not bother to state that awareness is necessary, as, for example, one sees in Art. 16 of the German Draft Penal Code quoted above.

The principle has especial application in Ethiopia to land offences since lack of awareness as to such matters as title and boundary lines is so widespread. The principle was correctly applied in *Public Prosecutor v. Captain Kebede Tesema*, a case involving Art. 652, displacing and removal of boundary marks.[35] The accused had been convicted in the Woreda Court. Although agreeing with the lower court that the punishable act of removing the boundary marks had been committed as charged, the Awraja Court reversed the conviction because the accused had "remov-

33. Because Art. 595 restricts the age of the minor to "from fifteen (per the Amharic; "more than fifteen," per the French and English) to less than eighteen," the accused who believes the girl is aged sixteen when in fact she is only aged fourteen does not violate Art. 595 because the girl is not between the ages of fifteen and eighteen and does not violate Art. 594 because as stated above he lacks awareness she was below fifteen. His criminal offence is "impossible attempt" (Art. 29) to violate Art. 595, for which, however, his punishment can equal that provided for Art. 595. See below at note 75.

34. Since the last actor "intended" to destroy the property of another, he is criminally liable under Art. 653, damage to property, as is provided by Art. 76 (2). His lack of awareness as to the value of the object, however, does prevent his conviction for *aggravated* damage to property. In effect, what we have here is the same as the distinction drawn before between the intention (i.e., desire) to perform the act and the intention to cause the specific result. The actor desires to destroy the property, and can be convicted for that desire and his act, but he does not desire to cause the specific result required for conviction under Art. 654 (b), the destruction of a valuable object of art. See above at page 377. Art. 76 (3) which rules out the defence of mistake of fact where there is "a mistake as to . . . the object of the offence" is not applicable to a case where the object is a specific ingredient of the offence charged, as is so with aggravated damage to property under Art. 654 (b). See Graven, work cited above at note 7, pp. 232-33.

35. Addis Ababa High Court, 1968, Crim. Case No. 107/60 (unpublished).

ed the boundary marks not with the intention of committing an offence but in the belief that the land belongs to him." This decision was affirmed by the Addis Ababa High Court.[36] In another case, *Public Prosecutor v. Woz. Atsede Habte Sellassie*, the Addis Ababa High Court wrote:

> "To have a criminal case of trespass [Art. 649-651], there must be the intention of depriving a person of his property unlawfully with the knowledge that the land from which that person is deprived belongs to that person. If a person in the honest belief that a piece of land belongs to him, takes his cattle to graze on that land or cuts trees growing on that land, that does not amount to criminal trespass; such acts may amount to civil trespass for which a civil action for damages may lie."[37]

Awareness of unlawfulness.

Does the requirement of "awareness" just discussed include the actor's awareness that his act is unlawful? Can the actor, to phrase the question another way, be held guilty of committing an intentional offence if he was unaware at the time he acted that his act was unlawful?

Awareness of the factual circumstances which make an act unlawful, which is needed for liability for intention, is not the same as awareness that the act is unlawful. The question under the former, to refer to an earlier example, is whether the actor is aware that the girl with whom he is having sexual intercourse is below the age of fifteen; the question under the latter is whether the actor, who knows that the girl is below the age of fifteen, also knows that *it is against the law* to have consensual sexual intercourse with a girl below the age of fifteen.[38]

For many offences within the Ethiopian Penal Code, the question of knowledge of unlawfulness can hardly arise. It would be nearly impossible for any sane person in Ethiopia to claim that he was unaware that it is unlawful to commit homicide or theft or robbery or to burn down another person's property.[39] Society judges these

36. The High Court, though affirming the Awraja Court's decision, observed that the real issue in the case was one of who lawfully possessed the land in question, an issue that should have been tried in the Civil, not the Criminal, courts.

37. Addis Ababa High Court, 1959, Crim. App. No. 618/51, translated in Lowenstein, work cited above at note 30, p. 32–33.

38. There is an important distinction between being aware of the unlawfulness of one's act, i.e., that it is legally prohibited, and being aware of the reprehensibility of one's act. A person may realize that his act is reprehensible according to some internally applied standard of good behaviour yet be unaware that that act is violative of some penal provision, since not everything that it wrong or bad is legally prohibited. In those codes that deal with the matter, including apparently Art. 78 of the Ethiopian Penal Code (see Graven, work cited above note 7, pp. 154-55), the relevant awareness pertains to the existence of the legal prohibition, although quite clearly the more reprehensible the act is to the average man, the easier it is to infer that the act is also legally prohibited and that the actor was aware of this. See below at notes 39 and 40, and accompanying text. For a careful discussion of this difficult issue that "few Codes settle specifically" (*id.*, p. 154), see P. Ryu & H. Silving, "*Error Juris:* A Comparative Study," *Univ. Chicago L. Rev.*, vol. 24 (1957), at pages 458-66.

39. In fact, in the one situation in the Penal Code where awareness of unlawfulness is made a requirement for conviction, the case of a subordinate who has carried out an illegal order from his superior (Art. 70), the Code in effect creates a presumption that the subordinate was aware of the unlawfulness of the order, if the order was to commit "homicide, arson or any other grave offence against persons or property, essential public interests or international law."

and many other acts to be immoral, apart from their being prohibited by penal law, and we can and do expect that a sane offender is aware of these community judgments of morality and hence equally aware that his act is immoral.[40]

However, it is quite possible for a sane person in Ethiopia to be unaware that it is a crime to have consensual sexual intercourse with a female below the age of fifteen (Art. 594) or between the ages of fifteen and eighteen (Art. 595), or that it is a crime to fail to register the birth of an infant (Art. 623), or that it is a crime, under specified circumstances, to fail to lend aid to another person "in imminent and grave peril of his life, person or health" (Art. 547), or even that it is a crime to contract a second marriage before one's first marriage has been legally dissolved (Art. 616). These and many other prohibitions can be traced to no clear society-wide judgment of immorality of which the offender ought to be aware. Some of these forms of conduct may even be entirely in agreement with the prevailing moral norms of some segments of Ethiopian society. It is with respect to these offences, as well as others like the offences in the Code of Petty Offences, which are on the outer edges of criminality, that the claim of lack of awareness of unlawfulness causes the greatest difficulty.

Legal opinion is seriously divided on the question. On the one hand, it cannot be denied that the chief aim of any penal code, "the prevention of offences by giving due notice of the offences and penalties prescribed by law" (Art. 1 of the Ethiopian Penal Code), cannot be achieved with the offender who is honestly unaware of the existence of the offence and the penalty. On the other hand, there is the view of the American jurist and legal philosopher, Oliver W. Holmes, Jr, that "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey"[41] and the further argument that the claim of ignorance of the law could too easily be made while the honesty of the claim "could scarcely be determined by any evidence accessible to others."[42] In

40. H. Hart, "The Aims of the Criminal Law," *Law & Contemporary Problems*, vol. 23 (1958), pp. 413, 419. And see discussion above at note 38.

41. The full passage is: "Public policy sacrifices the individual to the general good. . . . It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scale." Holmes, work cited above at note 15, p. 48. Holmes' view has come under increasing attack from modern American theorists on the ground that punishing those who are ignorant of legal provisions not contrary to the community's moral values is punishing persons who are not in any sense of the term blameworthy. See, e.g., Hart, work cited above at note 40, pp. 418-22; Packer, work cited above at note 8, pp. 129-30. It has also been argued forcefully that such punishment imposes an unreasonable restraint upon freedom of action and is "offensive to human dignity." "Subjection of man to sanctions under a law which is unknown and unknowable to him and which he has no opportunity to accept or reject expresses the view that he is a mere object of the law." Ryu & Silving, work cited above at note 38, p. 471. The question is complicated, however, by the considerable variety of offences to which the claim of ignorance can be made and the considerable variety of reasons for such ignorance the accused can offer, both variables affecting the acceptability of the claim. This aspect of the problem is treated at length by Hall, work cited above at note 8, pp. 386-414.

42. J. Austin, *Lectures on Jurisprudence* (4th ed., 1879), vol. 1, p. 498, quoted in Hall, work cited above at note 8, p. 378. Holmes, however, "doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into. The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the law-breaker," Holmes, work cited above at note 15, p. 48. See the discussion in Hall, *id.*, pp. 378-83.

accordance with these and similar policy-type arguments, the Anglo-American Penal Law system has adhered to the principle, *ignorantia legis neminem excusat*, "ignorance of the law excuses no man." In this view, which has the support in Europe of France,[43] a person can be punished for committing an offence intentionally although he was unaware that his act was or might have been unlawful. All the actor need know is the factual circumstances that objectively make his act a crime.

The opposite view is maintained in Germany. Decisive weight is accorded there to the factor of blameworthiness, more specifically, to its absence from the case of the actor who is honestly ignorant of the unlawfulness of his act.[44] In the leading German court decision on the subject,[45] a lawyer was prosecuted for the crime of "Coercion" (Art. 554 of the Ethiopian Penal Code is the equivalent offence) in that he had pressured his client to make an advance payment of his fees by threatening on the eve of the trial to withdraw from the case if she did not pay. His paradoxical defence was that he did not know his act was unlawful. The German Federal Supreme Court, observing that "penalty presupposes guilt" and "guilt is blameworthiness," ruled that awareness of unlawfulness is a prerequisite to a finding of guilt. The actor is liable to punishment only if he was either aware his act was unlawful, or if he, as perhaps the lawyer-accused could have done, "with a requisite searching of his conscience" could have been aware his act was unlawful. Only then "can blame attach."[46]

The middle position between these two views is taken by Switzerland[47] and in Arts. 78 of the Ethiopian Penal Code and 700 of the Code of Petty Offences[48]

43. "Application of the law cannot be subordinated to the greater or lesser zeal which those subject to its jurisdiction may exert in order to acquaint themselves with it." Donnedieu de Vabres, *Traité de Droit Criminal et de Législation Pénale Comparée*, p. 86, quoted in Ryu & Silving, work cited above at note 38, p. 432, n. 68.

44. *Id.*, pp. 442-43, 450-53. See discussion above at note 41.

45. Decision of March 18, 1952 (Fed. Sup. Ct., Ger. Fed. Republic), *Entscheidungen des Bundesgerichtshofes in Strafsachen*, vol. 2, p. 194, translated in part in Lowenstein, work cited above at note 30, p. 242.

46. *Id.*, p. 243. This decision and the German theory of *ignorantia legis* in general is analyzed at length by Ryu and Silving, work cited above at note 38. The German Federal Supreme Court decided only the question of law involved. The lawyer's guilt or innocence, i.e., whether he "could have been aware," was left to the trial court.

47. See Graven, work cited above at note 7 pp. 236-37; X c. Ministère public du Canton d'Argovie (Trib. féd., Switz., 1961) *J. des Trib.* (Droit pénal), p. 82, translated in Lowenstein, work cited above at note 30, p. 240.

48. As Dr. Graven has pointed out, Art. 58 (1), the provision that defines intention, fails in all three language versions to indicate the relevance of awareness of unlawfulness. Resort must therefore be had to Arts. 78 and 700. Graven, work cited above at note 7, pp. 154-55, 236-37. Art. 700 is ambiguous on a key point. Art. 78, as is explained in the text above, declares that "Ignorance of the law is no defence," but does nonetheless provide for both reduction and total exemption of punishment if certain conditions are met. Art. 700, first paragraph, simply states: "He who committed a petty offence may not plead as justification ignorance of the law or a mistake as to right (Art. 78)." The ambiguity is whether the cross-reference to Art. 78. takes in all of Art. 78, including the reduction and exemption provisos, or, as seems more likely since the penalties in the Code of Petty Offences are so small to begin with, takes in only the part of Art. 78 that bars the defence of ignorance of the law. The question is important because the claim of ignorance of the law is more likely to be raised in the context of "petty offences," many of which are of a regulatory or esoteric nature. (See discussion above at page 383). The writer is not aware of any Ethiopian decision that has considered this ambiguity.

Art. 78 (1) states the basic principle, similar to the Anglo-American approach, that "Ignorance of the law is no defence." It then goes on to say, however, that the person "who in good faith believed he had a right to act and had definite and adequate reasons for holding this erroneous belief," though remaining liable to punishment for acting intentionally, "shall" be granted a reduction of his punishment under Art. 185 (i.e., "without restriction").[49] Complete exemption of punishment may be granted "in exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent."[50]

The competing realities that moved the Codification Commission to adopt this compromise are recorded by Dr. Graven:

> ". . . it would be unrealistic to lay down a conclusive presumption that all citizens know the law while the law so far has been almost entirely unwritten [one might add to this the fact of "the complexities of modern life and consequent increase in the volume of laws," noted in the Emperor's Preface to the 1957 Penal Code] as it would in all respects be detrimental to the interests of a nation in full development always to let go free persons who do not take 'due notice of the offences and penalties prescribed by law'. . . ."[51]

This compromise solution, as Graven also notes, had been adopted earlier in the 1930 Penal Code: "The man who offends after learning and knowing the law of the Government, and after reading the law or hearing the proclamation with his own ears, is a wilful offender and shall receive full punishment" (Art. 12), while those who were unaware of the law through some form of excusable ignorance (the stranger; "the countryman . who has not seen with his own eyes how the [law] work is done but only hears by report the law and ordinance of the Government;" "the poor man who is unable to attend and hear what goes on in any kind of court and is unable to know the law;" "the woman who has not learned the law and ordinances and does not go out to the courts;" etc.) were entitled to have from one-tenth to nine-tenths of their punishment remitted (Arts. 13 to 21). Though the 1930 Code provisions and Art. 78 of the 1957 Code do not appear to be completely parallel (e.g., "definite and adequate reasons" under Art. 78 implies more than ignorance due to one's poverty, local or sex), yet it seems likely that the statutes specified in the 1930 Code will continue to be taken into account under Art. 78. A 1961 decision of the Eritrean High Court in fact did just that. It took

49. Art. 79 (1) does not specify the factors the court is to consider in determining whether the actor "had definite and adequate reasons" for believing he had a right to act. The issue is left to the court's discretion. In this regard, the 1957 Penal Code differs from the 1930 Penal Code where the relevant factors were enumerated in considerable detail. See discussion below this page. One factor that will be very relevant, of course, is the nature of the prohibition violated. It will be easier for the accused to claim excusable ignorance where the prohibition violated is a new addition to Ethiopia's law (in the sense that it was not an offence under the Fetha Nagast, the 1930 Penal Code or relevant customary rules) or is not altogether clearly defined in the 1957 Code or is not considered particularly reprehensible by the segment of Ethiopian society to which the accused belongs.

50. The reference to "criminal intent" is misleading as it implies that awareness of unlawfulness is somehow a part of intention in Ethiopia as it is in Germany. The trouble, again, arises from a translation error. The French text reads "et lorsque *la criminalité de l'acte* n'était pas apparente," "and when *the criminality of the act* was not apparent."

51. Graven, work cited above at note 7, p. 237. The second consideration referred to by the Codification Commission resembles Holmes' viewpoint quoted above at note 41.

into account, among other things, "the extreme poverty of the accused [and] the fact that he is an ignorant shepard" in reducing the accused's punishment for failure to pay the Federal Salt Tax under the relevant Proclamation and Amending Decree[52] to that of a fine of $15 or, in default of payment, imprisonment for seven days.[53]

II -

Introduction to the concept of dolus eventualis.

Art. 58 (1) describes a third state of mind included under "intention." It is best known by its Latin name, *dolus eventualis*, which literally means "intent directed toward a possible event." *Dolus eventualis* is defined in the second paragraph of Art. 58 (1) as existing "when the offender being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow." Despite its Latin name, the concept is German in origin[54] and accordingly has received its most detailed treatment from German theorists.[55] It is applied throughout continental Europe and in many countries, including Ethiopia, which have borrowed their penal law from continental Europe.[56] It is not recognized as such in the other major penal law system, the Anglo-American.[57] As already noted at the outset of this article, it is entirely new to Ethiopia and, if not delineated with care, can be confused with advertent negligence defined in Art. 59 (1).

The justification for the classification of *dolus eventualis* under intention, rather than under negligence as could have been done,[58] must be the *moral reprehensibility*

52. By virtue of Art. 3 of the 1957 Penal Code, "special laws of a penal nature," which includes taxing provisions imposing a penalty upon violators (Graven, p. 12), are subject to the general principles of the Code (which would include Art. 78), "except as otherwise expressly provided [in such special law]."

53. The Crown v. Faid Mahmoud Abdel Kader, Federal High Court of Eritrea, 1961, Crim. Case No. 710/53, translated in Lowenstein, work cited above at note 30, p. 239. For further treatment of Art. 78, see Graven, work cited above at note 7, pp. 235-39, in particular 237-39.

54. The term was coined by the German theorist, von Weber, in the nineteenth century. As a state of mind it was recognized earlier under the terms *dolus indirectus* and *dolus indeterminatus* by the German theorists J. S. F. Bohmer and Paul Feuerbach. K. Warnke, *Die Entstehung und Behandlung der Dolusatten (The Origin and the Treatment of the kinds of Dolus)* (1965, unpublished thesis, Berlin) pp. 34-37. This thesis, which provided the writer with the approach of the German theorists to *dolus eventualis*, was kindly supplied by Dr. Klaus Warnke of the Center for Comparative Criminal Law, New York University School of Law. It was translated into English for the writer by Professor Hans Schweisthal of the German language department of the Haile Sellassie I University.

55. The prime concern of German theorists has been to identify and describe the mental elements that justify the inclusion of *dolus eventualis* within the concept of intention. Warnke, work cited above at note 54, pp. 38, 55-57.

56. *Dolus eventualis* may be specifically defined in the Penal Codes of these countries (see representative Code provisions quoted below at note 76) or it may be implied by judicial decision based upon history or upon scholarly writings, as, for example, in Switzerland and Germany. See below at notes 85 and 110.

57. *Dolus eventualis* appears in Anglo-American penal law theory, though not by name, as an aggravated form of "recklessness," a state of mind in that system lying between intention and inadvertent negligence. Hall, work cited above at note 8, pp. 115, 116-17; G. Mueller, "The German Draft Criminal Code— An Evaluation in Terms of American Criminal Law," *Illinois L. Forum* (1961), pp. 46-47.

58. See below at note 76.

of the attitude in *dolus eventualis*.[59] Negligence is the state of mind which justifies the least punishment or no punishment at all because, as noted before,[60] it is less morally reprehensible than intention, as well as less deterrable. The negligent actor does not desire the harm. On the contrary, he *opposes* the occurrence of the harm and if he believed his action would bring about the harm, he would desist. He only continues his action either because he mistakenly believes the harm foreseen will not come about (e.g., aware that his brakes are faulty, he continues to drive believing that they will hold sufficiently in an emergency), a case of "poor judgment" or "advertent negligence," or because he is not aware even of the possbility the harm might come about (e.g., he is not aware his brakes are faulty), a case of "inattentiveness" or "inadvertent negligence."[61]

The moral reprehensibility of *dolus eventualis* is greater than that of negligence. In one important sense, it is equal to that of "knowledge of certainty or near certainty," the second state of mind discussed in Part I. In knowledge of certainty or near certainty, the actor does not desire or seek the harm, but neither does he oppose its occurring. He is too concerned with his own action and the end he has in sight (hitting the person behind the window with the rock, collecting fire insurance on his house, enjoying sexual satisfaction, etc.) to be concerned about his action also causing harm to some other interest. This *willingness* to bring about harm rather than to give up what one is doing is the morally reprehensible aspect of this actor's conduct.

Dolus eventualis involves the same kind of *willingness* as does this second kind of intention. The key difference between the two is found in the element of knowledge. The *dolus eventualis* actor is aware not of certain or nearly certain harm, but of the *possibility* that his action will bring about harm. To quote Art. 58 (1), second paragraph, again: the offender is aware "that his act *may* cause illegal and punishable consequences."

Dolus eventualis and advertent negligence.

It is the strength of *dolus eventualis* that it identifies a category of moral conduct deserving greater community condemnation in the form of greater criminal punishment than either of the two forms of negligence.[62] It is its weakness that in

59. In German theory, this is known as the "guilt content" *(Schuldgehalt)* of *dolus eventualis*. Warnke, work cited above at note 54, pp. 34, 56, 75.

60. See above at note 11.

61. Negligence, of course, involves more than just "advertence" or "inadvertence." A person might understandably take the risk of driving with faulty brakes because he has no choice in the matter. His child, for example, could be desperately ill with no other means of reaching a hospital available. A person might not be aware his brakes are faulty because they had worked properly the last time he drove his car. Numerous lawful activities present an inherent risk of harm. "Life in modern society," as Andenaes has written, "is based on the fact that a certain causation of danger is legal." There is an area of "permissible risk." Andenaes, work cited above at note 24, p. 151. The test for criminal liability is always whether the person who caused harm through "advertence" or "inadvertence" fail[ed] to take such precautions as might reasonably be expected in the circumstances of the case...." Pen. C., Art. 59 (1), second paragraph. See generally Graven's commentary on Art. 59 , work cited above at note 7, pp. 159-63; Wechsler & Michael, work cited above at note 11, pp. 742-46; Andenaes, *id.*, pp. 151, 217-24; Williams, work cited above at note 11, pp. 58-59, 103-105.

62. Warnke, work cited above at note 54, p. 33; Graven, work cited above at note 7, p. 157.

many situations it will be difficult to ascertain whether the actor's state of mind was *dolus eventualis* or the advertent form of negligence.

There is much about *dolus eventualis* that is similar to advertent negligence.[63] The knowledge element is the same in both. Both states of mind, that is, include an awareness on the part of the actor that his action *may* bring about a forbidden harm. And, though several writers have referred to "selfishness" as the identifying characteristic of *dolus eventualis*,[64] in truth, both *dolus eventualis* and advertent negligence include this element. It is seen in the decision each actor makes to continue his action despite the possibility of that action causing harm.[65] The advertently negligent actor does, it is true, believe that the harm will not occur and is mentally opposed to its occurrence. But that does not alter the fact that he has, for whatever end he has in mind, *taken the risk of being mistaken* concerning his belief that the harm will not occur. "He has chosen," as one writer has said, "to increase the existing chances that a proscribed harm will occur."[66] The *dolus eventualis* actor takes no mental stand against the harm's occurrence and, therefore, does more than take the risk of causing harm. He is, again for whatever end he has in mind, *selfishly willing to let the harm occur.*

The qualitative difference between these two kinds of selfishness is clear. The problem, however, is equally clear. How in a particular fact situation will a court be able to determine whether the actor selfishly continued his action because he mistakenly believed the harm would not occur, or because he did not care whether it would occur? We cannot expect the actor to admit to the authorities the latter attitude, especially when, as will be developed more fully later,[67] the Criminal Procedure Code allows him to consult a lawyer before he is questioned. This at present is an empty right, but as the supply of Ethiopia's lawyers increases it will not remain so. The Criminal Procedure Code in addition greatly restricts the power of the police to question the accused concerning his alleged offence. Proof that the actor was willing to bring about the harm will, for the vast majority of cases in the future, have to come from other, less direct, sources, in particular from the objective facts surrounding his action.

The closeness of *dolus eventualis* and advertent negligence, made worse by the unlikelihood of obtaining direct proof that the characteristic attitude of one or the other was present when the actor caused some forbidden harm, requires the court to exercise extraordinary care in examining the evidence. The minimum and maxi-

63. A good deal of the German theoretical writings on the subject of *dolus eventualis* have been concerned with this fact and the consequent problem of justifying the higher punishment authorized for *dolus eventualis*. Warnke, work cited above at note 54, pp. 55-57, 66-75.

64. "Egoism . . is the essence of *dolus eventualis*." von Hipple, quoted in Warnke, *id.*, p. 51. "The [*dolus eventualis*] actor shows by his indifference a feeling to the effect that he places his ends at the same level, or even higher, as the ones protected by the law." *Id.*, p. 75. "In the case of *dolus eventualis*, the inhibiting, negative value of the harm envisaged by the offender . . . is weaker than the positive value that he attaches to accomplishment of the act . . . . One is thus able to definitely say that, in the case of *dolus eventualis*, it is *selfishness* which motivates his action despite the consequences." (Emphasis in original) Logoz, work cited above at note 30, p. 66, translated in Lowenstein, work cited above at note 30, p. 142.

65. Graven, work cited above at note 7, p. 157.

66. Hall, work cited above at note 8, p. 112. "The advertently negligent actor has not been prevented from acting by the foresight of the possible result." Warnke, work cited above at note 54, p. 67.

67. See below at pages 412-414.

mum punishment authorized for a *dolus eventualis* offence will in all cases be much greater than that authorized for an advertent negligence offence. For those offences where negligence is not punishable, the court's choice of *dolus eventualis* or advertent negligence will mean conviction or acquittal.

It is partly for this reason that some commentators, most notably in Germany, have argued for an interpretation of *dolus eventualis* based not upon the attitude of the actor toward the foreseen harm, but upon the probability of harm he foresaw.[68] According to this argument, known in Germany as the "theory of probability" *(Die Wahrscheinlichkeitstheorie)*, *dolus eventualis* exists "when the actor had foreseen the [harmful] result as probable, advertent negligence when he had only said to himself that the result is possible."[69] This approach presents the obvious difficulty of "drawing the line" between the probable and the possible and the gradations thereof, but, it is argued by the main proponents of the theory, Grossmann and Grünhut, this difficulty is only "quantitative": the judge has before him certain objective facts, such as, taking an automobile homicide case as an example, the speed at which the car was being driven, the number of pedestrians on the roadway, the road conditions, etc., and he has only to make a judgment from these proven facts as to the degree of harm the situation presented. This, so the argument continues, is the ordinary task of the judge requiring no special insight or knowledge of human nature. It is far more manageable, therefore, than inquiring into the attitude (the "psychic process") of the actor toward the foreseen harm.[70]

The American writer, Helen Silving, has argued further that the prevailing European conception of *dolus eventualis*, by "its disregard of the degree of objective probability . . . that the consequence will occur," produces results that are "absurd."[71] She supposes the case of two motorists, one who engages in extremely dangerous conduct (driving at the excessive speed of 190 kms. per hour) trusting that he will not hit anyone and the other who engages in much less dangerous conduct (driving at 65 kms. per hour, assuming this also to be excessive) but not caring about killing another person. If both motorists should hit and kill someone, then, according to the European conception of *dolus eventualis*, the latter is guilty of *dolus eventualis* (and hence intentional) homicide, while the former is guilty only of negligent homicide. This is the result she considers "absurd," apparently because it fails to take into account the relative dangerousness of each actor's conduct.[72]

Whatever the merit of these two arguments for the theory of probability,[73] the fact remains that the explicit language of Art. 58 (1), second paragraph, that the offender "commits the act *regardless* that such consequences *may* follow,"[74] precludes

68. Warnke, work cited above at note 54, pp. 59-61. The second reason lies in the theoretical controversy in Germany on which mental elements justify *dolus eventualis*' classification as a form of intention. See above at note 55.

69. *Id.*, p. 59.

70. *Id.*, pp. 60-61.

71. Silving, work cited above at note 21, pp. 227-28.

72. Silving refers also to "the practical impossibility of differentiating" the two mental states. *Id.*, p. 228.

73. The second motorist who drives slower, it can be argued, displays, in his not caring about killing another person, a subjective dangerousness or "dangerous disposition." See Graven, work cited above at note 7, p. 157.

74. The French version of Art. 58 (1), second paragraph, is still more explicit: ". . . lorsque l'auteur, . . . l'accomplit néanomoins *en acceptant* celles-ci *pour l'éventualité* ou elles se produiraient. "The Amharic text is closer in meaning to the French: ". . . ጥፋተኛው . . . የሆነው ፥ ይሁን ፥ በማለት ፥ ይህንኑ ፥ የወንጀል ፥ ተግባሩን . . . በፈጸመ ፥ ጊዜ ፥ ነው ።"

an interpretation of *dolus eventualis* based solely upon the high degree of harm foreseen by the actor. It is the actor's attitude toward that foreseen harm, his willingness to bring it about, that under the Penal Code is the indispensible element of *dolus eventualis*. The high degree of the harm foreseen is assigned the important but secondary role of aiding in the proving of that attitude. This weighting is consistent with the overall theme of the Code to prefer subjective factors, what Art. 23 terms "the moral element," to objective factors as the basis for punishing offenders.[75]

How dolus eventualis fits in the 1957 Penal Code.

When the drafter and the Codification Commission decided to include the definition of *dolus eventualis* in the basic Penal Code article that defines criminal intention instead of treating it as a form of advertent negligence or as an entirely separate state of mind,[76] they made a decision that is crucial for those who must

75. "The Code must make it clear at the outset that it is chiefly concerned, not with the art and the result as such, but with the wrongdoer, for judgment is not given with respect to an act, but with respect to the human being who performed it. This subjective conception of criminal law should inspire the Code, the more so since it is in conformity with the tradition of the Fetha Nagast." *Exposé des Motifs*, quoted in Graven, work cited above at note 7, p. 59. Perhaps the clearest example of this orientation is the Code's provision on the punishment prescribed for an attempt. The offender "is liable to the punishment attaching to the offence he intended to commit." Art. 27 (3). The Code draws short of totally ignoring the factor of objective harm by authorizing mitigation of punishment for an attempt "if circumstances so justify." *Ibid.* Another concession is made for the death penalty which under Art. 116 (1) is limited to offences "which are completed."

76. *Dolus eventualis* is treated in most continental European countries and in countries whose penal law is derived from continental Europe as a form of intention. This is often done by statutory provision: "Anybody . . who considers [effectuation of the definitional elements of the act] possible and does not mind it, acts intentionally." *German Draft Penal Code E* 1962, Art. 16, translated in the *American Series of Foreign Penal Codes*, work cited above at note 27.

"Whosoever willingly effectuates those facts which according to statutory definition are the elements of the crime, or whosoever realizes that by his conduct he may effectuate them and, in that case, would approve thereof, acts intentionally." *Penal Code of Greece of* 1950, Art. 27 (1), translated in Lowenstein, work cited above at note 30, p. 146.

"A criminal offence is committed with intent when the offender . . .was conscious that a prohibited consequence might result from his activity or omission and had consented to its occurring." *Yugoslav Criminal Code of* 1951, Art. 7 (2), translated in M. Acimovic, "Conceptions of Culpability in Contemporary American Criminal Law," *Louisiana L. Rev.*, vol. 26 (1965), p. 31.

"An act is considered to have been committed intentionally if the actor foresaw that the act would accomplish the constituent element of an offence and such accomplishment was not contrary to his will." *Republic* of *China (now Taiwan) Criminal Code of* 1935, Art. 13 (II), translated in L. Fuller & H. Fisher, *The Criminal Code of the Republic of China* (Taipei, Sino-American Legal Series, 1960), p. 5.

In some countries, the most notable examples being Switzerland and Germany, the courts, on the basis of history or scholarly writings on the subject, have accomplished the same thing by interpreting the concept of intention to include *dolus eventualis*, though the Penal Codes are silent on the subject. See below at notes 85 and 110.

Not every continental European country views *dolus eventualis* as a kind of intention. In France, for example, it is included within the state of mind of advertent negligence. Graven, work cited above at note 7, pp. 156-57; Bouzat & Pinatel, work cited above at note 6, p. 189. This is also the approach in England and the United States. See above at note 57.

The German theorist, von Soden, proposed that *dolus eventualis* be viewed as a separate state of mind category falling in between intention and advertent negligence *(Die Dreiteilungstheorie)*. Warnke, work cited above at note 54, p. 57. This proposal has not met with acceptance in Germany or elsewhere one reason being, as Warnke says, the ineritia of a penal law "that, until now, knows only intention and negligence." *(Ibid.)*

apply the Code. As a form of intention, *dolus eventualis* is a state of mind justifying punishment for practically all offences in the Code. The only exceptions are (1) when the Code article makes punishable only negligent conduct, or (2) when the Code article specifies some special element for which *dolus eventualis* is insufficient. The applier of the Code accordingly must pay strict attention to the words used to define the particular offence.

Most statutes in the Code specify only those objective circumstances which must exist and the specific consequence which must occur before criminal liability under that statute is established. For example, the girl must be below the age of fifteen for sexual outrage under Art. 594 or be between the ages of fifteen and eighteen for sexual outrage under Art. 595, the property taken by the offender must be "the property of another" for theft under Art. 630, a fact imputed to another must be "such as to injure his honour or reputation" for defamation under Art. 580 (1), etc. For all such offences, *dolus eventualis* under Art. 58 (1), second paragraph, no less than "full knowledge and intent" (i.e., "will") under Art. 58 (1), first paragraph, is sufficient for criminal liability. In other words, a person who violates these objective elements of the offence, as by having sexual intercourse with a girl below the age of fifteen or by imputing to another a fact that injures that other's honour or reputation, is punishable if he was aware the girl *was* below the age of fifteen or the fact *was* injurious to the other's honour or reputation (Art. 58 (1), first paragraph)[77] or if he was aware the girl *might* be below the age of fifteen or the fact *might* be injurious to the other's honour or reputation, and he did not care (Art. 58 (1), second paragraph).

There are, however, some Code articles which, with respect to one or more specified objective circumstances, require more than that these objective circumstances exist; the person is required to have *actual knowledge* of their existence before he becomes criminally liable. For these offences, the person's awareness that such circumstance or circumstances *might* exist and his indifference towards their existence is not the equivalent of *knowing* they exist, and hence for these offences only "full knowledge and intent" and not *dolus eventualis*, will suffice for criminal liability. Thus, the offence of calumny, Art. 580 (2) of the Code, is defined so as to require that the offender utter or spread false and defamatory statements "with knowledge of their falsity." Such actual knowledge is indispensible to guilt under that provision. For this offence, being aware the statements might be false and being indifferent towards that fact would not be enough. False denunciation, Art. 441 (a), likewise requires that the offender denounce to the authorities as the perpetrator of an offence "a person he knows to be innocent" and thus, as a Swiss case dealing with an identical provision in the Swiss Penal Code has held, cannot be committed unless the offender actually knew the person to be innocent, and not merely was aware he might be and did not care.[78] A third example is Art. 373 (1) (b) of the Code which punishes the person who "knowingly uses . . . false or counterfeit

77. See above at pages 378-379.

78. Ministère public du canton d'Argovie c. Morgenthaler (Trib. féd, Switz., Dec. 1, 1950), *J. des trib.* (Droit pénal), p. 146, where the Swiss court said: "By using the terms 'that he knew to be innocent' the legislator wanted to require that the offender be aware of the inaccuracy of his denunciation. . . . He who restricts himself to knowing that an accusation is *perhaps* false does not make it against a person he knows to be innocent." Translated for the writer by Miss Marta Rozankowskyj, *Licence en droit*, licensed translator, Geneva, Switzerland.

[official] marks [e.g., seals, rubber stamps, labels] as genuine or unused." The offender, to be punished under this article, would have to *know* that the official mark he is using is false or counterfeit. Here, too, his awareness that it *might* be false or counterfeit and his indifference toward that fact would not suffice for criminal liability.[79]

This decisive role played by the words of a Code article is well illustrated by Art. 50 (1) of the Code. Art. 50 (1) deals with "intentional or culpable irresponsibility," and reads: "The provisions excluding or reducing liability to punishment shall not apply to the person *who in order to commit an offence intentionally* put himself into a condition of irresponsibility or of limited responsibility by means of alcohol or drugs or by any other means . . . ." (Emphasis supplied.) Addressing himself to the term, "intentionally," in Art. 50 (1) and relying upon the fact that *dolus eventualis* is a form of intention, Dr. Graven, in his commentary on Art. 50 (1), makes the following observation: "Under sub-art. (1), [the accused remains fully liable when he] drinks either in order to do wrong or when he knows and accepts the possibility of doing wrong (e.g., he knows he must drive and, being aware that he might run a pedestrian down if he drinks too much, tells himself that it is late at night so that nobody will see him if he runs a pedestrian down)."[80] Graven's example accurately describes an attitude of indifference toward the safety of pedestrians on the road and, thus, accurately describes a *dolus eventualis* state of mind. However, what Graven has done is to include *dolus eventualis* in Art. 50 (1) when it is specifically excluded by the phrase, "in order to commit on offence." The person in Graven's example may have shown deplorable indifference toward the safety of others, but he hardly can be said to have drunk alcohol and become irresponsible "in order to" run a pedestrian down. His purpose in drinking was only to enjoy himself. The phrase "in order to" used in Art. 50 (1) and phrases of similar import such as "for the purpose of" and "with the object of" demand more than a *dolus eventualis* state of mind.[81]

79. If the actor's actual knowledge can be proved, other elements of the offence can be established with *dolus eventualis*. Thus, in Art. 580 (2), it is provided that the imputations or allegations known to be false must constitute an "injury to honour or reputation." A person who knowingly utters false statements and who is indifferent to whether they are injurious to the other party's honour or reputation violates Art. 580 (2).

80. Graven, work cited above at note 7, p. 139.

81. It could be that Graven is relying upon Swiss decisions which hold that for a person's "design," as for his intention, *dolus eventualis* is a sufficient state of mind. Thus, for example, in Meierhofer c. Ministère public du canton de Zurich (Trib. féd., Switz., July 8, 1954), *J. des trib.* (Droit pénal), p. 54, the offender knew that he was denouncing an innocent man to the authorities. It was held by the Swiss court that the Article's requirement that the denouncement be "with a view to having penal proceedings instituted against the person" was satisfied by proof that the offender was willing to have such proceedings instituted. That the offender's purpose in denouncing the man might have been to clear himself of charges was held irrelevant. According to such reasoning, it is possible to argue that in Graven's example the person's purpose in drinking alcohol, i. e., "in order to commit an offence," could also be established by evidence of his willingness to have an offence occur, even though his actual purpose was only to drink and enjoy himself. With such a view of *dolus eventualis* the writer must disagree. Language in a Code article such as "in order to," as in Art. 50 (1), or "for the purpose of," as in Art. 261 (b), or "with the object of," as in Art. 450, and other similar phrases denoting a *specific purpose* for acting, clearly mean that the actor must have *desired* that particular goal when he was acting. To say instead that a specific purpose to bring about a particular result can be established by showing that the actor was, through indifference or some other reason willing to have that result occur, stretches words beyond their ordinary meaning, and thus is prohibited by Art. 2 (1) of the Penal Code, the

In the pages that follow, we will identify the characteristic attitude of *dolus eventualis* using cases from Switzerland whose Code served as the principal foreign source of the 1957 Penal Code.[82] This will be followed by general rules on when to apply *dolus eventualis*. Next, three homicide cases, one from Germany and two from Ethiopia, will be examined in considerable detail. This examination has two purposes: first, to illustrate the operation of these general rules in a very serious yet common type of criminal offence, and, second, to demonstrate the sort of painstaking analysis of the facts needed before a court can be satisfied beyond a reasonable doubt that the *dolus eventualis* attitude was in the mind of the actor. Lastly, and as a ground for the concluding section, we will examine the problem of proving *dolus eventualis* to see why this problem is even more acute in Ethiopia than in continental Europe.

The characteristic attitude of dolus eventualis: two Swiss decisions.

The leading Swiss case on *dolus eventualis* is *Elsasser c. Procureur général du Canton de Berne*, decided in 1943,[83] a case of fraudulent misrepresentation in violation of Art. 148 of the Swiss Penal Code, the model for Art. 656 of the Ethiopian Penal Code.[84]

The prosecution's evidence showed that during World War II one Ernest Hertig, a chemical manufacturer, had received large quantities of sugar, a food commodity in short supply due to the war, from the Swiss Federal War Office for Food. The sugar was allocated to Hertig specifically for the purpose of manufacturing chemicals. In violation of this condition, Hertig sold part of the sugar to bakers

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so-called "principle of legality." See Strauss, work cited above at note 10, pp. 419, 429, 440. If the drafter of the Code, by including the definition of *dolus eventualis* in Art. 58, meant to make *dolus eventualis* a sufficient state of mind even for language in a Code article that appears on its face to exclude such a state of mind, then he did not make *his* purpose clear enough.

82. Graven, work cited above at note 7, pp. 2-3; S. Lowenstein, "The Penal System of Ethiopia," *J. Eth. L.*, vol. 2 (1965), pp. 385-87. Dr. Graven in his commentary on Art. 58 (1), second paragraph, draws heavily on Swiss case decisions. Graven, work cited above at note 7, pp. 156-58. Other European Codes were consulted by the drafter. Graven mentions the Italian, Greek and Yugoslav, in particular. *Id.*, p. 2.

83. Trib. féd., Switz., May 21, 1943, *J. des trib.* (Droit pénal), p. 73. The case was translated for the writer by Miss Marta Rozankowskyj (see note 78 above). Swiss decisions are written in either French, German or Italian, depending upon the language spoken by the accused. Elsasser's tongue was German. The court's decision thus was written in German and then translated into French for publication in the *Journal des Tribunaux*. The translation for the writer into English is from this French version.

84. Art. 148 of the Swiss Penal Code reads in part: "Any person who, with intent to make an unlawful profit for himself or another, shall fraudulently mislead another person by falsely representing or concealing facts or shall fraudulently use the error of another and thus cause the deceived person to act detrimentally against his own or another person's property, shall be confined in the penitentiary . . . ." Translation, Friedlander & Goldberg, "The Swiss Federal Criminal Code," *J. Crim. L., Criminol., & Pol. Sci.*, vol. 30 (Supp., 1939), p. 53. Art. 656 of the Ethiopian Penal Code reads in part: "Whosoever, with intent to obtain or to procure to a third person an unlawful (sic: enrichment), fraudulently causes a person to act in a manner prejudicial to his rights in property, or those of a third person, whether such acts are of commission or omission,

a) either by misleading statements, or by misrepresenting his status or situation, or by concealing facts which he had a duty to reveal; or

b) by taking advantage of the person's erroneous beliefs, is punishable . . . ."

on the so-called "black market." Hertig, not satisfied, decided to sell to bakers quantities of sugar much greater than the quantity he actually had in his possession or he could expect to receive from the War Office for Food. Warner Elsasser, the accused, was enlisted by Hertig to locate potential buyers for the sugar. In late 1941 and early 1942, Elsasser, as Hertig's agent, sold a total of seven tons of sugar to two bakers, receiving payment for the sugar in advance of delivery. Elsasser promised to deliver the sugar to both bakers within a very short time. The sugar was never delivered. In 1943, Elsasser and Hertig were arrested and prosecuted, as stated above, for obtaining money fraudulently.

The two men were alleged to have committed fraud by obtaining money for sugar which they never intended to deliver. Hertig, having dealt directly with the Food Office, took the buyers' money knowing that the sugar would never be delivered. However, since Elsasser had never dealt with the Food Office, it would have been quite difficult to prove that he knew that no additional sugar was going to be allocated to Hertig and, therefore, that delivery of the sugar could never be made to the buyers. Therefore, the prosecution attempted to prove Elsasser's intention to defraud the buyers by showing that he had acted with *dolus eventualis* (in French, *le dol éventuel)*, a form of intention in Swiss law as it is in Ethiopian law.[85]

It could easily be proved that Elsasser was aware, when he made the sale to the buyers and promised delivery, that Hertig did not have the sugar in stock at that time. In addition, he must have been aware that sugar was a "restricted commodity." It could be proved, in other words, that Elsasser was aware of the *risk* of not being able to deliver the sugar as promised and yet, despite this awareness, he accepted the buyers' money. This, as the Swiss federal *Cour de Cassation* (appellate court) pointed out, was not enough to prove *dolus eventualis*. If Elsasser, though aware of this risk, nevertheless believed that the sugar would be delivered (perhaps because of what Hertig had told him), and, more important, was unwilling to keep the money if it were not delivered, then, no matter how mistaken or even naive his belief was, he would be guilty of no more than advertent negligence and could not be convicted under the Swiss (or Ethiopian) provision.

What had to be proved for *dolus eventualis* was stated by the Swiss appellate court in the following language: that Elsasser "was aware from the beginning that he might find it impossible to deliver the sugar and [that] he had the idea of keeping the money received in advance anyway should such a case arise."[86] This nicely spells out the selfish attitude involved in *dolus eventualis*.

The question remained as to how to prove that such an attitude had existed in Elsasser's mind. Elsasser had not admitted that he had had such an attitude. On the contrary, he had denied its existence and claimed, instead, that he had believed all along that the sugar would be delivered. There were no positive acts on Elsasser's part showing otherwise. Despite this lack of direct evidence, the attitude

85. *Dolus eventualis* was not explicitly included in Art. 18 of the 1942 Swiss Penal Code, the article defining intention. In view of the history in Switzerland of including *dolus eventualis* under intention, the Swiss court implied its presence in Art. 18, reasoning: "Art. 18 . . . must be considered to include [*le dol éventuel*] as long as the text of this provision does not in the least exclude this interpretation." *J. des trib.*, p. 77.

86. *Id.*, p. 78.

amounting to *dolus eventualis* could be inferred from his action, the court said, if the possibility of the harmful result occurring "would have imposed itself on the mind of the actor in such a way that his act could not be interpreted in any other way than the acceptance of this result"; if, in other words, the probability of not being able to deliver the sugar had been objectively so high that it would have had to have been clear to Elsasser, and that therefore, he must have been willing to have such a result occur when he accepted the buyers' money. There was no proof in the case that the probability was this high. The evidence produced by the prosecution, therefore, failed to establish a *dolus eventualis* fraud beyond a reasonable doubt.[87]

The later Swiss case of *Cretenoud c. Procureur général du Canton de Vaud*, decided by the federal *Cour de Cassation* in 1960,[88] further explains the meaning of *dolus eventualis*.[89] Cretenoud was the manager of a *kiosque*, a small retail shop that sells newspapers, cigarettes, chocolates and the like. His duties were to take care of the *kiosque*, sell the merchandise provided to him by his employer and turn over all sales revenues to his employer. For this he received a fixed salary.

From the beginning, Cretenoud seemed more interested in enjoying himself than in working. He opened the store late. He frequented cafés or went to watch sporting events, leaving care of the store at these times to other persons, sometimes children. He neglected his bookkeeping, often returning unsold newspapers to his employer too late for his employer to receive reimbursement from the publisher. At the time he left his job, about one year after he was hired, he was keeping no records at all and was unable to account for Sw. fr. 7,826.50 (roughly Eth. $ 4,800).

Cretenoud was prosecuted for "unfaithful management" under Art. 159 of the Swiss Penal Code, the model for Art. 663 of the Ethiopian Penal Code ("Mismanagement of private interests").[90] Both provisions punish the person who intentionally causes harm to another's property with which he was legally or contractually entrusted.

Cretenoud was convicted on the theory that he had harmed his employer's property interests with *dolus eventualis*. His state of mind in this regard could easily be proved. He could not have been opposed to injuring his employer's financial interests to have behaved the way he did. The probability of causing harm to his

87. The trial court and, apparently, the prosecutor had mistakenly believed that awareness of the possibility of the harm's occurring might alone allow an inference of *dolus eventualis*. Other relevant evidence on the issue of *dolus eventualis* may have existed but was not produced or considered at the trial. Therefore, the case was returned to the trial court for reconsideration.

88. Trib. féd., Switz., Jan. 13, 1960, *J. des trib.* (Droit pénal), p. 74. The translation of this case appears in Lowenstein, work cited above at note 30, p. 143. The double translation problem mentioned above at note 83 does not exist in the *Cretenoud* case since Cretenoud's tongue was French and hence the opinion was written in French.

89. The case is considered a significant one within Switzerland. See comment on case by C. Bonnard, *J. des trib.*, cited above at note 88, p. 79, also translated in Lowenstein, work cited above at note 30, p. 145.

90. Art. 159 of the Swiss Penal Code reads in part: "Whoever dissipates the resources of another person entrusted to him by law or contract shall be confined in prison. " Translation, Friedlander & Goldberg, work cited above at note 84, p. 54.

Art. 663 of the Ethiopian Penal Code reads in part: "(1) Whosoever is legally or contractually bound to watch over the property rights of another, and who intentionally causes prejudice thereto by misusing his powers or by failing in his duties, is punishable with simple imprisonment or fine."

employer by his behaviour (not keeping records, leaving the store in the care of others, sometimes children, failing to return newspapers in time for his employer to get reimbursement from the publisher) was unmistakably clear. Accordingly, the inference of *dolus eventualis* that could not be drawn in Elsasser's case because the probability of harm to the buyers was not proved to be high enough, could be drawn in Cretenoud's case.[91]

Nor did the prosecutor have to rely on inference alone. There was separate, more direct, evidence of Cretenoud's state of mind. A friend of his, who was also a *kiosque* manager, had warned him of the probable consequences of his behaviour. His response had been to laugh at her. A subordinate had quit over the way he was managing the *kiosque*, yet Cretenoud had made no change in his behaviour. Plainly, he was not interested in working but wanted only to enjoy himself even if it resulted in harm to his employer's interests: the selfish attitude which is the hallmark of *dolus eventualis*.[92]

What is also interesting about the *Cretenoud* case is the Swiss court's attempt to distinguish *dolus eventualis* from advertent negligence. The court observed what has been pointed out before: that there is a danger of confusing the two because each involves (1) the person's awareness that his action may produce a harm forbidden by law and (2) his continued action in the face of that awareness. The point "which catches the decisive difference" between the two states of mind, according to the court, is that the *dolus eventualis* offender "consents" to the production of the harm, i.e., is willing to have it come about, whereas the advertently negligent offender "far from consenting to the eventual result of his acts, on the contrary rejects it and expects that it will not come about."[93]

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91. The probability of the harm's occurring might have been high enough in the *Cretenoud* case to constitute knowledge of certainty or near certainty, the second kind of intention considered in Part I. The trial court, in fact, had found this intention. The cantonal and federal appellate courts did not feel it necessary to "go that far." It may have been that the appellate courts wanted this opportunity to clarify the *dolus eventualis* standard within Switzerland in view of some confusion as to that standard in earlier decisions. See comment on case by C. Bonnard, cited above at note 89.

92. The reference to Cretenoud's *dolus eventualis* attitude of wanting "to enjoy himself" even at the expense of his employer's interests does not conflict with the earlier analysis of the person in Graven's example who drank alcohol "in order to enjoy himself" knowing that he had to drive and not caring about hitting a pedestrian. See above at note 81, and accompanying text. The writer acknowledged there that the attitude of the person in Graven's example constituted a *dolus eventualis* attitude. What was pointed out there is that Art. 50 (1) of the Ethiopian Penal Code specifically requires that the *purpose* of drinking be to commit a criminal offence and hence a *dolus eventualis* attitude is not sufficient under that Article. In the case of both the Swiss and Ethiopian provisions on "mismanagement of private interests," there is no specific requirement as to the *purpose* of the offender's action (see the articles quoted above at note 90) and, therefore, *dolus eventualis* is a sufficient state of mind for guilt.

93. The court's opinion reads: ". . . l'auteur, loin de consentir au résultat éventuel de ses actes, le refuse au contraire et compte qu'il ne se produira pas." (*J. des trib.*, cited above at note 88, pp. 77-78), incorrectly rendered in Lowenstein's translation of the case as: ". . . the offender, far from consenting to the eventual result of his acts, on the contrary refuses to believe that it, in fact, will come about." Lowenstein, work cited above at note 30, p. 144.

Other Swiss cases illustrating further the types of offences in which *dolus eventualis* may be present follow. The first reference is to the Ethiopian Penal Code (E. P. C.) article that corresponds to the Swiss Penal Code offence involved in the case. The Swiss Penal Code (S.P.C.) article and citation to the *Journal des Tribunaux* follow. Titles of the Swiss Penal Code articles have been taken from Friedlander & Goldberg, work cited above at note 84. Translations of the cases were done for the writer by Miss Marta Rozankowskyj (see note 78 above).

General rules for applying dolus eventualis.

These two Swiss cases show that the *dolus eventualis* actor's attitude of willingness is a decision he makes to accept causing harm "as part of the bargain,"[94]

E.P.C., Art. 400. Uttering false or adulterated goods. (S.P.C., Art. 154. Selling adulterated goods.) Probst c. Ministère public du canton de Zurich (Trib. féd., Switz., May 1, 1963), *J. des trib.* (Droit pénal), p. 74. "The intention of cheating third parties in business relations is . . not excluded by the fact that the firm . . has sold the coins to the appellant expressly declaring that they were imitations. Even he who informs the first buyer could have imitated the merchandise with a view to cheating third parties, especially if he has the direct idea or even only the possible idea of seeing subsequent buyers cheated. . . . At the very least, the possibility of leading subsequent buyers into erroneous conclusions could be so evident to the manufacturer that his act should be interpreted as an approval of cheating."

E.P.C., Art. 539. Common wilful injury. (S. P. C., Art. 123. Simple assault.) Annen c. Ministère public du canton de Vaud (Trib. féd., Switz, May 15, 1959), *J. des trib.* (Droit pénal), p. 99. Father abused his right of correction by striking his eleven year old son with a leather belt because the son had stolen money from his wallet; "From the fact that Annen let himself be seized by a fit of anger, grabbed a leather belt and lashed his son a good number of times on various regions of the body, one must conclude that he voluntarily caused the bodily injuries. Indeed, he must have known that his action would necessarily bring them about, and even if he did not exactly want this result, he at least accepted it as such." (Query, however, whether this is not "knowledge of certainty or near certainty," rather than *dolus eventualis.)*

E. P. C., Art. 594. Sexual outrage on infants or young persons. (S. P. C., Art. 191. Immorality with children.) Langenegger et consorts c. Ministère public du canton de Schwyz (Trib. féd., Switz., February 11, 1949), *J. des trib.* (Droit pénal), p. 6. Accused had sexual intercourse with two girls below the prescribed age (16, in the Swiss provision); if the accused "acted with the idea that the girl could have been 16 or even older, but that they also held that it was possible that she was younger [and] were determined to act even in the latter case," then they acted with *dolus eventualis.*

E. P. C., Art. 656. Fraudulent misrepresentation (S. P. C. Art. 148, Fraud.) Schmid c. Ministère public du canton de Bale-Ville (Trib. féd., Switz., Sept. 13, 1946), *J. des trib.* (Droit pénal), p. 18. The offence of fraudulent misrepresentation is committed by making misstatements in applying for a loan when the lender "must have considered it, if not certain, at least very probable that he would not be able to pay off in time" and he accepted that result.

E. P. C., Art. 686. Unjustifiable preference (S. P. C., Art. 167. Privilege to one creditor.) Schodler et Hagenbucher c. Ministère public du canton d'Argovie (Trib. féd., Switz., March 24, 1948), *J. des trib.* (Droit pénal), p. 143. The debtor, Schodler, knowing he was insolvent (such knowledge is sufficient for the Swiss provision whereas the Ethiopian provision also requires the debtor to be "bankrupt or [have] given a declaration of default"), gave his creditor, Hagenbucher, a mortgage as security for a loan when he was not required to do so; *dolus eventualis* if Schodler "positively foresaw" that he was favoring one creditor to the harm of the others "with enough seriousness so that the guarantee by means of the mortgage could not reasonably be interpreted in any other way than the acceptance of this result."

E. P. C., Art. 744, Code of Petty Offences. Violation of provisions regarding lotteries, gambling and betting. (Arts. 4 and 6, Swiss Federal law on gaming establishments. Prohibition against gaming establishments.) Stierli et consorts c. Ministère public du canton de Zoug (Trib. féd., Switz., June 17, 1955), *J. des trib.* (Droit pénal), p. 21. Proprietor of a tavern tried to stop gambling from going on when he was present in the tavern, however did nothing to stop it from going on in his absence. "If he had disapproved of gambling going on when he was not there, he would have done something to prevent it, since, after they had tried to continue playing illegally in his presence in spite of his opposition, he could infer that this would happen even more in his absence. This conclusion was so clearly obvious to him that the [trial court] . . . could interpret his passivity as approval of the gambling going on in his establishment." (Note that on the same facts Art. 744 of the Code of Petty Offences would not be violated because it specifies that the offender must "organize" the gambling, etc. "for profit.")

94. The actor's "taking-the-consequence-into-the-bargain" *(Inkaufnahme)* is the term for the actor's state of mind commonly applied in Germany, although often with the idea of "approving" the consequences *(billigende Inkaufnahme).* Warnke, work cited above at note 54, p. 47; Silving, work cited above at note 21, pp. 226-27.

the price he is ready to pay for the accomplishment of the end he has in mind. Cretenoud weighed the loss of sales revenue to his employer against his own personal enjoyment, and decided to accept the harm to his employer. Elsasser weighed causing harm—not delivering sugar that the bakers had paid for—against his own desire for money, and, although the evidence produced was insufficient to prove it, may have decided to accept the harm to the bakers.

Cretenoud and *Elsasser* are representative of those cases which most societies view as not particularly harmful. In such cases it is easy to see that the actor was willing to accept the harm "as part of the bargain." Contrasted with *Cretenoud* and *Elsasser* are cases where the gravity of the harm caused by the actor is great, such as when the harm is another person's death. In cases of great harm, it is difficult to find that the actor would be willing to accept the harm "as part of the bargain."

What is being suggested here is the *first consideration* for judging cases of *dolus eventualis: the gravity of the harm caused by the actor.* Where that harm is great, the court must presume the actor was not willing to accept it, that instead he opposed the occurrence of the harm and continued the action which created a risk of that harm only because he believed the harm would not occur. This "presumption" in great harm cases will have the effect that all presumptions have, that of alerting the judge to the greater than normal need for clear and convincing evidence of the existence of the *dolus eventualis* attitude.

In all cases of *dolus eventualis*, the *second consideration* will be *to determine whether the actor when he acted was aware of the possibility of the harm's occurring.* The court can infer his awareness from the circumstances of the case; if an ordinary and reasonable man, knowing the same facts as the actor, would have been aware of the particular risk of harm, the court may assume that the actor was aware. This inference, like all inferences, can be rebutted by any evidence showing that, despite what an ordinary and reasonable man would have been aware of, the actor was in actual fact not aware of the risk of harm. It must be remembered that this element of awareness is common to both *dolus eventualis* and advertent negligence and hence by itself cannot constitute proof of *dolus eventualis.* Awareness of the possibility of harm was all that was proved in the *Elsasser* case, and the prosecution for that reason failed.

The *third consideration*, the most difficult for the court, is *to determine whether the actor possessed the attitude required for dolus eventualis.* In making this determination, the court must be on the lookout for certain categories of evidence from which this attitude may be established. These categories are:

(a) The significance to the actor of the end he was seeking or the motive for which he acted. Since the *dolus eventualis* attitude has been described as "the price [the actor] is ready to pay for the accomplishment of the end he has in mind," it follows that the more significant that end the more willing the actor will be to "pay the price" of causing harm. The motive is the reason for the actor's action, that which caused him to act. For example, in *Elsasser* the end sought was money. If it had also been shown that Elsasser was motivated by a special *need* for money, e.g., to pay off some pressing debts or to pay for an operation needed by his child, how much easier it would have been to conclude that he was willing to cause pecuniary harm to the bakers as a consequence of getting that money.

(b) Any acts or statements of the actor tending to demonstrate his willingness to have the harm occur. A good example of this category of evidence is Cretenoud's

laughter when warned by a friend of the probable consequences of his behaviour. Special care will be needed in determining the relevance of this kind of evidence to the actor's attitude. In this section, we will see several examples of acts or statements that appear relevant but, upon analysis, are seen to be ambiguous or wholly irrelevant.

(c) The accused's own admissions. The clear admission or confession by the actor that he was willing to have the harm come about will be rare. More frequent will be cases where the actor admits to the authorities some fact or disposition from which the court may infer his willingness. Here, again, the court must be careful. An admission by the actor that he was aware of the possibility of his action causing harm will have no bearing upon his attitude toward that foreseen harm. It is relevant only to the *second consideration* described above. In the three homicide cases to be analyzed later in this section, we will examine a number of admissions, some helpful and some not helpful in determining the existence of the *dolus eventualis* attitude.

(d) The probability of the harm's occurring. This particularly valuable category of evidence resembles the *second consideration* above, except that instead of awareness of *possibility*, we deal here with awareness of *probability*. Objective probability of harm has been considered earlier as a separate theory of *dolus eventualis*.[95] Its evidentiary role in proving the existence of the *dolus eventualis* attitude has also been considered earlier, in connection with the *Elsasser* and *Cretenoud* cases. In those cases it was shown that the more probable the harm appeared to the actors the more likely it is that he was willing to have the harm occur when he acted. Its value as evidence will increase as the degree of probability increases.

Analysis of a hypothetical case offered by Dr. P. Graven will show how these considerations and categories of evidence interact.

> "A is driving a car and B, his passenger, points to him that he drives too fast and might hit someone. To which A replies: 'You needn't worry. I'm a good driver and nothing is going to happen.' A moment later, B again insists that A should slow down. A then answers: 'I've told you before I'm a good driver. Anyway, it's two o'clock in the morning, the police are asleep and nobody will see us if something should happen.' Thereupon, A runs down a pedestrian who dies."[96]

A's response to B's first warning confirms A's awareness of the possibility of striking someone, the *second consideration* above. As Graven says, it also indicates his attitude of having "rejected" this possibility, another way of saying that he was opposed to such a result and only continued driving at an excessive rate of speed because he believed he was a good driver and so would not strike anyone—the attitude of advertent negligence. Graven then says that after the second statement to B, "it is virtually certain that [A] had accepted the possibility of causing a result against which B had warned him twice and that he is, therefore, gulity of [a *dolus eventualis*] homicide, for it is improbable that he again changed his mind after making this second statement."[97]

95. See above at pages 389-390.
96. Graven, work cited above at note 7, p. 158.
97. *Ibid.*

Graven does not provide A's "motive" for driving at an excessive rate of speed and we must assume, therefore, that no special motive existed. According to the facts, the only "end" A could have had in mind was that of driving his automobile at a fast rate of speed. Graven also does not give facts from which to determine the degree of probability that a person would be struck, such as the actual speed of the car, the driving conditions, the number of persons on the roadway, etc. However, the time stated is 2:00 in the morning when the streets, even in the capital city, are normally empty. The probability of anybody being struck, therefore, must be measured as slight, no matter what the speed of A's car and the driving conditions.[98]

The only evidence to establish the existence of the *dolus eventualis* attitude is A's statement to B that he "is a good driver" and that "anyway, it's two o'clock in the morning, the police are asleep and nobody will see us if something should happen." This statement appears to be evidence, under category (b), of A's willingness to strike pedestrians rather than slow down the speed of his car. However, measured against the *first consideration*, namely, the presumption against an actor's willingness to cause *great* harm and the need, therefore, for particularly clear and convincing evidence of such an attitude, the evidence of A's statement is not sufficient to prove A's *dolus eventualis* state of mind. This *first consideration* and the complete lack of any other evidence in the case—no significant end or motive, no admissions, no probability of the harm's occurring—force a judge to view the statement very skeptically. It is possible, of course, that A meant what he said, that driving his car at a high rate of speed was so important to him (perhaps as it gave him a feeling of power) that he was willing to run a pedestrian down rather than slow his car down. But it seems just as possible that A did not mean what he said. Indeed, coming after A's first statement to B that nothing would happen because A is a good driver and B's insistence for the second time that "A should slow down," it is possible that A, annoyed at B's second interruption, said what he said just to shut B up. It is also possible that A at that time of night uttered the statement due to tiredness and not seriously. This statement, in other words, is too ambiguous to be the basis for a conviction of an offence as grave as *dolus eventualis* homicide.

If we compare A's statement to B with the laughter of the accused in the *Cretenoud* case, the interaction of these considerations and categories of evidence becomes even clearer. Cretenoud's laughter could also be interpreted in an innocent way—for example, a person may laugh as much from nervousness as from mirth—but it is instead "evidence of the highest probative value"[99] because of the relatively low harm involved in the case and the very high probability of that harm's occurring. Another way of viewing this, in particular the key role of the gravity of the harm in judging cases of *dolus eventualis*, is to ask whether we would hesitate to rely upon A's statement to B if it were a matter of running over a chicken.

98. The circumstances make it doubtful whether A could even be convicted of homicide with advertent negligence. Judging from the way most people drive at that time of the night, A's conduct does not appear unreasonable enough to constitute criminal negligence under Art. 59 (1) of the Code. It has generally been held in the United States that excessive speed *alone* does not make a person liable for negligent homicide should he strike and kill somebody, although, admittedly, the standard for criminal negligence, at least where homicide is concerned, is stricter in the United States. R. Perkins, *Criminal Law* (Brooklyn, The Foundation Press, 1957), pp. 667-68, 671.

99. *J. des trib.*, cited above at note 88, p. 78.

A class of great harm cases where *dolus eventualis* is more likely to exist is that of the actor who causes someone's death while in the course of carrying out or escaping from a criminal offence itself dangerous to life. These are offences like robbery or aggravated robbery (Arts. 636 and 637 of the Penal Code), rape (Art. 589), arson (Art. 488), aggravated illegal restraint or "kidnapping" (Art. 561 (1) (b)), etc. These types of cases always include two categories of evidence from which *dolus eventualis* can be implied: the significance of the end the actor is seeking and his motive for acting (category (a)) and the dangerous means or acts employed (category (b)).

A similarity exists between this class of potential *dolus eventualis* cases and the so-called "felony-murder" rule developed in England[100] and applied in the United States. This rule as generally stated deems the actor guilty of the equivalent of intentional homicide, what is called in these countries a "killing with malice" or "with malice aforethought," whenever he causes a person's death in the course of committing or attempting to commit an offence dangerous to life.[101] The rationale for this rule is supplied by the American writer, Perkins: "Certain crimes such as arson, rape, robbery and burglary, have been found to involve such an unreasonable element of human risk, even if the wrongdoer had no such thought in mind at the start, that one perpetrating or attempting such an offence is held to have a state of mind which also falls under the label of 'malice aforethought' so that if homicide is caused thereby it is murder, however unintended the killing may be."[102]

The extraordinary aspect of the Anglo-American "felony-murder" rule is disclosed by the last phrase in Perkins' statement, "however unintended the killing may be." *Any* killing caused by an actor who was engaged in the commission of an offence dangerous to life is treated as if it were intentional and is punishable as such.[103] This is more a matter of social policy than legal theory: the offender is warned that he will be liable to a charge of intentional homicide should he even accidentally cause another person's death while engaged in committing an offence dangerous

100. The Homicide Act of 1957 "purports to have abolished" the "felony-murder" rule in England, but the language of the Act is not conclusive. W. Russell, *Russell on Crime* (12th ed. by J. W. C. Turner, London, Stevens & Sons, 1964), pp. 467, 500-501, 503.

101. This is the more modern statement of the "felony-murder" rule. In the early British common law it was stated as a homicide resulting from an "unlawful act" not necessarily dangerous to life. Perkins, work cited above at note 98, p. 33.

102. *Id.*, p. 713. A British author has suggested that the Homicide Act of 1957 be interpreted to make a killing in furtherance of a felony, "murder," only if "the subjective attitude of mind in the prisoner revealed by evidence [is] that when *acting as he did he realised that he was endangering the other man's life;* or, in other words, that he consciously took the risk of killing the man." (Emphasis in original.) Russell, work cited above at note 100, p. 504.

103. This approach has on occasion led in the United States to astounding results; for example in one case, one of two robbers was held guilty of "felony-murder" where the victim of the robbery shot and killed the other robber. In another case, an arsonist was held guilty of "felony-murder" where his accomplice, while perpetrating the arson carelessly, killed himself. Commonwealth v. Thomas (Sup. Ct. Pennsylvania, 1955), Pa. Rep., vol. 382, p. 639, Atlantic Rep. (2nd Series), vol. 117, p. 204, printed in A. Harno, *Cases and Materials on Criminal Law & Procedure* (4th ed., Chicago, Callaghan & Co., 1957), p. 330; Commonwealth v. Bolish (Sup. Ct. Pennsylvania, 1958), Pa. Rep., vol. 391, p. 550, Atlantic Rep. (2nd Series), vol. 138, p. 447. These and similar types of cases are discussed in S. Kadish and M. Paulsen, *Criminal Law and Its Processes* (2nd ed., Boston Little, Brown & Co., 1969), pp. 347-48. The decision in *Thomas* was overruled by a subsequent Pennsylvania Supreme Court decision, Commonwealth v. Redline, printed *id.*, pp. 342-47.

to life. Through this warning it is hoped to deter him from committing that particular offence or, at least, to induce him to commit it in a less dangerous manner (e.g., to induce the robber to commit robbery with an empty rather than a loaded gun.)[104]

The Anglo-American "felony-murder" rule, in *dolus eventualis* terms, can be said to presume *conclusively* that the offender was willing to cause another person's death as the price of furthering his illegal objective. The "felony-murder" rule, therefore, differs in a critical aspect from the *dolus eventualis* rule for such situations. In *dolus eventualis*, the actor's commission or attempt to commit an offence dangerous to life is only evidence from which his *dolus eventualis* attitude may be implied.

This difference is illustrated in a famous "felony-murder" case from England, *Director of Public Prosecutions v. Beard*.[105] The accused was convicted of a "felony-murder" for causing the death of a thirteen year old girl during a rape. The girl had struggled to escape and, in order to overcome her struggles, the accused had "placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation."[106] Beard was guilty of "felony-murder" regardless of the actual state of his mind when he put his hand over her mouth and thumb on her throat. It would have made no difference whether he meant only to quiet her so as to complete the rape and whether, in addition, he would have abandoned his attempt to rape her had he known that his action would cause her death.

Had the same case occurred in Ethiopia, Beard's guilt of a *dolus eventualis* homicide would not have been clear. As stated, his goal of raping the girl and the inherent dangerousness of the acts involved would be relevant evidence of his willingness to cause her death in the event she resisted. So would be the high probability of death from his acts to stop her struggling. However, *all evidence in the case needs to be examined to determine the existence of dolus eventualis*. For example, there was evidence in the case that Beard was intoxicated when he committed the act of raping the girl. The British House of Lords dismissed this evidence of intoxication with the words: "There was certainly no evidence that [Beard] was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in the furtherance of the felony of rape. Such a killing is by the law of England murder."[107] The evidence of intoxication, held by the court to be irrelevant to the question of "felony-murder," would be relevant to the question of probability and hence to that of Beard's guilt of *dolus eventualis* homicide. If he were drunk, he might have been unaware of how much force he was using on the girl's mouth and throat and thus have been unaware of the high probability of her death.[108]

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104. This policy approach has been criticized: ". . . where it is sought to increase the deterrent force of a punishment, it is usually accepted as wiser to strike at the harm intended by the criminal rather than at the greater harm possibly flowing from his act which was neither intended nor desired by him; that is to say, . . ., to increase penalties on felonies—particularly armed felonies—whenever retaliatory force can be foreseen, rather than on the relatively rarer occasions when the greater harm eventuates." N. Morris, "The Felon's Responsibility for the Lethal Acts of Others," *Univ. Pennsylvania L. Rev.*, vol. 105 (1956), p. 67.

105. House of Lords, Eng., 1920, *All Eng. L. Rep. Reprint*, 1920, p. 21.

106. *Id.*, p. 23.

107. *Id.*, p. 31.

108. Which of Beard's two acts caused the girl's death was not clearly indicated by the court because it was not material to the issue of "felony-murder." It appeared to be the combined effect of the two acts, although there was a mark on the girl's throat indicating "considerable pressure" from the accused's thumb. *Id.*, p. 22.

For further study of the general rules for applying *dolus eventualis*, let us turn now to three more homicide cases, one from Germany and two from Ethiopia.

The German case is the leading one in that country on the subject of *dolus eventualis*. It was decided in 1955 by the German Federal Supreme Court (the *Bundesgerichtshof)*.[109] The facts of the case are as follows: the two accused, J and K, plotted together to assault an acquaintance of theirs, one M (German criminal cases omit the names of the accused and other involved parties), and take his money and clothing. Their scheme was to render M unconscious and while he was unconscious to take the money and clothing they wanted. They thought of three separate methods of making M unconscious. The first was to put sleeping pills in his coffee. This they actually tried, but the pills did not put M to sleep. The second idea they had was to overcome M by force, fasten a leather belt around his neck and tighten it until he lost consciousness. However, when they had an opportunity to use this plan, they did not take it. They subsequently decided to abandon this plan, as they apparently told the authorities, for the significant reason that they did not want to risk choking M to death. Their third plan, chosen to avoid endangering M's life, was to knock him out by hitting him over the head with a small sandbag.

One evening when J and K were staying in M's flat, they decided to put their sandbag plan into operation. When M was asleep, J hit him over the head with the sandbag. The effect was not to render M unconscious, but rather to wake him up. Worse for J and K, the sandbag split open on the third blow. In the ensuing confusion and excitement, and while J and M were grappling, K ran out of the room and came back with a leather belt. He threw it over M's head. He was able after some fumbling to tighten it around M's neck while J held M's arms. M quieted, and J and K began to tie him up. Before they could finish, M regained consciousness and again began to struggle with J and K. K tightened the belt again. When J noticed that M had stopped struggling and was again quiet, he told K to stop, which K did. The belt this time was left tightened around M's neck, the end through the buckle. J and K then finished tying M up and went about the flat taking a number of items of clothing and linen. When they were finished, M's appearance alerted them to the fact that he might be dead. They both tried to revive him, but in vain. They thereupon left the flat. M was, as they had suspected, dead.

The German Supreme Court acknowledged that the actions of J and K did not show an attitude of indifference toward the life of M, but, on the contrary, showed "a feeling of resistance and repugnance" toward causing his death. The court nevertheless found that J and K had committed homicide with *dolus eventualis* and hence could be punished for intentional homicide. The view of the court was that they were willing to bring about M's death in spite of their earlier opposition to such a result because they were more interested in M's property than his life. The reasoning of the court in this regard follows:

> "Even in the case of *dolus eventualis* [in German, *bedingten Vorsatz*], the occurrence of the result might be undesired by the perpetrator. This

109. Decision of April 22, 1955 (Fed. Sup. Ct., Ger. Fed. Republic) *Entscheidungen des Bundesgerichtshofes in Strafsachen*, vol. 7, p. 363. This case was kindly supplied to the writer by Dr. Klaus Warnke of the Center for Comparative Criminal Law, New York University School of Law. It was translated for the writer by Mrs. Ruth Grunfeld, LL.B., researcher in the Haile Sellassie I University, Faculty of Law.

> is so in all cases in which somebody in order to achieve a certain goal reluctantly applies an expedient, because he knows that he can achieve his desired goal only by this expedient . . . . The perpetrator who acts with *dolus eventualis* puts up with [the harmful result] feeling that if he can not achieve his goal otherwise, he will use the undesired expedient. The accused wanted under any circumstances to take possession of the articles that were in M's ownership. . .After [the attempt to do so by less dangerous means] failed, they decided to strangle M, although they had before recognized and discussed its perilous nature. They did this not because they now, contrary to before, believed that the possible result would not occur, but because they did not want to give up their objective under any circumstances, even in the event that the strangling would lead to the death of M."[110]

This statement accurately describes the *dolus eventualis* attitude of willingness. The critical question, though, is whether there was proof of this attitude *beyond a reasonable doubt*. All four categories of evidence were present. First, their end of robbing M of his property was a significant one, though their need for his property, which would have supplied them further with a motive for their action, does not appear in the case. Second, the acts they performed with the leather belt did tend to demonstrate a willingness to have his death occur. Third, they apparently admitted to the authorities, since the evidence could not have come from any other source, that they knew that the use of the leather belt would endanger M's life. Fourth, and perhaps most important, their act of tightening the belt around M's neck and leaving it buckled tight while they went about his flat gathering his property created a very high probability of M's choking to death.

The German appellate court's decision thus was an understandable one. There was, however, other evidence in the case that seems to raise doubts as to J and K's attitude. They had taken considerable precautions not to kill M, right up to the moment of panic when K went for the leather belt. Even during those confused moments, they seemed to show opposition to M's death. J told K to stop tightening the belt when M had again become quiet, and K did as he was told. They then tied M up, indicating that they believed he was still alive and that he might again regain consciousness and cause them trouble. When they realized he might be dead, they made efforts to revive him, evidence pointing away from a willingness to have him dead. Even the strongest evidence against them, that they left the belt buckled around M's neck while they went about the flat, might be explained by the confusion and excitement of the moment — they might not have realized that the belt was buckled. That they took the trouble of tying him up seems to support this possibility.

The case is a close one. The writer feels, however, that the evidence was not "clear and convincing" enough, the standard for great harm cases,[111] to justify conviction of *dolus eventualis* homicide. A reasonable doubt exists, at least in the mind of this writer, and therefore he would have convicted J and K of homicide through

110. *Id.*, p. 369-70. In 1955, when this case was decided, there was no definition of either *dolus eventualis* or intention in the German Penal Code. The German court was relying upon scholarly writings on the subject. A definition of these state of mind concepts appears in the new German Penal Code. See above at note 76.

111. See the *first consideration* discussed above at p. 398.

advertent negligence (in addition, of course, to robbery).[112] The case is a particularly suitable one for the following admonition by the Swiss writer, Logoz:

> "If the judge remains in doubt after careful examination of the mental process of the offender, he must resolve such doubt in conformity with the principle *in dubio pro reo* [when in doubt favour the accused], that is to decide in favour of [advertent] negligence rather than dolus eventualis."[113]

The next case for discussion is *Public Prosecutor v. Bekele Ghebre Michael*, decided by the Addis Ababa High Court in 1965 G.C.[114] The case began as a negligent homicide charged under Art. 526 (1) of the Penal Code, but during the trial the High Court ordered the prosecutor to alter the charge to one of intentional homicide under Art. 523, exercising a power the court apparently is given by Art. 119 (1) of the 1961 Criminal Procedure Code.[115]

The facts upon which the court relied were supplied by two witnesses, both policemen. The accused was a taxi driver. He was driving his taxi in Addis Ababa on the street near the Coca-Cola factory at 8:30 p.m. on a rainy night when he ran over a man lying in the roadway. The body was dragged by the car for approximately five kilometers. It was discovered when the accused stopped at a gas station to refuel his car. The car (a Fiat 1100) had to be lifted in order to extricate the body from the underpart of the car. The body was so mutilated that at first it was impossible to determine its sex.

The accused admitted to the police witnesses, once at the gas station and once at the police precinct station, that he had seen the man lying on the street and that he had not stopped his car, but "had to run over him." He "feared that if he stopped he would be charged with killing the man." He further admitted that he heard "a noise" underneath his car after he ran over him. To the first witness, he said that he thought that the noise was due to the rough road so he did not stop. To the second witness, at the police station, he said that he "could not stop because it was raining" and besides, he thought the reason for the noise was that "something was wrong with his tire."

A third witness, also a police officer, testified that the accused had told him "he had knocked the man down." As to the noise under his car, the accused allegedly stated that he thought it was due to the rough road and the fact that

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112. A robbery in which a death occurs is treated in Germany as an aggravated robbery. German Penal Code of 1871, Art. 251, translated in *The American Series of Foreign Penal Codes*, work cited above at note 27, vol. 4, p. 130. (The adoption of the new German Code, to the knowledge of the writer, has not proceeded to the Special Part.) It would also be an aggravated robbery under the Ethiopian Penal Code, Art. 637 (2).

113. P. Logoz, work cited above at note 30, p. 66, translated in Lowenstein, work cited above at note 30, p. 143.

114. Addis Ababa High Court, 1965, Crim. Case No. 553/56 (unpublished). The case was translated for the writer from Amharic by two Law IV students, Ato Paulos Tesfa Giorgis and Ato Abdul Wasie Yusuf, independently of each other. No substantial differences were noted between the two translations. The case was located in the files of the Addis Ababa High Court by Ato Paulos. It is in the Law Faculty library.

115. The trial court is given the power in Art. 119 (1) to alter a charge on its own motion "where the accused is brought to trial on a charge containing essential error or omissions . . " The only qualification of this power appears to be Art. 120 (3) which requires the court to order an adjournment "if proceeding immediately with the trial is likely .to prejudice the accused in his defence.. . "

"he had hit a stone." The accused made a statement in court denying almost everything. He said that he ran over nobody and heard no noise under his car. He admitted that a body had been found under his car at the gas station, but he claimed that it had not been attached to his car, but had been lying on the ground. The court rejected this version and credited the accused's alleged statement that he had run over a man lying in the street, and not that he had knocked someone down.

Bekele was convicted of intentional homicide under Art. 523. Quite aside from the *dolus eventualis* question, there is a serious defect in this conviction. No evidence was presented that the person who was lying in the road *was alive* when he was run over by the accused. Any one of the massive wounds described by the medical expert would have caused the death of the deceased and any one of them could have been inflicted by some other person or car before the accused ran over and dragged the deceased. The deceased might even have been clubbed and murdered and left in the road. Thus, the prosecutor failed to prove that the act of the accused *caused* the death of the victim, as required by Art. 24 of the Code.[116] Based upon the evidence produced in court, the only charge that could properly have been brought against the accused was under Art. 487, "outrage on the repose and dignity of the dead;" there is no doubt that the dragging amounted to "mutilation" under sub. art. (1) (b) of that article.[117] For his conviction under Art. 523, Bekele was sentenced to eight years of rigorous imprisonment.

We can, however, for the purpose of our discussion here assume that such missing evidence had been introduced, and proceed to consider the question of the accused's state of mind. The prosecutor's only argument on this question was that the accused was negligent and that his negligence was "gross." The High Court was more explicit: "It is a grave fault," the court said, for a person "to run over a body for fear that he would be blamed for the act if he stopped." It was also "a grave fault," the court continued, when the accused "knowing that he had driven over a body lying in the road and hearing a noise under his car, ... did not stop to look under his car."

Since the court convicted the accused of intentional homicide under Art. 523, without saying that the accused actually intended the death, it probably had Art. 58 (1), second paragraph (the *dolus eventualis* provision) in mind.[118] But, if so, the court misapplied that provision. The accused's admission that he had seen the man lying in the street before he ran over him did furnish proof of one of the mental elements of *dolus eventualis:* the accused's awareness, in the words of Art. 58 (1),

116. Evidence that the person was alive when he was run over by the accused would have had to come from witnesses who had seen the person move or make a sound before being run over by the accused, or who had heard a sound come from the person at the moment he was actually run over by the accused.

117. Art. 487 of the Penal Code reads in part: "(1) Whosoever: . . . (b) violates or profanes the resting place of a dead person, degrades or defiles a funeral monument, or profanes or multilates a dead person, whether buried or not; . . is punishable with simple imprisonment or fine." As pointed out earlier (see above at notes 12 and 13), this article punishes intentional action only, even though the word "intention" does not appear therein.

118. It is also possible that the court in the *Bekele* case, like the court in the next case to be discussed, the *Mekeria* case, applied Art. 523 not realizing that it only punishes intention. This does not seem likely, however, both because of the language of the court quoted above and because the court expressly ordered the charge increased to Art. 523 from negligent homicide under Art. 526.

second paragraph, "that his act may cause illegal and punishable consequences." Having seen the man lying in the roadway, the accused must have been aware that he *might* be alive and that driving over him might cause his death, the *second consideration* in a *dolus eventualis* case. However, was there sufficient evidence of the *third consideration*, that the accused had driven over the man *willing to kill him?*

The evidence produced in the case does not prove this attitude. The probability that the man in the roadway was alive was high enough, evidentiary category (d), to be evidence that the accused when he drove over the man was willing to cause his death. However, this can *only* be true if Bekele had been able to avoid the man, yet drove over him anyway. His statement to the police that he "*had* to run over him" raises a substantial doubt on this crucial issue in the case. It seems to suggest that the accused was unable to avoid the person. Since it was dark (8:30 p.m.) and raining "rather heavily," this is not implausible. What was needed was an admission from the accused, category (c), that he could have avoided the body but did not bother to. In the absence of such an admission, no conviction for *dolus eventualis* homicide is possible.[119]

Furthermore, what could have been Bekele's end or motive? To answer this question we have only his statement that he "feared that if he stopped he would be charged with killing the man." While this is not a praiseworthy attitude, is it a significant motive for causing someone's death? Rather, it seems like a motive for not stopping *after* having run over somebody, an interpretation that seems confirmed by his preceding statement that he "had to run over him."

Finally, there is the evidence that the accused had continued to drive, dragging the victim, although he could hear "a noise" under his car. This appears to fall under evidentiary category (b), namely, an act "tending to demonstrate [the actor's] willingness to have [death] occur." However, upon analysis, the evidence is ambiguous. There is, first of all, the accused's claim that he thought the noise was due to such things as "the rough road," a defective tire or the fact that he "had hit a stone." His offering of three separate explanations to three separate witnesses raises some doubts as to the truthfulness of the explanations, but not enough, this writer believes, to discredit this claim. Contradictions and the doubts they raise do not replace actual proof.[120] Moreover, would Bekele have driven his car into a gasoline station if he had thought there was any likelihood it was dragging a dead body?

Even if Bekele had actually known he was dragging a body or had accepted that fact, would this have shown a willingness to *cause death?* The very high probability would have been that the person being dragged already was dead by the time the noise was heard and that Bekele would have known that. Therefore, his continuing to drive for five kilometers, perhaps in the hope that the body would become disengaged, would have shown only a willingness to muti-

119. Depending upon the evidence as to the speed at which Bekele was driving, how bad the road conditions were, whether the road was lighted or not, etc., it might even have been difficult to convict him of homicide through advertent negligence.

120. This is true at least under the common law where falsehoods, fabrications, etc. are given only the auxiliary role of adversely affecting the credit to be given to other evidence offered by the falsifier or fabricator. J. H. Wigmore, *Evidence* (3rd ed., Boston, Little, Brown & Co., 1940), vol. 2, pp. 120-25; S. Sarkar, *Law of Evidence* (11th ed., Calcutta, S. C. Sarkar & Sons, 1965), pp. 49-50.

late someone already run over and believed dead—not the attitude of *dolus eventualis* homicide.[121]

The evidence produced thus falls far short of the high standard of proof required in a case of *dolus eventualis* homicide. The most that Bekele could have been convicted of, again assuming there had been proof that his act had caused the deceased's death, was homicide through advertent negligence.[122]

The third homicide case for discussion is *Public Prosecutor v. Mekeria Yabo*,[123] decided by the Jimma High Court in 1965 G.C. The undisputed evidence in this case was that the accused threw his spear at the deceased piercing him and causing his death. At the time, the deceased was removing beans from the accused's bean field. The evidence as to the accused's state of mind when he killed the deceased was as follows: the accused was in his house when he heard a cry from a woman named Wassie Bayou. According to the accused's statement to the police, she called out "that something had got into the bean field, but she did not know whether it was an animal or some other thing." The accused further stated to the police that following the cry of Wassie Bayou he ran out with his spear to the field. To the police, he said that "he could not distinguish" whether the thing at which he threw his spear "was an animal or a human being." In court, he said that he pierced the deceased "because he mistook him for an animal." Later in his court statement, however, he said that "as it was dark he could not distinguish whether the rustling was made by an animal or a human being," thus repeating what he had said to the police. To the police, he added that before throwing his spear he had seen whatever it was "on the point of carrying away a bundle of beans." Further evidence was that the accused and deceased were neighbors and that they had had no previous quarrel.

The High Court convicted the accused of homicide under Art. 523, but on a theory of negligence, apparently overlooking the fact that Art. 523 is an offence requiring intention.[124] The court said that the accused had caused the death of the deceased "by his failure to exercise due care." Elsewhere in the opinion, in fact, the court charitably labeled the act as "somewhat accidental." Conviction under Art. 523 was thus incompatible with the court's own assessment of the facts. According to that assessment, Art. 526, negligent homicide, was the appropriate provision.

There was ample evidence, however, to establish the accused's *dolus eventualis* state of mind and, hence, properly to convict him under Art. 523. The accused admitted both to the police and in open court that when he threw the spear he was uncertain whether the thing at which he was throwing was an animal or a human being. This admission, coupled with the rest of the evidence in the case, convicts Mekeria.

121. If it could have been proved that Bekele knew he was dragging a body or had accepted that fact, his continuing to drive in the hope the body would become disengaged from his car would establish the intention to "multilate" under Art. 487 (1) (b) (see above at note 117). Bekele could hardly argue that he was not aware of the effects on the deceased of dragging him for five kilometers.

122. On the facts, a conviction for advertently negligent homicide would have been difficult. See above at note 119.

123. Jimma High Court, 1965, Crim. Case No. 151/57, translated in P. Strauss, work cited above at note 19.

124. Although Art. 523 says only "Whosoever commits homicide," it must be read as requiring intention. See above at notes 12 and 13.

Mekeria's admission furnishes conclusive evidence of the element of awareness, the *second consideration*, and is strong evidence of his willingness to bring about the harm, the *third consideration*. Throwing a spear at a target one knows might be a human being is clear evidence of a willingness to cause that human being's death. In addition, Mekeria's second admission that he could see the thing "on the point of *carrying away* a bundle of beans" makes it probable that the creature in his field was a human being, further evidence, under category (d), that when Mekeria threw the spear he was willing to kill a human being.

Finally, we have evidence of a significant end—the protection of the accused's bean crop and his fields from an intruder. The Ethiopian reader of this article is a better judge of just how significant such an end might be to a person like Mekeria, but it would seem important enough to be substantial evidence under category (a) of Mekeria's willingness to kill even should the intruder turn out to be human.[125]

The evidence, therefore, is "clear and convincing" enough to prove Mekeria's guilt of a *dolus eventualis* homicide under Art. 523 beyond a reasonable doubt.[126]

The obstacle to obtaining admissions.

Writers on the subject of *dolus eventualis* have been pessimistic concerning its practical value. Dr. Philippe Graven has written: "Natural as the distinction [between *dolus eventualis* and advertent negligence] may be, it entails difficulties with regard to evidence since it lies in the doer's state of mind and the 'acceptance' or rejection of the consequences of the act may be almost impossible to prove,..."[127] The American commentator, Gerhard Mueller, has stated that "the perpetuation of the distinction between [advertent negligence] and *dolus eventualis* is questionable for practical reasons."[128] The Norwegian jurist, Johannes Andenaes, has gone even further: "*Dolus eventualis* ... is of no great practical significance, since it rarely will be possible to prove the thought of the perpetrator."[129]

Andenaes' statement goes too far. We have seen in the preceding section of this article that "the thought of the perpetrator" can be established from such factors as the significance to him of his end or motive for acting, the acts he may perform or statements he may make, the probability of the harm's occurring, and from his own admissions on the matter.

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125. The deceased's wife had also testified that she ran out to the field on hearing a shout and found her husband wounded. He then told her that the accused had pierced him and then had "pulled the spear out . . and went away with it." This, if it was true, was further evidence of indifference toward the life of the deceased, either on the ground that it showed that Mekeria indeed did not care what creature he had hit with his spear or on the ground that in order to avoid being identified as the person who had wounded the deceased he was willing to leave him behind to bleed to death.

126. Mekeria could not claim legitimate defence under Art. 74 as a defence to the charge of homicide. As Strauss has pointed out, Art. 74, in conjunction with Art. 524 (a), "fixes and emphasizes a moral norm—that killing in the defence merely of property is not justified." Strauss, work cited above at note 10, p. 399; Graven, work cited above at note 7, p. 227. However, as what Mekeria did is use "disproportionate means" in repelling the unlawful trespass on his property and theft of his beans, he would be entitled under Art. 75 (1) to unrestricted mitigation of the penalty imposed under Art. 523. His sentence of three years of risorous imprisonment, when Art. 5235 minimum is five years, indicates he received mitisation.

127. Graven, work cited above at note 7, p. 157.

128. Mueller, work cited above at note 57, p. 47.

129. Andenaes, work cited above at note 24, p. 213.

It is this last, the actor's own admissions, that prompts and justifies the above pessimism. It was the absence of admissions in the *Elsasser* case that made it impossible to prove *dolus eventualis*. It was mainly the presence of admissions in the *Mekeria* case that allowed us to conclude that Mekeria had acted with *dolus eventualis*. In the *Bekele* case, there were some admissions, but the key one concerning Bekele's ability to avoid the person in the roadway was lacking. Key admissions were also lacking in the German case of J and K, at least according to this writer's analysis of the facts. Only in the *Cretenoud* case were admissions unnecessary because the probability of the harm's occurring was so very high.

The question being raised by the above writers and the one we must consider at this point is how likely is it that the accused will provide the police or the court with the admissions usually needed to prove that he acted with *dolus eventualis*. The answer will depend first and foremost upon the system of criminal procedure in force. Ethiopia's system is poorly designed for obtaining admissions. In fact, it is correct to say that it is purposely designed to discourage resorting to admissions to prove guilt. A comparison of Ethiopia's system of criminal procedure with continental Europe's will illuminate this point.

A key figure in continental Europe's system is the "investigating magistrate," the *juge d'instruction*, in France, and the *Untersuchungsrichter*, in German-speaking countries.[130] He is a member of the judiciary completely independent of the prosecutor's office.[131] He thus is expected to conduct an impartial examination of the case and to decide, on the basis of the evidence collected, whether the accused should be discharged from custody or his case sent to the prosecutor for decision whether to prosecute. His jurisdiction varies from country to country. In all countries, his investigative powers are extensive. They include the power to summon and interrogate "witnesses," which at this stage of the case will include the person accused of the offence. The interrogation of the person accused may take place with or without his consent and, depending upon the seriousness of the case, over a period of days, weeks or even months. The accused can have his lawyer present and need not answer the questions of the magistrate. The effect of his refusal to

130. The principal sources for this very brief description of continental European criminal procedure, all written in English, are as follows: A. Anton, "L'Instruction Criminelle," *American J. Comp. L.*, vol. 9 (1960), p. 441; S. Bedford, *The Faces of Justice, A Traveller's Report* (New York, Simon & Schuster, 1961); H. Hammelmann, "The Evidence of the Prisoner at His Trial; A Comparative Analysis," *Canadian Bar Rev.*, vol. 27 (1949), p. 652; H.-H. Jescheck, "German Criminal Procedure," in *The Accused, A Comparative Study* (J. Coutts, ed., London, Stevens & Sons, 1966), p. 246; G. Kock, *Introduction, The French Code of Criminal Procedure* (American Series of Foreign Penal Codes, G. Mueller, ed., South Hackensack, New Jersey, Fred B. Rothman & Co., 1964); M. Pieck, "The Accused's Privilege Against Self-incrimination in the Civil Law," *American J. Comp. L.*, vol. 11 (1962), p. 585; E. Schmidt, *Introduction, The German Code of Criminal Procedure* (American Series of Foreign Penal Codes, G. Mueller, ed., South Hackensack, New Jersey, Fred. B. Rothman & Co., 1965); F. Sullivan, "A Comparative Survey of Problems in Criminal Procedure," *St. Louis Univ. L. J.*, vol. 6 (1961), p. 386, excerpted in S. Fisher, *Ethiopian Criminal Procedure: A Sourcebook* (Addis Ababa, Faculty of Law, 1969), p. 195; R. Vouin, "The Protection of the Accused in French Criminal Procedure," *Int'l Comp. L. Quart.*, vol. 5, (1956), pp. 1, 157 (in two parts).

131. An exception to this is in the Soviet Union, at least in the largest of the 15 union republics, the Russian Soviet Federated Socialist Republic (RSFSR). There the "investigating magistrate" is in the office and under the supervision of the prosecutor ("procurator"). H. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes* (Cambridge, Mass., Harvard Univ. Press, 1966), pp. 75-78.

answer, in France, is that the magistrate can "deduce such consequences as [he chooses] from a refusal to answer."[132] In West Germany, this practice of drawing unfavourable inferences from the accused's silence is being abandoned.[133] In practice, it is unusual for the accused to remain silent through the entire interrogation, particularly since both at this stage and at the trial there is no sanction for lying.[134]

The interrogation of the accused need not end here. At his trial, he will be asked if he wishes to make a statement.[135] Should he make a statement, he will be questioned by the presiding judge. The judge is aided in his questioning of the accused by the *dossier*, the file compiled by the investigating magistrate, which the judge will have examined before the beginning of the trial.[136] Though, again, there is no obligation to make a statement or to answer the questions of the judge, in Germany "the court can increase a sentence where it is convinced that persistent denial by the defendant of the facts is an indication of his unwillingness to admit the wrong he has done (BGHSt 1,104)."[137]

The extensive interrogation of the accused by judicial officers allowed in the continental system tends to produce greater evidence of what was in his mind before and during the commission of the act charged against him. This is illustrated by the German case of J and K. The detailed evidence of the various plans they devised to take M's property, their fear that the leather belt would endanger his life, and all that happened in M's flat, must have come from the accused themselves.

Even in such a procedural system, however, there is little that can be done in a *dolus eventualis* prosecution should the accused deny the existence of the necessary mental attitude. It is quite difficult, unless there is objective evidence that the

132. Anton, work cited above at note 130, p. 449.

133. This trend is visible both in scholarly writings and in recent decisions of the German Federal Supreme Court. Schwarz & Kleinknecht, *Strafprozessordnug* (27th ed., Munchen, C. H. Beck's, 1967), p. 555.

134. The accused is not placed under oath and hence no charge of perjury can be lodged against him for lies that may be discovered. Schmidt, work cited above at note 130, p. 18; W. Clemens, "The Privilege Against Self-Incrimination—Germany," *J. Crim. L., Criminol. & Pol. Sci.*, vol. 51 (1960), pp. 172, 173; R. Vouin, "The Privilege Against Self-Incrimination—France," *J. Crim. L., Criminol. & Pol. Sci.*, vol. 51 (1960), p. 170.

135. This is the practice in Germany. Schmidt, work cited above at note 130, p. 18. It is different in France. Art. 328 of the French Criminal Procedure Code reads: "The president *shall* interrogate the accused and receive his statement." French Code of Criminal Procedure, work cited above at note 130.

136. The practice of the continental European judge of informing himself of the facts of the case before the trial is controversial, being opposite to the attempt in Anglo-American countries (and in Ethiopia) to shield the judge (and, in Anglo-American countries, the jury) as much as possible from the facts of the case before the trial begins. Regarding France, one French writer has characterized the trial as more a trial of "a *dossier*" than a trial of "a man." Anton, work cited above at note 130, p. 456. A defence of the practice has been offered by the German writer, H-H. Jescheck: ". . . the presiding judge should have prior knowledge of the file. Only in this way can he inform himself of the nature of the case involved and decide accordingly how to plan and direct his own conduct of the trial . . . There is a danger of a judge being biased, a risk inherent in his having prior knowledge of the file of the case. This danger is abated by the fact that German judges are encouraged to view the charge, and the evidence upon which it is based, as a merely provisional and preparatory compilation of the material forming the basis of the proceedings. The final judgment must be the result not of a preliminary investigation, but solely the outcome of the main trial (s. 261, StPO)." Jescheck, work cited above at note 130, pp. 246, 247.

137. *Id.*, p. 250.

harm which occurred had been highly probable, to contradict the accused's claim that he had trusted the harm would not occur and had continued to act only for that reason. Continued questioning is unlikely to shake him from that claim, especially if he has the benefit of the advice of counsel. It is this fact that explains the pessimism even of European writers towards the practicality of the *dolus eventualis* concept.

Ethiopia's criminal procedure resembles the Anglo-American system. This is especially so where the interrogation of the accused is concerned. The Anglo-American system is said to be "accusatorial," rather than "inquisitorial," a catchword for a system in which, theoretically at least, interrogation opportunities are strictly limited. Under this system, a United States Supreme Court justice once wrote, "society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation."[138] There is, accordingly, no provision in the 1961 Ethiopian Criminal Procedure Code that authorizes judicial interrogation, either at the investigation stage or the trial stage.[139] It is entirely up to the accused and his lawyer whether he will or will not give testimony. Even should he decide to testify, the court, whether it be at his preliminary inquiry or at his trial, is restricted simply to recording his statement.[140] Cross-examination of the accused, one of the most dramatic episodes in an Anglo-American trial and a time-tested way of getting at the inner thoughts of the accused, is forbidden in Ethiopia. The trial court judges may put questions to the accused but only "for the purpose of clarifying any part of his statement."[141]

Interrogation opportunities do exist in Ethiopia, as they do in all countries—at the police station. It is undoubtedly true, as numerous observers have pointed out, that unrestricted police interrogation can be most effective in eliciting incriminating admissions from an accused, even without resort to physical brutality.[142] For this very reason, the Anglo-American system and the Ethiopian Criminal Procedure Code

138. Watts v. Indiana (Sup. Ct., U.S., 1949), U. S. SUP. CT. REP. (Lawyers' ed.), vol. 93, p. 1806 (Frankfurter, J.).

139. The appearance of the arrested person before a judge under Art. 29 of the Criminal Procedure Code clearly is not for the purpose of interrogation. It is only to decide the question of bail versus continued custody. S. Fisher, *Ethiopian Criminal Procedure: A Sourcebook* (Addis Ababa, Faculty of Law, 1969), pp. 144-46. There is a little-used power given by Art. 35 of the Code to "any court" to "record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial." This refers only to recording statements or confessions the accused has indicated he wishes to volunteer. It does not authorize questioning of the accused by the court. Art. 35 is essentially a device to avoid coercive questioning of an arrested person by the police. S. Fisher, "Involuntary Confessions and Article 35, Criminal Procedure Code," *J. Eth. L.*, vol. 3 (1966), p. 330.

140. At the preliminary inquiry, the accused is asked "whether he wishes to make a statement in answer to the charge." Art. 85 (1). He is "informed that he is not bound to say anything and that any statement he may wish to make . . . may be put in at his trial." Art. 85 (3). If he elects to make a statement, "such statement shall be taken down in writing, read over to him, signed by the accused and kept in the file." Art. 86 (2).

141. Art. 142 (3). On the unresolved question of whether the accused can be put under oath before he makes his statement and thus be liable under Art. 447 (2) of the Penal Code to a charge of aggravated perjury should it subsequently be established that he lied, see Fisher, *Sourcebook*, cited above at note 139, pp. 315-16.

142. See, e.g., discussion by United States Supreme Court in Miranda v. Arizona (Sup. Ct., U. S., 1966), U.S. SUP CT. REP. (Lawyers' ed., 2nd Series), vol. 16, pp. 708-13.

place substantial obstacles in the way of such "unrestricted" police interrogation. The most important of these in the Criminal Procedure Code is Art. 27 (1) and (2). This provision imposes upon the police the obligation to inform the arrested person, either just before or just after they ask him to answer the accusation against him, "that he has the right not to answer and that any statement he may make may be used in evidence." While it is impossible to determine exactly how effective this warning is "in overcoming the inherent pressures of the interrogation atmosphere,"[143] since its effectiveness will depend upon such factors as the way in which it is stated by the police questioner and the age, education, etc. of the arrested person, it seems safe to assume that a warning of this sort, by relieving some of the arrested person's fears, increases the difficulty of obtaining incriminating statements from him. This certainly is the assumption upon which the Anglo-American system operates, and is probably the reason that in the continental European system, which relies so heavily on interrogation as a means of establishing guilt, the arrested person is not so warned.[144] Moreover, once the arrested person has decided not to answer their questions, it is very doubtful whether the police in Ethiopia may question him further in the hope he will change his mind.[145]

A second obstacle to unrestricted questioning of the accused in Ethiopia is Art. 61 of the Criminal Procedure Code, which provides that "Any person detained on arrest or remand shall be permitted forthwith to call and interview his advocate . . " As the number of trained lawyers increases in Ethiopia, and this right becomes more widely known,[146] it will almost certainly add to the difficulty of obtaining admissions from arrested persons. The average lawyer, before leaving his

143. *Id.*, p. 720.

144. Pieck, work cited above at note 130, pp. 596-98.

145. Art. 27 (2) states that the accused "shall not be compelled to answer" the accusation or complaint. This, admittedly, is ambiguous and could be taken to mean that the police, after warning the accused, may not resort to force, threat or other improper inducement to make the accused answer their questions, but that they may otherwise continue to question him. However, the police are specifically forbidden to use such improper inducements by Art. 31 of the Code. It seems unlikely that the language in Art. 27 (2) that the arrested person "shall not be compelled to answer" was meant only to repeat the prohibition against improper inducements contained in Art. 31 or to remind the police of such prohibition. Each provision in a Code is "intended to have some unique function. [The draftsman] would not knowingly include some superfluous provision or repeat something already provided for, since the only effect of this would be to confuse." Strauss, work cited above at note 10, p. 393. It could also be argued that an incriminating statement is not given "of the arrested person's own free will" (the standard applied in at least two cases, Leggesse Tumtu & Argaw Mametcha v. Attorney General (Sup. Imp. Ct., 1964), Crim. App. No. 634/55; Public Prosecutor v. Sintayehu Makonen (A. A. High Court, 1966), Crim. Case No. 1092/58; both in Fisher, *Sourcebook*, cited above at note 139, pp. 41, 43), when it has to be coaxed out of the reluctant arrestee. In this connection, the United States Supreme Court has maintained that "any statement taken after the person invokes his privilege [to remain silent] cannot be other than the product of compulsion, subtle or otherwise." Miranda v. Arizona, cited above at note 142, p. 743.

146. There is no requirement in Art. 61 that the arrested person be advised of his right to consult with counsel, an omission that undoubtedly will inhibit exercise of the right. The right, however, might be enforced in other ways. In one case reported by Fisher, a lawyer obtained an *ex parte* order from the High Court ordering the police, among other things, to permit him to consult with his two arrested clients. Fisher, *Sourcebook*, cited above at note 139, p. 86.

client alone with the police,[147] can be expected to advise him to say nothing to police and to inform his client that he has a right to remain silent and that the consequence of foregoing that right will probably be conviction.

The value of the warning and the right to consult with one's lawyer depend initially upon whether the police comply with these two articles and, if they fail to comply, upon the measures taken by the courts to enforce compliance. In England, the "Judges' Rules"[148] provide directions to the police and the courts on the warning procedure and access to a lawyer.[149] British courts are given the discretion to exclude from the trial of the accused any admission or confession obtained in violation of the "Rules."[150] In the United States, exclusion of an admission or confession obtained without a proper warning or without access to counsel is mandatory.[151] Two 1966 decisions of the Addis Ababa High Court implied that a rule of exclusion with respect to Art. 27 would be adopted by that court.[152]

It seems likely that Ethiopian courts will have decreasing patience with failures on the part of the police to comply with Arts. 27 and 61. It also seems likely that voluntary compliance by the police will, with time, occur with greater frequency. The consequence will be fewer admissions than can be expected at present.

Conclusion.

Judges thus will have to decide whether or not a person had acted with *dolus eventualis* too often without benefit of one of the major categories of relevant evidence and too often, therefore, on the basis of inference and potentially ambiguous items of proof. An error by the court in deciding this question—a finding that

147. Art. 61 does not grant the lawyer the right to be present during police interrogation, nor does it require the police or any other agency to appoint a lawyer for an arrested person who cannot afford his own. In this sense, it falls far short of the most controversial part of the holding in the American *Miranda* case. Appointing lawyers for the indigent at the police investigation stage would clearly be impractical for the present in Ethiopia. See comments in Fisher, *id.*, pp. 270-71.

148. The "Judges' Rules" are summarized in Fisher, *id.*, pp. 68-69.

149. The "Rules" on access to a lawyer are less stringent than Art. 61. They provide: "7. . . (a) A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so." "The Judges' Rules and Administrative Directions to the Police," 1964 *Crim. L. Rev.*, p. 173.

150. Fisher, *Sourcebook*, cited above at note 139, pp. 68, 69.

151. Miranda v. Arizona, cited above at note 142.

152. Public Prosecutor v. Sintayehu Makonen, cited above at note 145, Fisher, *Sourcebook*, cited above at note 139, p. 43; Public Prosecutor v. X (A. A. High Court, 1966), Crim. Case No. 1339/58, Fisher, *id.*, p. 45. In the latter case, the High Court said: "Evidence of a confession taken without first informing the accused of his rights is valueless." In 1963, the Supreme Imperial Court had implied the opposite, that a statement made to the police without a proper warning would not be excluded as long as it was otherwise obtained lawfully. Teshome Gebre v. Attorney General (Sup. Imp. Ct., 1963), Crim. App. No. 237/56, Fisher, *id.*, p. 45. Exclusion is not the only measure of enforcement available. Art. 416 of the Penal Code provides "Any public servant who arrests or detains another except in accordance with the law, or who disregards the forms and safeguards prescribed by law, is punishable with rigorous imprisonment not exceeding five years, and fine." A civil suit against the offending police officer and against the state is also possible. Civil Code, Arts. 2031, 2035, 2126-27; Rev. Const., Art 62 (b).

dolus eventualis was present when the evidence does not support such a finding—in turn risks serious injustice to the accused. An erroneous finding of *dolus eventualis* in a prosecution for homicide would bring the case under Art. 523 of the Penal Code or, perhaps, even under Art. 522 (1) (c) if it is found that the homicide was committed "to further or to conceal another crime" (the situation in the German case of J and K). The punishment provided in Art. 523 is rigorous imprisonment for a minimum of five years and a maximum of twenty years. Under Art. 522 (1) (c), the punishment authorized is "rigorous imprisonment for life, or death." If the finding in the same case were advertent negligence, the case would come under Art. 526 of the Penal Code and the punishment could be no more than three years of simple imprisonment.[153] In a property offence, e.g., Art. 656, fraudulent misrepresentation, an incorrect finding of *dolus eventualis* would result in a conviction and perhaps a sentence of rigorous imprisonment as high as five years. If the finding were advertent negligence, the person would be entitled to his complete freedom, since most property offences, fraudulent misrepresentation included, if committed with advertent negligence are not punishable.[154]

The subjective orientation of the Penal Code,[155] and of the Fetha Nagast, as well,[156] justifies, if not requires, higher punishment for persons who act with selfish willingness to cause harm. However, that state of mind must first be proved. It is regrettable in this respect that the Criminal Procedure Code, enacted four years after the Penal Code, did not take into account the subjective orientation of the Code it was supposed to implement.[157] The *Avant-Projet* of the Criminal Procedure

153. If the negligent homicide were caused "by a person who has a special professional duty to safeguard life," the maximum punishment would be five years of simple imprisonment instead of three. Art. 526 (2).

154. Negligent offences, as was pointed out at the outset of this paper (see above at notes 9 to 13, and accompanying text), are not as a general rule punishable under the Penal Code. The major exception in the case of property offences are those offences against property that also constitute a danger to the public safety. Arts. 492, 493, 495 and 496.

155. See above at notes 5 to 8, and accompanying text, and at note 75.

156. See quote from the Fetha Nagast above at note 7.

157. A further consequence of this mis-matching of Codes can be seen in the important area of "attempt," Art. 27 of the Penal Code. The test laid down for when an attempt begins and therefore, for most cases, when criminal liability begins, is "when the act performed clearly aims by way of direct consequence, at [the offence's] completion." Art. 27 (1), second paragraph. Dr. Graven, in his commentary on Art. 27, has argued, probably correctly, that this language, together with the overall approach of the Code to the question of attempt, establishes a subjective or "mental proximity" test for when an attempt begins. "A person begins to [attempt] an offence when he does something such as to show that he is determined to cause harm.. [T]he Ethiopian Code adopts 'the criterion of the unequivocal nature of the act, manifesting the doer's firm, irrevocable intent to achieve by way of direct consequence the result he seeks to achieve.' " Graven, work cited above at note 7, pp. 72, 74. The nature of this test is such that it will frequently involve an investigation of the "character and antecedents of the accused . ., for an habitual offender may overcome 'the crisis of the imminent act' and reach the point of no return earlier than a person who has no previous convictions." *Id.*, p. 73. It is at this point that the Criminal Procedure Code intrudes. Art. 138, entitled "Antecedents of accused," states: "(1) Unless otherwise expressly provided by law, the previous convictions of an accused person shall not be disclosed to the court until after he has been convicted." This is a basic principle of the common law designed to avoid the prejudice that can accrue to an accused person during his trial if the jury finds out that he has one or more prior convictions. G. Williams, *The Proof of Guilt* (3rd ed., Stevens & Sons, 1963), pp. 213-16. It is not the wisdom of this common law principle that is in question. The point, rather, is that it is rejected in the continental

Code, drafted by Jean Graven in 1956, had been "an evenly 'mixed' continental-common law procedure, but this was subsequently abandoned for an overall design more substantially adversary."[158] Fisher suggests as a reason for this that "the Ethiopian courts had British-influenced adversary procedures since 1941 at least; substantial alterations in procedure might have caused confusion to Ethiopia's judges and advocates."[159]

Unless "inquisitorial" procedures which allow more extensive questioning of the accused are introduced, or until *dolus eventualis* is removed from the definition of intention in the Penal Code,[160] judges will have to be very sparing in their use of *dolus eventualis*. The general rules presented in this article, even if unswervingly applied by Ethiopia's courts, cannot eliminate the possibility of error. To further protect against such error and the injustice it can cause, the judge must also exercise self-restraint. A finding of *dolus eventualis* must be the exception, especially in homicide and other "great harm" cases. If, after carefully examining all of the evidence on the question, the judge is left with any doubt as to whether the person had acted with *dolus eventualis*, he must follow the counsel of the Swiss jurist, Logoz, and "resolve such doubt in conformity with the principle *in dubio pro reo* [when in doubt favour the accused]," that is he must rule the case one of advertent negligence.

European non-jury system where proof of prior convictions is regularly considered by judges on the issue of guilt as part of a greater freedom allowed them in the evaluation of evidence (for a graphic illustration of this, see Bedford, work cited above at note 130, pp. 177-80), and the Swiss drafter of the Ethiopian Penal Code quite apparently believed it would likewise be rejected in Ethiopia's non-jury system. It was not, and the substantive doctrine of attempt is thus deprived of one of the major categories of evidence needed for its proving.

158. Fisher, *Sourcebook*, cited above at note 139, pp. x-xi.

159. *Id.*, p. xi.

160. *Dolus eventualis* could be removed from intention and treated as it is in France and the Anglo-American countries as an "aggravated form" of advertent negligence. See above at notes 57 and 76. If this were done, the task of the judge and, more importantly, the consequence of error, would be greatly reduced. Whether the judge found *dolus eventualis* or advertent negligence to be present, he would have to choose only an appropriate punishment within the single range of punishment for advertent negligence, and would not have to choose between two widely disparate ranges of punishment, one range for intention and the other for advertent negligence, or between punishment and freedom. The difficulty with thus removing *dolus eventualis* from intention is that it would have to be preceded by a major revision of the Penal Code. An enlargement of advertent negligence to include *dolus eventualis* would first require some increase in the maximum penalty for offences committed with advertent negligence. Few judges or members of the community, it is believed, would be satisfied, for instance, with a maximum of three years of simple imprisonment for a person who was proved to have committed homicide with the attitude of willingness involved in *dolus eventualis*. Inclusion of *dolus eventualis* within advertent negligence would next require a considerable increase in the number of offences for which advertent negligence is punishable. Again, property damage or fraud committed with the indifference characteristic of *dolus eventualis* would probably give rise to demands of punishment that could not be met under the present system that makes advertent negligence an exceptional state of mind for criminal liability. Advertent negligence would have to take on the character of "recklessness" in Anglo-American penal law, which, rather than being an exceptional form of liability in that system, is generally as punishable a state of mind as is intention, both comprising what that system terms *mens rea* or "culpability." See, e.g., the American Model Penal Code, work cited above at note 25, Sec. 2.02 (3), and the drafters' comments thereto printed in Kadish & Paulsen, work cited above at note 103, p. 222; Williams, work cited above at note 11, pp. 30-31. The only exceptional form of criminal liability remaining in the Ethiopian Penal Code would then be inadvertent negligence. Such a revision of the Penal Code entails problems and policy considerations requiring further study.