

THE MODEL PENAL CODE, MASS INCARCERATION,
AND THE RACIALIZATION OF AMERICAN CRIMINAL
LAW

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INTRODUCTION

On a muggy summer night in 1951, a white woman from Alabama took a stroll with her two daughters and a neighbor's child. She observed a black man walking behind them. Fearing that the man may want to harm them, the woman instructed the children to run to a neighbor's house and tell him to come meet her. When the man saw the neighbor, he turned back, walked down the street, and leaned against a stop sign. The woman watched the man remain by the sign for about a half hour, after which he left. The man was subsequently arrested on suspicion of rape. While in custody, the chief of police contended that the man confessed to intending to rape "the first woman that came by."¹ Although the man denied having confessed to the crime, he was eventually charged and convicted of attempted assault with intent to rape.² On appeal, he contended that his conduct did not amount to a punishable attempt.³ The Alabama Court of Appeals rejected his contention, deciding that a conviction for the offense charged required proof that the defendant "intended to have sexual intercourse with [the victim] against her will."⁴ It held that the jury could have found intent based on a consideration of the "social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and the defendant was a Negro man."⁵

If this case sounds familiar to the legally trained reader, it is because it narrates the facts of *McQuirter v. State*,⁶ which figures prominently in many

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¹ *McQuirter v. State*, 63 So. 2d 388, 389 (Ala. Ct. App. 1953).

² *Id.* at 388–89.

³ *Id.* at 390.

⁴ *Id.*

⁵ *Id.*

⁶ 63 So. 2d 388 (Ala. Ct. App. 1953).

criminal law casebooks.⁷ The standard account in the literature is that *McQuirter* is an example of a criminal law that has gone astray as a result of racial prejudices. In their popular casebook, Professors Sanford Kadish, Stephen Schulhofer, and Rachel Barkow explain that the conviction in *McQuirter* is troublesome because of “[t]he context of racial bigotry,” which included a “black man, white woman” and a “small town in the South in the 1950s.”⁸ In a similar vein, Professor Bennett Capers is troubled by the fact that “the proof required to convict [McQuirter] . . . was in fact a lesser standard of proof than that which would have been required had [he] been white.”⁹

While the standard account of *McQuirter* is right to emphasize the role race played in the case, this Article will argue that it also misses an important part of the story. The *McQuirter* case is troublesome not only because of the way its outcome was infected by race, but also because it is one of the first examples of how the evolving law of attempts gave judges and juries increased opportunities for racial discrimination. To see how this is so, it is useful to compare *McQuirter* to another Alabama case featuring a black defendant accused of attempting to commit a serious offense against a white victim. In *State v. Clarissa*,¹⁰ a black slave was accused and convicted of attempting to kill two white men by poisoning their coffee with an allegedly noxious substance called “Jamestown Weed.”¹¹ On appeal, the Supreme Court of Alabama overturned the conviction. In doing so, it explained that “[a]n unexecuted determination to poison, though preparation was made for that purpose, . . . will not be an attempt to poison within the meaning of the statute.”¹² The contrast with *McQuirter* is stark. For the *McQuirter* court, attempt liability followed inexorably from proof of the defendant’s intent to commit the offense charged. In contrast, the *Clarissa* court held that firm intent and preparation were not enough to generate attempt liability. In addition to intent, the court required proof of conduct that went beyond mere preparation and that was apt for causing the harm contemplated by the offense.¹³

What changed in the one hundred years between *Clarissa* and *McQuirter*? Why did *Clarissa* result in an acquittal while *McQuirter* resulted in a conviction? After all, both defendants were black, and both were accused of attempting to harm white victims in Alabama. If *McQuirter* was convicted

⁷ See, e.g., SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 657–61 (10th ed. 2017); JOHN KAPLAN ET AL., CRIMINAL LAW 645–48 (5th ed. 2004).

⁸ KADISH ET AL., *supra* note 7, at 658.

⁹ I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1389 (2010).

¹⁰ 11 Ala. 57 (1847).

¹¹ *Id.* at 58.

¹² *Id.* at 60–61. The court also pointed out that “the actual administration of a substance not poisonous . . . though believed to be so by the person administering [is not punishable as] an attempt to poison.” *Id.* Given that the prosecution could not prove that Jamestown Weed was poisonous, the court concluded that attempt liability in this case was inappropriate. See *id.* at 61.

¹³ *Id.*

because of racial bigotry—as the standard account of the case tells us—then why was *Clarissa* acquitted under similar circumstances? A clue that racial bigotry cannot entirely explain the different outcomes is that race relations were not significantly better in 1847 when *Clarissa* was decided than they were in 1951 when *McQuirter* was convicted. If anything, they were worse.

This Article submits that what changed in those one hundred years was not the prevalence of racial biases, but the underlying theory of crime and attempts. During this time, American criminal law shifted from the pattern of manifest criminality to the pattern of subjective criminality.¹⁴ The pattern of manifest criminality predicates punishment on the occurrence of acts that cause or imminently threaten to cause harm, rather than on the existence of blameworthy mental states.¹⁵ This was the approach taken in *Clarissa*, when the court refused to impose attempt liability solely on the basis of the defendant's malevolent will. Instead, it required that the actor's conduct come very close to causing the harm prohibited by the offense.¹⁶ In contrast, the pattern of subjective criminality justifies the punishment of seemingly inoffensive acts as long as they are carried out with a blameworthy mental state.¹⁷ This was the view of attempt put forth in *McQuirter*. Walking behind another person in a public thoroughfare is not an inherently wrongful act, let alone one that comes close to causing the harm inherent in the offense of rape. In spite of the ostensibly innocuous nature of *McQuirter*'s acts, the court nevertheless found that he could be convicted of an attempted offense if he had formed the intent to rape the alleged victim.¹⁸

Once *McQuirter* is placed in the broader context of the patterns of criminality that underlie American criminal law, one can see that what is most extraordinary about the case is not the racial bigotry that it reveals. After all, it is hardly surprising that a black man in the 1950s was unjustly convicted by an Alabama court of the attempted rape of a white woman. What is quite surprising, however, is that this kind of conviction was more difficult to obtain when *Clarissa* was decided one hundred years earlier. Given that racial bigotry was not less of a problem in the antebellum period than it was during the Jim Crow Era, there was something occurring in *McQuirter* that evaded a purely racial explanation. That “something” was the turn to subjective criminality that took place in the middle part of the last century. With its emphasis on punishing actors for their wicked will rather than for their harmful acts, the pattern of subjective criminality is particularly susceptible to generating a racist and repressive kind of criminal law. It is difficult to argue that the defendant in *McQuirter* came dangerously close to causing the harm

¹⁴ These patterns of criminality were first identified by Professor George Fletcher. See George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 490–91 (1976).

¹⁵ See George P. Fletcher, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319, 340 (1980).

¹⁶ *Clarissa*, 11 Ala. at 60–61.

¹⁷ See Fletcher, *supra* note 15, at 338.

¹⁸ *McQuirter v. State*, 63 So. 2d 388, 390 (Ala. Ct. App. 1953).

contemplated by the offense of rape, as the pattern of manifest criminality would require. As *Clarissa* illustrates, this stringent conduct requirement often holds racial bigotry at bay, at least as far as the criminal law is concerned. In contrast, it is considerably easier to claim—as subjective criminality demands—that *McQuirter* malevolently intended to have sex with the alleged victim. Once the inquiry is framed in terms of a defective will, it is easier to infer the requisite blameworthy mental state on the basis of “social conditions and customs founded upon racial differences.”¹⁹

While the connection between subjective criminality and racism in American criminal law is not obvious, this Article will show that an inquiry into how the pattern of subjective criminality shaped German criminal law reveals the link quite clearly. Like American criminal law, the pattern of manifest criminality dominated German criminal law until the mid-twentieth century.²⁰ The dominance of manifest criminality began to wane as the National Socialist regime started to ascend.²¹ Nazi scholars began arguing that crimes should be understood not as occurrences of harmful conduct, but instead as instances of treason that violated the loyalty that the offender owed to the German people.²² The notion of crime as treason or disloyalty generated a kind of criminal law that punished defective-will formation even if the intent was not put into action and therefore did not cause or immediately threaten to cause harm. Once crime was approached in this manner, a racialized and oppressive system of criminal justice quickly took hold under National Socialism. The result was a criminal law aimed at identifying and eliminating socially undesirable individuals,²³ including homosexuals, vagrants, Gypsies, Jews, and anyone else who did not embody the National Socialist idea of a person.²⁴

Although the link between subjective criminality and a racialized criminal law was clear in Germany, the connection has mostly remained hidden in America, perhaps because the turn to subjective criminality in America was originally viewed as quite progressive.²⁵ The twentieth century witnessed the ascent of a deterministic account of human conduct, pursuant to which criminal acts were viewed primarily as a product of environmental and

¹⁹ *Id.*

²⁰ See THOMAS VORMBAUM, A MODERN HISTORY OF GERMAN CRIMINAL LAW 112 (Michael Bohlander ed., Margaret Hiley trans., 2014).

²¹ See POLÍTICA CRIMINAL Y SISTEMA PENAL 141 (Iñaki Rivera Beiras, ed., 2005).

²² *Id.* at 144.

²³ See Francisco Muñoz Conde, *El Proyecto Nacional-socialista Sobre el Tratamiento de los <<Extraños a la Comunidad>>*, 20 REVISTA CENIPEC 151, 154 (2001), <http://www.pensamientopenal.com.ar/system/files/2012/02/doctrina33291.pdf>. The Nazis actually wrote a draft statute called the “*gemeinschaftsfremde*” law, which called for the neutralization of alien elements of society. *Id.*

²⁴ *Id.* at 155.

²⁵ See Darryl Brown, *History's Challenge to Criminal Law Theory*, 3 CRIM. L. & PHIL. 271, 278–79 (2009).

psychological forces over which the actor had no control.²⁶ Confronted with this view of human action, criminologists and criminal-law scholars gravitated towards treatmentist and correctionalist approaches to punishment that treated crime as a symptom of broader social and psychological ills. By situating criminal offenders within the broader contexts of society, mental illness, and the environment, these criminal theorists sought to modernize and humanize the criminal law. This view spread like wildfire in America, eventually finding its way into the Model Penal Code (“MPC” or “Code”) and the many state criminal laws that were reformed in the wake of its publication.²⁷

But what these well-meaning progressive scholars did not envisage was that the ideas they advocated made it easier for racial bigotry to slip through the seams of criminal law doctrine, as it did in *McQuirter*. The outcome of the case is easier to justify if the purpose of criminal law is believed to be the identification and treatment of dangerous individuals. Black men who follow white women reveal themselves as threats, at least according to social mores of the South in the 1950s. The view was so widespread that it lay at the core of popular culture. An example was the wildly popular film *King Kong*, which “barely concealed [the] myth of animal-like, dangerous black men hard-wired to desire white women as trophies.”²⁸ If—as the drafters of the Model Penal Code would argue—crime is a product of social and biological forces beyond the actor’s control, then an Alabama court in 1953 would feel comfortable upholding the conviction in *McQuirter*. It is not difficult to see how at the time *McQuirter* could have been portrayed as a black man who was “dangerous” and “hard-wired to desire” having sex with a white woman.

Finally, this Article will argue that the same allegedly benign pattern of subjective criminality that enabled racial bigotry to infuse the outcome in *McQuirter* has allowed the ruling classes in America to use the criminal law as a vehicle for controlling segments of the population that it deems threatening. Applying a definition of attempts that was in tune with a purportedly progressive approach to criminal law, the *McQuirter* court ended up flouting rather than advancing liberal ends. But subjective criminality has enabled much more than a repressive view of attempts. It is also essential to explaining the rise of possession offenses, which have so often been used to oppress blacks.²⁹ Ultimately, then, *McQuirter* foreshadowed some of the perverse features that would later come to define the criminal law of modern time, including mass incarceration and the role that race has played in bringing it about. To reverse this trend, America should—like Germany after its failed

²⁶ See Thomas A. Green & Merrill Catharine Hodnefield, *Reflections on Freedom and Criminal Responsibility in Late Twentieth Century American Legal Thought*, 55 AM. J. LEGAL HIST. 1, 7 (2015).

²⁷ MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 5–6 (2d ed. 2015). Since the publication of the Model Penal Code, at least thirty-seven states have adopted at least some of its provisions. *Id.*

²⁸ ELIZABETH HAAS ET AL., PROJECTING POLITICS: POLITICAL MESSAGES IN AMERICAN FILMS 354 (Taylor & Francis, 2d ed. 2015) (2005).

²⁹ See *infra* Part III.C.

experiment with National Socialism—eschew subjective criminality and return to a criminal law patterned on manifest criminality. Failing to do so would only send the nation further down the path of mass incarceration and racialization of American criminal law.

This Article proceeds in three parts. Part I fleshes out the patterns of manifest and subjective criminality. Part II details the demise of manifest criminality and concomitant rise of subjective criminality in America and Germany, with the aim of revealing the hidden racism and oppressiveness of the pattern of subjective criminality. Part III shows that in spite of the progressive origins of the treatmentist views of crime and punishment that inspired the drafters of the Model Penal Code, the pattern of subjective criminality that these views ushered in contributed to the rise of mass incarceration and other discriminatory features of our criminal justice system. Much like subjective criminality facilitated the Nazification of German criminal law in the 1930s, so too has subjective criminality contributed to the racialization of American criminal law.

I. PATTERNS OF CRIMINALITY EXPLAINED

In its origins, criminal liability was premised primarily on a guilty act that amounted to a breach of the peace. This view of criminality eventually gave way to one in which liability was imposed primarily for acting with a guilty mind that revealed the dangerousness of the offender. This Part fleshes out in more detail these competing approaches to criminality.

A. *Manifest Criminality vs. Subjective Criminality*

Several decades ago, Professor George Fletcher observed that crimes and the doctrines that are developed to construe them tend to conform to one of several patterns.³⁰ The first is the pattern of “manifest criminality.”³¹ Crimes that conform to this pattern feature conduct that any observer would recognize as criminal without having to inquire into the actor’s mental state.³² The criminality of such acts is “obvious” or “manifest.” Since these crimes are defined primarily by reference to a manifestly criminal act, the intent with which the act is carried out is relevant only after the requisite act has been found to exist. Furthermore, the relevance of mental states under the pattern of manifest criminality is confined to establishing an excuse or a mistake defense that negates the inference of blame that arises from engaging in the manifestly criminal act. Mental states thus function as a “challenge to the

³⁰ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 115 (1978).

³¹ *Id.*

³² *Id.* at 115–16.

authenticity of appearances” rather than as an “inner dimension of experience that exists independently from acting in the real world.”³³

In contrast, offenses that conform to what Fletcher calls the pattern of “subjective criminality” are defined primarily by the existence of a blameworthy mental state.³⁴ As such, Fletcher observes that “the core of criminal conduct” that follows the pattern of subjective criminality “is the intention to violate a legally protected interest.”³⁵ While in the context of manifest criminality mental states are parasitic to the manifestly criminal act, in the pattern of subjective criminality they constitute “a dimension of experience totally distinct from external behavior.”³⁶ Such mental states are subjective, in the sense that they are experienced by the actor but not by others.

There are many examples of these competing patterns of criminality at work. Fletcher has argued that the historical evolution of the law of theft can best be understood as a body of law that slowly moved from the pattern of manifest criminality to the pattern of subjective criminality.³⁷ Originally, obtaining property by deception was not criminally punished. Courts found that in the absence of a trespass there could be no liability, even if the defendant had deceived the victim.³⁸ The law of theft thus required the existence of a trespassory taking that unequivocally identified the act as criminal. An example of such trespassory acts include instances of “breaking bulk,” such as removing an object belonging to another from its packaging or destroying the item in its entirety.³⁹ Without a trespassory act such as breaking bulk, there was no objective indicia of criminality. Causing property to exchange hands by lying did not satisfy the trespass requirement, for such a transaction would not appear manifestly criminal to an impartial observer. The criminality of the conduct would come to light only if one gained access to the defendant’s mind and could see that he was knowingly making a false statement with the intent to dispossess another of his property. Since humans lack the capacity to access the minds of others, such takings could not be described as manifestly criminal and, therefore, were not punishable at the time. Subsequently, courts began to slowly move away from the pattern of manifest criminality and instead started to focus on the defendant’s mental state at the time of the taking. If the mental state was sufficiently blameworthy, liability for theft could attach. This shift to the pattern of subjective criminality allowed courts to catalogue takings by deception as criminal, even in the absence of a trespassory act such as breaking bulk.⁴⁰

³³ *Id.* at 117.

³⁴ *Id.* at 118.

³⁵ *Id.*

³⁶ FLETCHER, *supra* note 30, at 118.

³⁷ Fletcher, *supra* note 15, at 517–18.

³⁸ *Id.* at 493.

³⁹ *Id.* at 484–85.

⁴⁰ *Id.* at 512–13.

Fletcher observed that a similar shift is detectable in the law of attempts. Originally, attempts were punished only if the actor engaged in conduct that came very close to consummation of the offense. In some jurisdictions, attempt liability would only attach when the actor engaged in the last step prior to consummation. Similar tests for determining what conduct counts as an attempt include the “proximity” and “unequivocality” tests.⁴¹ Pursuant to the proximity test, an actor’s conduct could be punished as an attempt only if it came dangerously close to completion.⁴² The unequivocality test generates attempt liability only if—without taking into account the mental state with which the act is performed—the actor’s conduct was manifestly criminal.⁴³ While there are subtle differences between these tests, they both required that the actor engaged in conduct that could be readily perceived as criminal without reference to the actor’s mental state. This was the approach to attempts adopted by the Supreme Court of Alabama in *Clarissa*. Although there was ample evidence that the defendant desired to kill two men by dissolving Jamestown Weed in their coffee, the court held that the presence of a wicked will was not enough to trigger attempt liability in the absence of acts that were apt for consummating the offense and that came close to actually doing so.⁴⁴

In contrast, the modern trend is to impose attempt liability even when the actor has not engaged in conduct that is manifestly criminal. This is most obviously the case in the Model Penal Code formulation of the doctrine, which requires only that the actor engage in a “substantial step” towards the commission of the offense.⁴⁵ Pursuant to the substantial-step test, a seemingly innocuous act—such as buying a ski mask—may generate attempt liability if it “strongly corroborate[s] [the actor’s] criminal purpose.”⁴⁶ Under this test, the conduct element is merely probative of the actor’s mental state. The actor’s subjective culpability thus becomes the central element of attempt liability. As the law of attempts moves away from proximity tests and closer to the substantial-step standard, it moves from the pattern of manifest criminality to the pattern of subjective criminality. This is closer to the view of attempts put forth in *McQuirter*. Even though walking several steps behind a person does not bespeak of criminality, the court affirmed the conviction because there was ample proof of the defendant’s intent to commit rape.⁴⁷

Professors Guyora Binder and Robert Weisberg argue that the patterns of criminality described by Fletcher can also shed light on the historical

⁴¹ See, e.g., *People v. Rizzo*, 158 N.E. 888, 889 (N.Y. 1927).

⁴² *Id.*

⁴³ Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299, 324–25 (1996).

⁴⁴ *State v. Clarissa*, 11 Ala. 57, 61 (1847).

⁴⁵ MODEL PENAL CODE § 5.01 (AM. LAW INST., 2017).

⁴⁶ *United States v. Jackson*, 560 F.2d 112, 120 (2d Cir. 1977).

⁴⁷ *McQuirter v. State*, 63 So. 2d 388, 390 (Ala. Ct. App. 1953).

development of rape and homicide law.⁴⁸ Regarding rape law, Binder and Weisberg point out that the law originally required that the sex be forcible and that the victim resist the perpetrator's sexual advances.⁴⁹ The force and resistance elements are compatible with the pattern of manifest criminality, for they require the occurrence of acts that clearly signal the criminal nature of the sexual intercourse. In contrast, modern rape statutes have eliminated the force and resistance requirements. In their place, modern rape laws require that the sex be without the victim's consent and that the perpetrator be at least negligent with regard to the victim's lack of consent.⁵⁰ This more modern approach shifts the focus from the perpetrator's visible use of force and the victim's visible resistance to the actor's subjective indifference to the victim's lack of consent and to the victim's desire to not engage in intercourse. While the force requirement reflects the pattern of manifest criminality, the more modern rape laws reflect the pattern of subjective criminality.⁵¹

Binder and Weisberg observe the same pattern in the law of homicide. At common law, homicide was defined as an unlawful killing of a human being with malice. When the law of homicide first developed, the core element of the offense was not the intent to kill. Instead, the central feature of homicidal conduct was the infliction of a mortal wound or the carrying out of an armed attack.⁵² While society now typically associates malice with a blameworthy mental state, Binder and Weisberg demonstrate that malice in the law of homicide originally meant simply that the manifestly violent act of killing was not excused pursuant to self-defense, provocation, or accident.⁵³ This reflected the pattern of manifest criminality, for inculcation was the product of engaging in a manifestly violent act and the element of malice served only to exculpate.

With time, however, malice morphed from an element that merely signaled lack of exculpation to an inculpatory element that communicated blame. As a result, malice is defined in more modern homicide law as a mental state that consists in the intent to kill, the intent to cause serious bodily injury, or the intent to commit a felony.⁵⁴ When malice was defined simply as the lack of excuse, most homicide litigation centered around the existence (or lack thereof) of self-defense, provocation, or accident.⁵⁵ In contrast, when malice became a mental state that consisted of proof of intent to engage in wrongful conduct, much homicide litigation gravitated around whether the

⁴⁸ Guyora Binder & Robert Weisberg, *What Is Criminal Law About?*, 114 MICH. L. REV. 1173, 1184–85 (2016).

⁴⁹ *Id.* at 1185.

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *Id.* at 1186.

⁵³ *Id.*

⁵⁴ *See* Binder & Weisberg, *supra* note 48, at 1186–87.

⁵⁵ *Id.* at 1186.

killing was produced with an accompanying blameworthy mental state.⁵⁶ This marks the transition in the law of homicide from manifest to subjective criminality.⁵⁷

The shift from manifest to subjective criminality in American criminal law reflected in the laws of theft, attempt, rape, and homicide expose a more general trend that accelerated in the second half of the twentieth century and continues to this day. The turn towards subjective criminality was precipitated in great part by the publication and subsequent influence of the Model Penal Code. The chief penological goals of the Model Penal Code were to deter those who could be deterred and to identify and treat dangerous individuals who could not be deterred.⁵⁸ Given that criminal laws quite often fail to deter, many of the Code's rules are best explained as doctrines that allow society to better identify and correct dangerous individuals.⁵⁹ In order to further this goal, the MPC fully embraces the pattern of subjective criminality. Examples of this abound. The MPC shifted the emphasis of attempts from engaging in an act that is close to consummation to engaging in conduct that strongly confirms the actor's purpose to engage in future wrongdoing.⁶⁰ The Code punishes most attempted crimes as severely as completed crimes.⁶¹ It also punishes conspiracy even when one of the parties to the conspiracy has feigned agreement and has thus not really agreed to commit a crime.⁶²

Perhaps the most obvious examples of the Code's shift to subjective criminality are its causation provisions.⁶³ While causation has historically been conceived as an objective inquiry into the relationship between the defendant's act and the wrongful result that ensued,⁶⁴ the Code instead defines causation primarily on the basis of the mental state with which the actor engaged in the allegedly wrongful conduct.⁶⁵ As such, causation is conceptualized by the Code as part of the culpability requirements of the offense "rather than as an independent requirement about the relation between the actor's conduct and the prohibited result."⁶⁶ The shift from manifest to subjective criminality is evident. Rather than requiring conduct that is objectively linked to the result in a certain kind of way (manifest criminality), the Code requires that conduct be linked to the result in a way that is compatible with the actor's

⁵⁶ *Id.* at 1186–87.

⁵⁷ *Id.* at 1185.

⁵⁸ Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 981–82 (2001).

⁵⁹ *Id.*

⁶⁰ MODEL PENAL CODE §§ 5.01(1)–(2) (AM. LAW INST., 2017).

⁶¹ *Id.* § 5.05(1).

⁶² *Id.* §§ 5.03(1)–(2).

⁶³ *Id.* § 2.03.

⁶⁴ Paul H. Robinson, *The Model Penal Code's Conceptual Error on the Nature of Proximate Cause, and How to Fix It*, 51 CRIM. L. BULL. 1311, 1311 (2015).

⁶⁵ *Id.* at 1313.

⁶⁶ *Id.*

mental state (subjective criminality).⁶⁷ Since the MPC greatly influenced criminal law reform during the latter half of the twentieth century,⁶⁸ it is no surprise that the pattern of subjective criminality has become quite dominant in America during the last several decades.

B. *Manifest and Subjective Criminality Generate Different Kinds of Criminal Law*

The pattern of manifest criminality generates a kind of criminal law that focuses on punishing acts that cause or immediately threaten to cause harm rather than on identifying dangerous actors. In *Clarissa*, for example, the defendant had clearly revealed herself to be a dangerous person when she dissolved what she believed to be a poisonous substance into the coffee of her intended victims. Yet she was acquitted because her conduct did not come close to harming the victims, as Jamestown Weed was not actually poisonous.⁶⁹

There are other examples of doctrines that produce similar results. The common-law approach to conspiracy punishes only actual agreements to commit a criminal offense.⁷⁰ If one of the parties feigns agreement, then the act goes unpunished.⁷¹ Note that the actor who agrees to commit a crime is dangerous even if the other party did not actually intend to follow through with the agreement. Nevertheless, no liability attaches in this case at common law. The common law of conspiracy does not punish fake agreements because criminality must manifest itself by way of the occurrence of an externally verifiable wrongful act rather than by the presence of a subjectively blameworthy mental state. Since there is no real agreement, there is no wrongful act that can trigger liability.

In contrast, the pattern of subjective criminality produces a kind of criminal law that emphasizes blameworthy mental states over the occurrence of harmful acts. The *McQuirter* case is, once again, illustrative. McQuirter was not convicted because he came close to raping the alleged victim. Instead, he was convicted because black men who follow white women were perceived to be dangerous. His dangerousness was corroborated both by his alleged confession of a desire to rape and by the so-called social conventions and customs that are produced by racial differences.

⁶⁷ *Id.* at 1313–14.

⁶⁸ Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 319–20 (2007).

⁶⁹ 11 Ala. 57, 61 (1847).

⁷⁰ Dierdre A. Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DEPAUL L. REV. 75, 77 (1979).

⁷¹ *See id.*

Other doctrines that track this pattern of criminality similarly exhibit a concern with actor dangerousness. An example is the Model Penal Code's approach to conspiracy, which imposes liability even when there is feigned agreement as long as the actor subjectively believed that there was real agreement.⁷² The existence of an actual meeting of the minds is not required because the actor's threatening character is revealed by his willingness to reach an agreement to commit a criminal offense. Whether the other party actually agreed to the proposal may be relevant to determining if a wrongful act took place in the world, but it is immaterial to assessing the proponent's defective and menacing will.

In what follows, this Article will explore how and when American criminal law shifted from manifest to subjective criminality and, therefore, from punishing harmful acts to identifying dangerous offenders. As this Article will show, the turn manifested itself in ways that went well beyond the examples discussed here. In addition to reshaping the doctrines of attempt and conspiracy, the subjective turn led to a rethinking of the very concept of crime and of the proper purposes of the criminal sanction. It also allowed for the creation and proliferation of offenses that punish seemingly innocuous acts, such as possession crimes. Interestingly, the turn to subjective criminality occurred in Germany around the same time it took place in America. But, unlike in America, the racialized and oppressive nature of this new pattern of criminality was evident from the outset in Germany, as the turn was brought about to help implement the racist and xenophobic program of National Socialism.

II. THE TURN TO SUBJECTIVE CRIMINALITY IN AMERICA AND GERMANY

This Part shows how the shift to subjective criminality in Germany during National Socialism illuminates the dangers inherent in the subjectivist turn that American criminal law took after the publication of the MPC.

A. *From Manifest to Subjective Criminality in America*

To understand the current effects of the subjectivist turns in American criminal law, it is first necessary to understand that things were not always this way. Rather, the emergence and subsequent influence of the Model Penal Code spurred a shift from objective to subjective criminality—a shift that remains to this day.

⁷² *Id.*

1. American Criminal Law Prior to the Turn to Subjective Criminality

As is well known, American criminal law doctrine traces its origins to the common law of England.⁷³ At common law, criminal law was thought of as a way for “the crown . . . to intervene for the preservation of the king’s peace.”⁷⁴ The criminal sanction was thus “perceived as an appropriate instrument of effective regulation of the affairs of the kingdom.”⁷⁵ The king’s peace, at least originally, could only be disturbed by conduct that amounted to a “visible causation of a material harm or the execution of an outward behaviour.”⁷⁶ With its emphasis on harm causation and externally manifested conduct, this view of crime excluded most inchoate offenses from the purview of the criminal law.⁷⁷

The view of crime that emerged was one that was patterned on manifest criminality and that, as a result, took “objective circumstances” to be “[t]he reliable indications of the disturbance of the general welfare,” which the criminal law sought to prevent.⁷⁸ This notion was echoed by Oliver Wendell Holmes, who argued that “the purpose of the criminal law is only to induce external conformity to rule.”⁷⁹ Given that “[a]ll law is directed to conditions of things manifest to the senses,” the object of criminal law must be “an external result.”⁸⁰ The consequence of this view is that conduct that does not cause harm will usually go unpunished even if it is performed with a wicked will or intent.⁸¹ This is exactly what happened in *Clarissa*. Even though the slave clearly intended to poison the two white men, she could not be held criminally liable because her conduct was not capable of causing death. As Holmes succinctly stated, the purpose of the criminal law at common law “is not to punish sins, but is to prevent certain external results.”⁸² The slave in *Clarissa* had plainly sinned, but she had failed to engage in the kind of untoward act that a criminal law patterned on manifest criminality requires.

In addition to holding that attempt liability could not be predicated on an act that was incapable of causing harm, the *Clarissa* court pointed out that “[a]n unexecuted determination to [harm]” was not punishable as an attempt

⁷³ *E.g., id.*

⁷⁴ Emilio S. Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1, 14 (1964).

⁷⁵ *Id.*

⁷⁶ *Id.* at 19.

⁷⁷ *See id.*

⁷⁸ *Id.* at 28.

⁷⁹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 46 (Paulo J. S. Pereira & Diego M. Beltran, eds., Univ. of Toronto Law Sch. Typographical Soc’y 2011) (1881).

⁸⁰ *Id.*

⁸¹ *See id.* at 47.

⁸² *Commonwealth v. Kennedy*, 48 N.E. 770, 770 (Mass. 1897).

even if “preparation was made for that purpose.”⁸³ The defendant must have therefore moved beyond mere preparation for attempt liability to attach. In keeping with manifest criminality, courts at common law drew the line between unpunishable acts of preparation and punishable attempts by reference to acts that were “immediately connected with the commission of an offense.”⁸⁴ Pursuant to this standard, acts that came very close to consummation were punishable, while more remote acts would not suffice for imposition of attempt liability.

A considerable amount of ink was spilt arguing about when exactly an actor’s conduct was sufficiently near consummation to warrant the imposition of criminal liability. One court described the act that suffices to trigger attempt liability as one that “move[s] directly toward the commission of the offense.”⁸⁵ The Supreme Court of Virginia posited that an attempt materializes when the actor engages in conduct that amounts to “the commencement of the consummation.”⁸⁶ Another court said that attempts required “an act immediately and directly tending to the execution of the principal crime.”⁸⁷ Others argued that conduct amounts to an attempt only when “it is so near to the result that . . . the danger [of success] is very great.”⁸⁸ This view was embraced by Justice Holmes, who argued that “the act done must come pretty near to accomplishing that result before the law will notice it.”⁸⁹

This approach to attempts led to not punishing acts that amounted to impossible attempts. Examples of such acts include shooting at a pillow believing it to be a human, or—as in *Clarissa*—administering a nonpoisonous substance believing it to be poisonous. Given that the common law viewed attempts as conduct that was immediately connected to the crime, “there is no need for the law to intervene if the actor’s conduct presented no [actual] risk because it was legally impossible for him to complete the crime.”⁹⁰ Professor Glanville Williams explained this outcome by positing that “[o]ne who attempts an impossible crime can never be in dangerous proximity to success.”⁹¹

The common law “assume[d] that the sole purpose of the law of attempts [was] to deal with conduct which creates a risk of immediate harmful consequences.”⁹² This view of attempts demanded the occurrence of externally verifiable conduct that actually and immediately risked harm as a prerequisite for criminal liability, rather than the existence of a subjective mental

⁸³ *State v. Clarissa*, 11 Ala. 57, 60 (1847).

⁸⁴ *People v. Sobieskoda*, 235 N.Y. 411, 419 (1923).

⁸⁵ *Milner v. State*, 89 So. 306, 306 (Ala. Ct. App. 1921).

⁸⁶ *Lee v. Commonwealth*, 131 S.E. 212, 214 (Va. 1926).

⁸⁷ *Ex parte Floyd*, 95 P. 175, 176 (Cal. Dist. Ct. App. 1908).

⁸⁸ *Hyde v. United States*, 225 U.S. 347, 387 (1912).

⁸⁹ *Commonwealth v. Kennedy*, 48 N.E. 770, 770 (Mass. 1897).

⁹⁰ WAYNE R. LAFAYE, 2 SUBSTANTIVE CRIMINAL LAW § 12.4(a) (3d ed. 2017).

⁹¹ GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 631 n.12 (2d ed. 1961).

⁹² LAFAYE, *supra* note 90.

state that revealed the actor's desire to cause harm in the future. This was most obviously the case in the context of the so-called "unequivocality" standard for attempt liability. According to this test, the act that gives rise to attempt liability must be "of such a nature that it is itself evidence of the criminal intent with which it is done."⁹³ The actor's conduct should thus "bear[] criminal intent upon its face."⁹⁴ As a result, an act that "is in itself and on the face of it innocent, is not a criminal attempt, and cannot be made punishable by [extrinsic] evidence . . . [of] the purpose with which it was done."⁹⁵ That is, the actor's conduct must manifestly bespeak criminality. If it does not, no amount of external proof of the actor's criminal intent will suffice to establish liability for an attempt.

A case like *McQuirter* would come out differently had the court adopted a view of attempts that—like the one at common law—reflected the pattern of manifest criminality. Walking several steps behind another person is conduct that is innocent on its face. It does not bespeak of criminality, nor does it come within dangerous proximity of consummating the offense of rape. As such, *McQuirter*'s conduct would go unpunished under tests that required conduct that unequivocally conveyed wrongdoing or that came dangerously close to consummation. So too would he escape liability under standards that required acts that amounted to commencement of the consummation of the offense or that immediately and directly tended toward its execution.

Manifest criminality shaped the common law in ways that went well beyond the law of attempts. As noted in Part I, the common law of conspiracy reflected manifest criminality when it required that an actual agreement take place as a prerequisite for liability. If a real agreement was lacking, belief in the existence of an agreement did not suffice. This Article also noted in Part I that the common law of homicide tracked manifest criminality as well. Originally, homicide liability was predicated on the occurrence of a deadly blow. While the mental state with which the blow was performed could exculpate a defendant, inculcation was primarily—if not entirely—the product of the harm that ensued from engaging in an act that could be unequivocally recognized as apt for causing death.

The common-law approach to complicity also closely tracked this pattern. The common law distinguished between principals and accessories. A principal was a person who either committed the offense herself or was present when the crime was consummated and aided or abetted its commission.⁹⁶ If the person was the actual perpetrator of the offense, she was considered a principal in the first degree.⁹⁷ On the other hand, if the person was present

⁹³ JOHN W. SALMOND, JURISPRUDENCE 425 (1st ed. 1902).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ WILLIAM C. SPRAGUE, BLACKSTONE'S COMMENTARIES ABRIDGED 437 (9th ed. 1915).

⁹⁷ *Id.*

when someone else perpetrated the offense and helped or encouraged the crime's perpetration, she was considered a principal in the second degree.⁹⁸

In addition to principals in the first and second degrees, the common law distinguished between accessories before and after the fact. As the labels imply, the assistance provided by the accessory before the fact took place prior to the commission of the offense.⁹⁹ Examples of this kind of assistance include providing the eventual perpetrator with a tool that will be used in the commission of the offense, or advising or commanding the perpetrator to consummate the crime.¹⁰⁰ In contrast, an accessory after the fact was a person who “receive[d], relieve[d], comfort[ed], or assist[ed]” the perpetrator after the crime was committed.¹⁰¹

In keeping with the pattern of manifest criminality, the distinctions between principals and accessories at common law reflect lines drawn pursuant to verifiable external facts. What distinguishes a principal from an accessory is presence at the scene of the crime, not the mental state with which the assistance is rendered. Similarly, accessories before and after the fact are distinguished by temporal criteria and not by subjective culpability.

Although American complicity law was patterned on manifest criminality for centuries, the 1900s witnessed a slow but steady trend towards subjective criminality both within and outside of complicity doctrine. The trend, which culminated with the publication of the Model Penal Code and its subsequent adoption in many states, is discussed in detail in the following subsection.

2. The Model Penal Code and the Turn to Subjective Criminality in American Criminal Law

With its emphasis on treatmentism and correctionalism, the Model Penal Code decidedly shifted criminal law's focus from harm-causing acts to subjectively blameworthy mental states. The turn was evident in every aspect of the Code, from its definition of homicide offenses, to its doctrines of justification, to its approach to inchoate crimes and complicity. But at its most fundamental level, the Code's commitment to subjective criminality manifested itself in the very purposes that the model legislation intended to serve. As such, the Code states that one of its chief purposes is “to subject to public control persons whose conduct indicates that they are disposed to commit crimes.”¹⁰² The rupture with manifest criminality could not be more evident. While manifest criminality authorizes punishment only for conduct that caused or came perilously close to causing harm, subjective criminality—

⁹⁸ *Id.*

⁹⁹ *Id.* at 439.

¹⁰⁰ *See id.*

¹⁰¹ *Id.*

¹⁰² MODEL PENAL CODE § 1.02(1)(b) (AM. LAW INST., 2017).

like the Model Penal Code—authorizes the imposition of liability for conduct that indicates the actor’s disposition to commit a crime, even if such conduct did not come close to causing harm.

In what follows, this Article will illustrate the turn to subjective criminality that took place during the mid-twentieth century primarily by reference to doctrines of the Model Penal Code. While the reach of subjective criminality goes beyond the MPC, the Code’s influence over contemporary American criminal law is enormous. Approximately thirty-four states have reformed their criminal laws to conform more closely to the MPC.¹⁰³ The influence of the Code can be felt even in jurisdictions that have not deliberately set out to partially or fully adopt the MPC. All federal courts of appeal, for example, have adopted the MPC’s substantial-step test for attempt liability even though the Federal Criminal Code’s attempt provision is not based on the text of the MPC.

The Code’s turn to subjective criminality is perhaps most obviously illustrated by its novel approach to criminal attempts. Pursuant to the Code, attempted offenses can be punished as severely as consummated offenses.¹⁰⁴ As far as the goals of identifying and treating dangerous actors are concerned, there is little difference between those who intend to cause harm but fail to do so and those who actually cause the intended harm.¹⁰⁵ Both of these actors are equally dangerous, for whether or not the harm ensues depends not on the actor but on contingent factors. Whether the victim of a shooting dies depends on factors that the shooter cannot control, such as whether the victim responds well to antibiotics or receives adequate medical treatment. Since the Code prioritizes the identification of dangerous offenders over other goals, it makes sense for it to punish attempts as severely as consummated crimes are.

In terms of the actual doctrine of attempts, while the proximity and unequivocal attempt standards dominated the legal landscape during the first half of the twentieth century, pursuant to the MPC an actor is liable for an attempt if he engages in a “substantial step” that is “strongly corroborative of the actor’s criminal purpose.”¹⁰⁶ The Code lists a series of acts that are sufficient to satisfy the substantial-step test if they strongly corroborate the criminal intent of the actor. Among others, the acts listed include “searching for or following the contemplated victim of the crime,”¹⁰⁷ “reconnoitering the place contemplated for the commission of the crime,”¹⁰⁸ and “possession[ng] . . . materials to be employed in the commission of the crime” if they are designed for unlawful use or serve no lawful purpose.¹⁰⁹ The Code’s

¹⁰³ Robinson & Dubber, *supra* note 68, at 326.

¹⁰⁴ MODEL PENAL CODE § 5.05(1) (AM. LAW INST., 2017).

¹⁰⁵ Dubber, *supra* note 58, at 983.

¹⁰⁶ MODEL PENAL CODE §§ 5.01(1)(c), (2) (AM. LAW INST., 2017).

¹⁰⁷ *Id.* § 5.01(2)(a).

¹⁰⁸ *Id.* § 5.01(2)(c).

¹⁰⁹ *Id.* § 5.01(2)(e).

approach has exerted considerable influence on contemporary American attempt doctrine.¹¹⁰

The substantial-step test differs considerably from the common law proximity standard. The chief difference is that the MPC test “shifts the emphasis from what remains to be done, the chief concern of the proximity test, to what the actor has already done.”¹¹¹ Unlike the proximity standard, the fact that “further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial” under the Code.¹¹² As a result, the substantial-step test “broaden[s] the scope of attempt liability” when compared with the proximity standard.¹¹³

The facts that gave rise to the oft-cited *People v. Rizzo*¹¹⁴ case illustrate this quite nicely. The defendant in *Rizzo* set out to rob his intended victim but never actually found him.¹¹⁵ The New York Court of Appeals held that attempt liability was inappropriate in the case because the defendant’s conduct did not come sufficiently close to consummation of the offense to warrant the imposition of punishment.¹¹⁶ The defendant in *Rizzo* would nevertheless be held liable for attempted robbery under the MPC’s attempt provision because setting out to find the victim amounts to a substantial-step, even if such conduct is temporally and spatially distant from consummation of the offense. In fact, the defendant’s act in *Rizzo* so clearly satisfies the MPC’s attempt standard that the Code expressly lists “searching for . . . the contemplated victim” of the offense as an act that satisfies the substantial-step test.¹¹⁷

Unsurprisingly, the MPC also breaks with the traditional common-law approach to impossible attempts. As evidenced in the previous subsection, common-law theories are difficult to reconcile with the punishment of impossible attempts. If attempt liability is triggered by acts that come dangerously close to consummation, it makes little sense to impose punishment for conduct that cannot culminate in the offense because of legal or factual impossibility. The Code avoids this outcome by expressly positing that an actor is liable for an attempt as long as his acts “would constitute the [charged] crime if the attendant circumstances were as he believe[d] them to be.”¹¹⁸ The

¹¹⁰ See, e.g., William T. Pizzi, *Rethinking Attempt Under the Model Penal Code*, 9 OHIO ST. J. CRIM. L. 771, 772 (2012). To date, every federal circuit court of appeals has adopted the substantial-step standard.

¹¹¹ MODEL PENAL CODE AND COMMENTARIES § 5.01 cmt. 6(a), at 329 (AM. LAW INST., Official Draft and Revised Comments 1985).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 158 N.E. 888 (N.Y. 1927).

¹¹⁵ *Id.* at 336.

¹¹⁶ *Id.* at 889.

¹¹⁷ MODEL PENAL CODE § 5.01(2)(a) (AM. LAW INST., 2017). The act must also be strongly corroborative of the actor’s criminal purpose. *Id.* § 5.01(2). Given the facts of *Rizzo*, there is little doubt that the actor intended to rob the victim.

¹¹⁸ *Id.* § 5.01(1)(a).

result is that the Code imposes attempt liability in all cases of impossibility. While the Code's drafters were aware that "impossibility preclud[ed] . . . dangerous proximity to the completed crime," they believed that this fact "should not be conclusive" because "the law of attempts should be concerned with manifestations of dangerous character as well as with preventative arrest."¹¹⁹ As a result, legal impossibility is not a defense under the Code because "it is not a useful guide in determining whether the actor 'is disposed toward [criminal] activity.'"¹²⁰

The MPC's subjective approach to attempts would have led to liability in *Clarissa*. The fact that Jamestown Weed was not actually a poisonous substance would not preclude punishment for attempts under the Code. Although the defendant's attempt to poison the intended victims was factually impossible, she would be guilty under the MPC since the victims would have been poisoned had the circumstances been as *Clarissa* had believed them to be. *Clarissa* comes out differently under the Code because the MPC focuses on identifying dangerous actors rather than on punishing harmful acts. Since *Clarissa*'s belief that she was administering a poisonous substance sufficed to reveal her dangerousness, whether the belief was actually true was immaterial to her guilt.

Application of the Code's attempt provisions would also likely lead to the imposition of liability in *McQuirter*. Once the court was satisfied that the defendant in *McQuirter* had the intent to rape the alleged victim, then following the victim would clearly seem to satisfy the MPC's substantial-step test. In *United States v. Jackson*,¹²¹ the court held that the defendant had engaged in a substantial step when he drove towards the bank that he intended to rob.¹²² If Jackson performed a substantial step when he drove in the direction of the place he set out to rob, it stands to reason that *McQuirter* engaged in a substantial step when he followed the victim whom he supposedly desired to rape.¹²³

The period between *Clarissa* and *McQuirter* coincided with the period when American criminal law was slowly transitioning from the manifest criminality of the common law to the subjective criminality of the MPC. This time witnessed a dramatic change in how the nature of attempts was conceptualized and how punishment for inchoate crimes was rationalized. The notion of attempts underlying *Clarissa* was one in which the actor had to engage in conduct that objectively signaled to the community that harm was about

¹¹⁹ Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 584 (1961).

¹²⁰ LAFAVE, *supra* note 90, § 12.4(a) (quoting MODEL PENAL CODE AND COMMENTARIES *Introduction* to art. 5, at 294 (AM. LAW INST., Official Draft and Revised Comments 1985)).

¹²¹ 560 F.2d 112 (2d Cir. 1977).

¹²² *Id.* at 120–21.

¹²³ The MPC's attempt provision also requires that the actor's conduct firmly corroborate the firmness of intent. This article examines in more detail how this requirement may be applied to *McQuirter*. See *infra* Section III.B.

to take place. Criminal liability would be inappropriate in the absence of this kind of act, even if the actor had a firm purpose to do harm. In contrast, the view that emerged from *McQuirter* was one in which the firmness of criminal purpose is the defining feature of attempt. Whether the act objectively signals the imminent occurrence of harm is irrelevant under this formulation as long there is strong evidence of the actor's wicked will. Unlike the highly incriminating conduct that the common law required as a prerequisite for attempt liability, the more modern approach often leads to punishment for engaging in what appear to be innocent acts, such as buying a ski mask, driving around a neighborhood, or—as in *McQuirter*—walking several steps behind a person.

The Model Penal Code's commitment to subjective criminality is also manifested in its approach to complicity. Both the MPC and the state complicity statutes it inspired make criminalization and grading decisions primarily on the basis of the actor's mental state when the offense is rendered. The more blameworthy the mental state with which the assistance was rendered, the more likely the conduct is to be criminalized and punished severely. As the blameworthiness of the aider's mental state wanes, so does the likelihood of criminalization and the severity of punishment. This stands in sharp contrast with the distinctions made between participants at common law. As noted in the previous subsection, the common-law distinctions between different kinds of principals and accessories were based on objective features of the actor's conduct (e.g., presence or timing of the assistance) rather than on the basis of his subjective culpability.

In terms of the threshold for criminalization, the Code's view is that complicity ought to be punished only if the accomplice had the purpose or desire to help bring about the consummation of the offense but not if he merely had knowledge that his conduct would facilitate the perpetration of the crime. The classic formulation of this view can be traced back to Judge Hand's formulation of the mental state of complicity in *United States v. Peoni*.¹²⁴ According to Judge Hand, the mental state of complicity has “nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct.”¹²⁵ Rather, complicity doctrine “demand[s] that [the accomplice] in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.”¹²⁶ In sum, Judge Hand's view of complicity requires that the accessory have a “purposive attitude towards” the consummation of the offense.¹²⁷ This approach to the criminalization of complicity garnered increasing support in America during the first half of the twentieth

¹²⁴ 100 F.2d 401 (2d Cir. 1938).

¹²⁵ *Id.* at 402.

¹²⁶ *Id.*

¹²⁷ *Id.*

century, culminating with its adoption as the appropriate criteria for accomplice liability under the MPC.¹²⁸

As for grading distinctions made once the assistance is criminalized, contemporary American criminal law also makes them primarily on the basis of mental states. In spite of the fact that the majority of American states do not formally distinguish between different kinds of assistance for the purposes of grading criminal offenses, a handful of states punish the less serious offense of “criminal facilitation” alongside the more serious crime of complicity.¹²⁹ This was the approach initially suggested by the drafters of the MPC, although the final draft of the Code ended up eschewing the criminal-facilitation provision. Even though the offense of criminal facilitation did not make it into the official draft version of the MPC, several states enacted statutes creating the offense.

While there are minor drafting variations between the different states that punish criminal facilitation, the core elements of the crime are knowingly providing to another the means or opportunity to commit a criminal offense.¹³⁰ The objective element of the offense (i.e., *actus reus*) is thus to assist the perpetrator of a crime by providing him with either the means or the opportunity to commit the offense. In turn, the mental state (i.e., *mens rea*) required by the offense is to furnish such aid with knowledge that the conduct facilitates the commission of a crime.¹³¹ Although there are arguably some slight differences between the *actus reus* of complicity and the *actus reus* of criminal facilitation, the chief element that distinguishes these crimes from each other is the *mens rea* of each respective offense.¹³² In states that punish both complicity and criminal facilitation, the mental state of the former is limited to purpose, whereas the mental state of the latter is knowledge. The result is a grading scheme that primarily distinguishes between the most serious kinds of assistance (complicity) and the less serious ones (criminal facilitation) on the basis of the presence or absence of certain mental states.

Since both criminalization and grading decisions regarding complicity are primarily made on the basis of the actor’s mental state, the nature and degree of the assistance rendered is not generally relevant to such decisions. As a result, even quite trivial acts of assistance can be punished as complicity, as long as the aid is rendered with the mental state required by law.¹³³ Thus, criminal liability may attach for acts of assistance that are not manifestly criminal, such as selling a pen to someone who will use it to forge a signature or attending a concert performed by a foreign musician who is not authorized

¹²⁸ See MODEL PENAL CODE AND COMMENTARIES § 2.06 cmt. at 318 & n.58 (AM. LAW INST., Official Draft and Revised Comments 1985).

¹²⁹ E.g., N.Y. PENAL LAW § 115.00 (McKinney 2018).

¹³⁰ LAFAVE, *supra* note 90, § 13.2(d) n.134.

¹³¹ *But see, e.g.*, N.Y. PENAL LAW § 115.00 (requiring only the belief that facilitation is “probable”).

¹³² LAFAVE, *supra* note 90, § 13.2(d).

¹³³ Stephen P. Garvey, *Reading Rosemond*, 12 OHIO ST. J. CRIM. L. 233, 236 (2014).

to perform in the country.¹³⁴ On their face, selling pens and attending concerts are seemingly innocuous acts. Even if performed with knowledge that the acts are in some way facilitating someone else's commission of an offense, the aid provided to the perpetrator in these cases is quite trivial. Nevertheless, contemporary American criminal law imposes liability in these cases if the aid is provided with a particularly blameworthy mental state.¹³⁵

Since contemporary complicity law is patterned on subjective criminality, it is not surprising that much case law and scholarship regarding complicity in America centers on whether the aid was provided with the mental state required by the complicity statute. The recently decided Supreme Court case of *Rosemond v. United States*¹³⁶ and the academic commentary it spurred are representative. The defendant in *Rosemond* claimed that he could not be held liable as an accomplice to the crime of carrying a firearm during the commission of a drug trafficking crime unless he engaged in an act that assisted the carrying of the firearm (actus reus) and he had the purpose of facilitating the carrying of the firearm (mens rea).¹³⁷ Unsurprisingly, all of the Justices dismissed the defendant's actus reus claim as contrary to settled complicity law principles.¹³⁸ The Justices disagreed, however, regarding the defendant's mens rea claim.¹³⁹ The substance of the Court's disagreement is not relevant for the purposes of this Article. What is relevant, however, is that the disagreement was about the mental state required for complicity rather than its conduct element.

The scholarly commentary prompted by *Rosemond* similarly focused on the defendant's mental state. In an essay analyzing *Rosemond*, Professor Steve Garvey noted that the Court made conflicting statements regarding whether the mens rea of complicity is purpose or knowledge.¹⁴⁰ He then set out three different ways of reconciling the Court's seemingly conflicting statements regarding the mens rea of complicity. In another recent article on *Rosemond*, Professor Kit Kinports observed that "the rules governing mens

¹³⁴ See, e.g., *Wilcox v. Jeffery* [1951] 1 All ER (KB) 464 at 466.

¹³⁵ American criminal law at the very least authorizes the imposition of such punishment. Of course, discretion at either the front or back end of the criminal process may lead to mitigated punishment or no punishment at all. In the front end, prosecutors may exercise their discretion by deciding not to prosecute cases in which the act of assistance is seemingly innocuous. At the back end, judges may exercise discretion at sentencing by mitigating the punishment imposed on accomplices whose contribution is minimal. Nevertheless, the law does not formally discriminate between substantial and trivial assistance, as both are in principle punished with the same severity. For a more extensive discussion of this matter, see Luis E. Chiesa, *Reassessing Professor Dressler's Plea for Complicity Reform: Lessons from Civil Law Jurisdictions*, 40 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1 (2014).

¹³⁶ 572 U.S. 65 (2014).

¹³⁷ *Id.* at 72.

¹³⁸ See *id.*

¹³⁹ See *id.* at 83–84 (Alito, J., concurring in part and dissenting in part).

¹⁴⁰ Garvey, *supra* note 133, at 241.

rea and complicity remain surprisingly unresolved.”¹⁴¹ She then put forth a defense of “purpose” as the mental state that complicity ought to require. There are, of course, scholars whose writings focus on the conduct element of complicity.¹⁴² But these writings are the exception rather than the norm. Most complicity scholarship—like most complicity case law—focuses on mental states. This is the predictable result of criminal law doctrines that respond to the pattern of subjective criminality.

As this Article set forth in Part I, the MPC’s approach to the related doctrine of conspiracy is also patterned on subjective criminality. The Code adopts what has come to be known as the “unilateral” theory of conspiracy.¹⁴³ Pursuant to this theory, it is appropriate to impose conspiracy liability even if there is no real agreement.¹⁴⁴ This is of particular importance in cases of “feigned agreement,” such as those “in which one of two alleged ‘conspirators’ is, unknown to the defendant, an undercover police agent or a police informant.”¹⁴⁵ The unilateral theory leads to liability in this kind of case “based on the defendant’s subjective belief that he or she was conspiring.”¹⁴⁶

The unilateral theory “ignores the historical rationale of the common law crime of conspiracy,” which was based on preventing “the threat to society of two or more persons pursuing crime.”¹⁴⁷ In cases of feigned agreements, the common law’s “rationale for increased punishment is absent”¹⁴⁸ because the threats and harms that are linked to group criminality do not exist. In contrast, the MPC punishes unilateral conspiracy because those who wish to join forces with others for criminal purposes reveal themselves to be dangerous even if, because of feigned acquiescence, there is no actual agreement. Ultimately, the Code’s unilateral conspiracy theory punishes predisposition to group criminality rather than group criminality itself.¹⁴⁹ While this approach “may be heralded as a step toward more effective law enforcement,” it has considerable “potential for oppression,” because it allows undercover agents to impose criminal liability in cases in which there is no underlying harmful or threatening conduct.¹⁵⁰ This is a tradeoff inherent in laws that—like the MPC and most modern American criminal codes—are patterned on subjective criminality. While subjective criminality’s emphasis on the identification of dangerous actors enhances the crime-preventative powers of law enforcement agencies, it also opens the door to a discriminatory

¹⁴¹ Kit Kinports, Rosemond, *Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 134 (2015).

¹⁴² See, e.g., Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427 (2008).

¹⁴³ Burgman, *supra* note 70, at 77.

¹⁴⁴ See *id.*

¹⁴⁵ *Id.* (footnote omitted).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Burgman, *supra* note 70, at 78.

¹⁵⁰ *Id.* at 77–78.

and oppressive use of the criminal law, as the German experience highlighted in the next section shows.

B. *From Manifest to Subjective Criminality (and Back) in Germany*

This Section illustrates how the turn to subjective criminality in Germany enabled the National Socialist regime to enact racially oppressive substantive and procedural criminal laws.

1. Manifest Criminality During the Weimar Republic

German criminal law during the first half of the twentieth century was firmly committed to what scholars called an “act-based criminal law.” This approach was contrasted with what they dubbed an “actor-based criminal law.”¹⁵¹ The cornerstone of “act-based criminal law” was that persons ought to be punished for what they do, and not for who they are.¹⁵² This, in turn, generated a view of criminal law pursuant to which the goal of the criminal justice system was to prevent harm-causing acts rather than to identify or treat dangerous individuals.¹⁵³

As a consequence of this view, the so-called theory of legal goods was developed.¹⁵⁴ The theory of legal goods imposed a substantive limit on the state’s power to criminalize conduct.¹⁵⁵ Pursuant to this theory, criminal punishment ought to be imposed only when doing so is necessary to protect important individual or collective interests from harm.¹⁵⁶ The notion of crime that emerges from this theory is that of an act that causes harm or imminently threatens to cause harm to important personal or societal interests. This way of thinking about crime and punishment is in keeping with the pattern of manifest criminality. It predicates criminal liability on the occurrence of an externally verifiable harm-causing (or threatening) act, rather than on the presence of a subjective mental state that—when combined with certain conduct—signals dangerousness even if no harm is close to being caused. In what follows, this Article will—for illustrative purposes—detail how the German doctrines of complicity and attempt reflected this commitment to manifest criminality during the first half of the twentieth century. It is important to note, however, that manifest criminality pervaded not only the

¹⁵¹ HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *TRATADO DE DERECHO PENAL, PARTE GENERAL* 58–59 (Miguel Olmedo Cardenete trans., 5th ed. 2002).

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *Id.* at 274–75.

¹⁵⁵ *Id.* at 276.

¹⁵⁶ *Id.* 275–76.

German law of attempts and complicity, but also a wide array of criminal law doctrines during the period leading up to and right before World War II.

The predominant theory of complicity during the Weimar Republic was the so-called “objective” theory of perpetration.¹⁵⁷ Pursuant to this theory, an actor was considered a perpetrator if she engaged in conduct that fully satisfied every element of the criminal offense.¹⁵⁸ In the case of a rape, a person who used force to penetrate the victim against her will would be a perpetrator because his conduct satisfied all the offense elements of rape. In contrast, a person who held the victim’s arms while another sexually penetrated her was an accomplice rather than a perpetrator, because his conduct did not satisfy every element of the offense of rape (the penetration element was missing).

Eventually, this theory had to be modified to account for cases in which different people engaged in conduct that satisfied some elements of the offense, but neither engaged in conduct that satisfied all offense elements. In these cases, courts held that the person who engaged in conduct deemed to be more causally significant or proximate was considered the perpetrator and that the rest were deemed accomplices.¹⁵⁹ In the case of a homicide in which one person prepared coffee while another dissolved poison in the coffee and served it to the victim, the person who poisoned the coffee would be deemed a perpetrator and the one who prepared the coffee an accomplice, for the conduct of the former is more causally proximate than that of the latter.

This approach to distinguishing perpetrators from accomplices had as its distinctive feature not the subjective culpability of the participants but, rather, the nature of their causal contribution. More specifically, the objective theory of perpetration demanded that the actor engage in a certain kind of causally significant act in order to be considered a perpetrator. The act of the perpetrator had to be of such a nature that it could be recognized as comparatively more wrongful than those of the accomplices without the need to assess the mental state of the actors. Similarly, actors would be considered accomplices if the nature of their acts was of less significance than those of the perpetrator, even if they desired or intended to bring about harm. The subjective culpability with which the actor facilitated the commission of the offense was thus viewed as subsidiary to the more important question of whether the conduct contributed to the offense in a particularly significant kind of way. This kind of analysis is at the core of the pattern of manifest criminality.

The German law of attempts during this same period also reflected a commitment to manifest criminality. Until the mid-twentieth century, German criminal theorists advocated what they called the “objective theory” of attempts. The theory held that attempts should be punished because such

¹⁵⁷ JESCHECK & WEIGEND, *supra* note 151, at 697–98.

¹⁵⁸ This approach was known as the “objective and formalistic” approach to perpetration and complicity. *Id.* at 698.

¹⁵⁹ This approach came to be known as the “objective and normative” approach to perpetration and complicity. *Id.*

conduct threatens to cause harm to legally protected interests.¹⁶⁰ This meant that attempts ought to be punished not because of the content of the actor's will but rather because the acts come within dangerous proximity of consummating the offense.¹⁶¹ Pursuant to the objective theory, attempts should be punished only when the underlying conduct creates a high probability of producing the harm prohibited by the offense.¹⁶²

In practical terms, the objective theory of attempts leads to similar results as does the common-law tests for attempts. That is, it criminalizes attempts only when the underlying conduct comes very close to consummation of the offense. As a result, the objective theory generates a restrictive view of what counts as an attempt that leaves many acts leading up to the consummation of the offense unpunished.¹⁶³ It also leads to forsaking the punishment of impossible attempts, given that in such cases the actor does not engage in conduct that creates a high probability of producing the harm prohibited by the crime.¹⁶⁴

Conduct like the one that gave rise to *Clarissa* would go unpunished under the objective theory because the substance that the defendant dissolved in the coffee was not actually poisonous. Therefore, she did not perform conduct that created a high probability of harm, as the objective theory requires. This is, of course, the same result that would ensue pursuant to the common law view of attempts in America. Similarly, the defendant's acts in *McQuirter* would not generate liability under the German objective theory of attempts. Since the objective theory focuses on objective proximity to consummation of the offense instead of on the existence of evil will or intent, the act of walking several steps behind a person would not suffice to generate liability, even if there were conclusive proof of purpose to harm. This is compatible with how the case would fare under the common law approach to attempts but—as explained in the previous section—is in tension with the Model Penal Code's substantial-step test for attempt liability.

The objective theory also calls for punishing attempts less than completed offenses. Given that at the time the general belief was that the primary goal of the criminal law was to prevent harm to significant individual or collective interests, attempts were considered less serious forms of wrongdoing because they featured conduct that failed to cause harm. These consequences of the objective theory of attempts are in the spirit of the pattern of manifest criminality, as they reflect both a refusal to punish conduct that would be

¹⁶⁰ *Id.* at 550–51.

¹⁶¹ *Id.* at 551.

¹⁶² *Id.*; see also *id.* at 58.

¹⁶³ See JESCHECK & WEIGEND, *supra* note 151, at 697.

¹⁶⁴ See *id.* at 58, 551.

perceived as innocuous,¹⁶⁵ and a view of crime that places harm rather than subjective culpability at its core.¹⁶⁶

2. National Socialism and the Turn to Subjective Criminality in Germany

The dominance of the pattern of manifest criminality in German law began to wane as National Socialism began to rise. Once National Socialists gained control over the nation's governmental apparatus, criminal law scholars and courts slowly but steadily moved towards subjective criminality. By putting defective-will formation at the forefront of criminal theory, these scholars rejected the notion that conduct ought to be criminalized only when it is manifestly criminal. Instead, it embraced a concept of crime in which wrongdoing was inferred from the presence of flawed internal mental states rather than from external dangerous acts.

As this Article pointed out in the previous subsection, in the decades leading up to the rise of National Socialism in Germany, a crime was generally conceived of as an act that harmed or threatened to harm important legally protected interests. This idea was called into question by Nazi scholars, who argued that crimes should be understood not as conduct that threatened or caused harm but, rather, as acts of treason or a breach of the duty of loyalty owed by the individual to the German people.¹⁶⁷ This view of crime as treason or disloyalty generated a realignment of the fundamental principles of criminal law under National Socialism. Instead of focusing on the causation of harm, National Socialist criminal law focused on scrutinizing the will of the actor.¹⁶⁸ As Nazi scholars moved away from a harm-based criminal law, they argued that the criminal law should care more about the creation of unacceptable risks than about the production of harmful results.¹⁶⁹ As criminal theorists shifted their emphasis from harms and results to wills and risks, so too did they fundamentally reconsider the aims of the criminal sanction.¹⁷⁰ Before National Socialism, the dominant view was that punishment was primarily a vehicle for safeguarding legal goods.¹⁷¹ During National Socialism,

¹⁶⁵ This is illustrated by the fact that, under the objective theory, preparatory acts that do not come close to consummating the offense are unpunished even if performed with a blameworthy mental state.

¹⁶⁶ This is illustrated by the objective theory's refusal to punish impossible attempts as well as the contention that attempts ought to be punished less than consummated offenses.

¹⁶⁷ *POLÍTICA CRIMINAL Y SISTEMA PENAL* 144 (Inaki Rivera Beiras ed., 2005).

¹⁶⁸ FRANCISCO MUNOZ CONDE, EDMUND MEZGER Y EL DERECHO PENAL DE SU TIEMPO 143 (Tirant Lo Blanch ed., 4th ed. 2003).

¹⁶⁹ *Id.* at 143–44.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

criminal law was viewed primarily as an instrument for preventing breaches of duties owed to the German people.¹⁷²

The Nazi account of crime as treason feels quite at home in the pattern of subjective criminality. In fact, no crime fits this pattern better than treason. In its origins, “compass[ing]” or “imagining” the death of the king satisfied the crime of treason.¹⁷³ Pursuant to the original understanding of this offense, an individual did not need to perform any act in order to be guilty of treason, let alone an act that came close to endangering the king. While this kind of purely mental offense may strike current generations as a thing of the distant past, it was a criminal offense during the National Socialist regime to “compass” or “imagine” the death of a state official for political reasons.

As strange as this type of crime seems today, it was perfectly compatible with a criminal law that viewed crime as an act of disloyalty against the people and the state. Although one may certainly engage in conduct that externally manifests disloyalty, one need not act in order to be disloyal. Many argue that loyalty is a feeling or sentiment of devotion that one has towards a person, cause, or some other entity, such as a nation.¹⁷⁴ Insofar as loyalty is characterized this way, the act of seriously entertaining thoughts of harming the person, cause, or entity that one is said to be loyal to is in tension with the feeling or sentiment of devotion that loyalty presupposes. Such mental states are thus constitutive of disloyalty without any further act being necessary.

Taken to its logical extreme, this is exactly the kind of offense that one would expect to find in a criminal law patterned upon subjective criminality. Being entirely lacking in a conduct element, this kind of offense finds blameworthiness only in the internal workings of the actor’s mind. Wrongfulness is inferred from the quality of the actor’s will instead of from the nature of his conduct.

This turn to subjective criminality was embraced by some of the most respected German criminal theorists of their time. Hans Welzel, for example, in his 1944 edition of his much celebrated textbook on criminal law, expressed that although the Penal Code had largely remained unaltered during the Nazi regime, the changes introduced by the Third Reich had taken it to another level.¹⁷⁵ Among the changes that Welzel identified was the shift in emphasis in the concept of crime from objective results to subjective will.¹⁷⁶ The concept of crime that emerged according to Welzel was that of an “actor-

¹⁷² *Id.* at 143–45.

¹⁷³ Note, *Historical Concept of Treason: English, American*, 35 INDIANA L.J. 70, 72 & n.18 (1959).

¹⁷⁴ See, e.g., R. E. Ewin, *Loyalty: The Police*, 9 CRIM. JUST. ETHICS, Summer/Fall 1990, at 3, 3–4 (1990).

¹⁷⁵ Jean Pierre Matus Acuna, *Nacionalsocialismo y Derecho Penal. Apuntes Sobre el Caso de H. Welzel*, 12 ZEITSCHRIFT FÜR INTERNACIONALE STRAFRECHTSDOGMATIK 622, 626 (2014).

¹⁷⁶ *Id.*

based criminal law” that primarily focused on the blameworthiness of the actor rather than on the wrongfulness of the act.

For Welzel—as for many other criminal law scholars during National Socialism—the subjective concept of crime manifested in an approach to complicity law based on the actor’s will.¹⁷⁷ As a result, this time witnessed the ascent of the so-called “subjective” theories of perpetration and complicity. Pursuant to the subjective theory, an actor was considered a perpetrator if he acted with a “perpetrator’s will” (*animus auctoris*).¹⁷⁸ An actor manifested the will of a perpetrator when she wanted or desired the act to be her own. That is, when she identified the act as one of her own doing as opposed to someone else’s.¹⁷⁹ In contrast, an actor was deemed an accomplice under the subjective theory when she acted with an “accomplice’s will” (*animus socii*).¹⁸⁰ An accomplice’s will was manifested when the actor perceived the act as belonging to someone else. The act was thus subjectively perceived not to be the actor’s own doing.¹⁸¹

Somewhat self-servingly, the subjective theory of perpetration was invoked by the German courts in the 1960s to punish as accomplices those who directly executed people in concentration camps.¹⁸² At first glance, this outcome seems counterintuitive, for those who personally executed others would appear to be clear-cut perpetrators of homicide. Nevertheless, local courts concluded that they ought to be punished as accomplices because they did not fully identify with the killings. Instead, they viewed the killings as belonging primarily to those higher up in the chain of command who ordered them. They thus acted with the will of an accomplice (*animus socii*) as opposed to the will of a perpetrator (*animus auctoris*). Given that accomplices are punished considerably less than perpetrators in Germany, the practical consequence of this finding was that many people who actually executed victims in concentration camps had their sentences substantially mitigated.¹⁸³

Another example of the turn to subjective criminality in German criminal law can be found in the law of attempts. A law of attempts patterned on subjective criminality infers wrongfulness and blame from a defective mental state. This view of attempts relegates the actor’s conduct to playing the evidentiary role of confirming or blocking the inference of blame that arises from an initial assessment of the actor’s culpability. Unsurprisingly, the same conceptual commitments that gave rise to the extreme offense of treason

¹⁷⁷ *Id.* at 626–27.

¹⁷⁸ JESCHECK & WEIGEND, *supra* note 151, at 699.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Francisco Muñoz Conde, *Problemas de Autoria y Participacion en el Derecho Penal Economico*, 9 REVISTA PENAL 59, 62 & n.3 (2002).

¹⁸³ The vast majority of contemporary German criminal theorists disagree with the German Supreme Court’s decision in this case.

contemplated in National Socialist criminal law gave rise to this more subjective view of attempts.

Criminal theorists during the National Socialist regime advocated a turn towards a law of attempts that took as its focal point the actor's vicious will. In this vein, then-acclaimed German criminal scholar Edmund Mezger suggested in 1936 that the criminal law had to identify and capture its enemy from the outset.¹⁸⁴ This meant that criminal liability ought to be triggered from the very moment that the actor's will becomes bent on a criminal plan.¹⁸⁵ Hans Welzel also advocated doctrines that closely followed the subjective pattern of criminality. The kind of criminal law that he defended was one that subjectivized to the extreme the concept of wrongdoing, that advocated punishing attempts as severely as consummated offenses, and favored punishing impossible attempts well beyond what had previously been advocated.¹⁸⁶ These outcomes—especially punishing attempts as much as completed crimes—were seen as essential to the National Socialist approach to criminal law.

As far as the law of attempts was concerned, the combined effect of these principles was to produce a body of doctrine that was designed to identify instances of defective will formation, to punish impermissible risk creation, and to prevent breaches of duty. This explains why Nazi criminal law scholars advocated broad punishment of impossible attempts. Given the renewed emphasis on defective will formation, whether or not completing the offense was possible revealed itself as tangential. Regardless of the (im)possibility of completing the crime, the actor's conduct uncovered his evil will.

Commitment to these principles also led to criminalizing attempts well before the actor's conduct came close to completion of the crime. If criminal liability is premised on the presence of a defective will, there is no need to wait until the actor comes close to completion to confirm the existence of such a will. Preliminary acts that strongly suggest the presence of a flawed will-formation process ought to be enough.¹⁸⁷ Finally, punishing actors for conduct that reveals a defective process of will formation is also compatible with punishing attempts as severely as completed offenses. If the wrongfulness of an act is the product of the actor's defective will, then there is little reason to distinguish between the punishment of attempts and completed crimes. The actor's will is exactly the same regardless of whether the result ensues or not. The same outcome follows from a criminal law that focuses on punishing risk creation rather than harm causation. The risk created in attempted and completed crimes is the same. Of course, in completed crimes the harm actually materializes. But this is irrelevant if the criminal law is concerned with risks instead of harms.

¹⁸⁴ MUNOZ CONDE, *supra* note 168, at 143.

¹⁸⁵ *Id.* at 143–44.

¹⁸⁶ *Id.* at 97.

¹⁸⁷ The similarities of the National Socialist account of attempts with the Model Penal Code's substantial-step approach are striking.

3. The (Re)Turn to Manifest Criminality in Germany After the Fall of National Socialism

After the fall of National Socialism in Germany, criminal theorists slowly began shying away from the pattern of subjective criminality. Given that manifest criminality had dominated the landscape of German criminal law until the 1930s, scholars and lawmakers were in an ideal position to once again avail themselves of the concepts and doctrines that prevailed prior to the rise of subjective criminality. And so they did. In terms of the concept of crime and the aims of the criminal sanction, German scholars returned to the view of crime as conduct that harms or imminently threatens to harm significant individual or collective interests. Relatedly, the notion that the goal of the criminal sanction should be safeguarding legal goods once again took center stage. Combined, these ideas generated an approach to criminal law that once more placed the occurrence of externally verifiable harm at its core. As the rest of this subsection details, this led to the resurgence of manifest criminality in the doctrines of complicity and attempts.

In spite of the German Supreme Court's willingness to apply the subjective theory of perpetration well into the 1960s, the vast majority of contemporary criminal theorists rejected this view. The theory was deemed to be incompatible with the fundamental structure of modern criminal law, which demands that criminal laws be comprised of doctrines that are largely objective both in their content and scope.¹⁸⁸ While few scholars directly reference the determinative role that the subjective theory of perpetration played in the lenient punishments imposed on many defendants who executed people in concentration camps, it would be naïve to believe that these events were unrelated to the rejection of the subjective theory in contemporary German complicity law.

A majority of German commentators today embrace the so-called "control theory" of perpetration. Pursuant to the control theory, an actor is a perpetrator if she has dominion over the course of conduct that culminates in the commission of the offense.¹⁸⁹ More specifically, the perpetrator is the person or persons that have control over how, when, and where the offense is committed. The most obvious kind of perpetrator is the person who personally engages in the conduct that constitutes the offense, such as the person who pulls the trigger in a homicide, the person who penetrates the victim against her will in rape, and the person who takes someone else's property in theft. On the other hand, an actor is an accomplice if he facilitates the commission of an offense but does not have control or dominion over the conduct that produces the crime.¹⁹⁰ A person who gives a knife to another so that she can

¹⁸⁸ JESCHECK & WEIGEND, *supra* note 151, at 700.

¹⁸⁹ *Id.* at 702.

¹⁹⁰ *Id.*

stab the victim is an accomplice, for the control over the offense lies with the person who stabs the victim and not with the one who provides the weapon.

The control theory is objective in the sense that the person must have actual control over the criminal conduct. A desire to control the conduct that gives rise to the offense is not enough to establish perpetration. The control theory thus stands in sharp contrast to the subjective theory that was embraced by German criminal theorists during National Socialism and that continued to hold its grip over German courts through the 1950s and 1960s. Grading distinctions under the subjective model were dependent on the content of the actor's will. The eviler the will, the more punishment that was deserved. In contrast, grading distinctions under the control model are dependent on an objective assessment of the degree of control that the actor exerts over the conduct. The more control that the actor has over the criminal conduct, the more punishment that is deserved. The subjective model bears the signature structure of the pattern of subjective criminality, for the factor that marks the difference between perpetration and complicity (the content of the actor's will) is not readily ascertainable by a third party observing the conduct. On the other hand, the control theory represents a shift to the pattern of manifest criminality, since control is determined independently of the actor's will.

In the context of attempts, many contemporary German criminal theorists continued to argue even after the fall of National Socialism that the will to engage in criminal conduct ought to be an essential element of attempted crimes.¹⁹¹ Nevertheless, they contended that the will needed to be coupled with actions that put in motion a chain of events that was likely to culminate in the commission of an offense. While the notion of a criminal will paired with acts tending to the commission of an offense explains the concept of a criminal attempt, it does not itself justify the imposition of punishment for engaging in an attempt. Most scholars today suggest that punishment is justified only if the actor's conduct is also of such a nature that it undermines the community's sense of tranquility or that it breaches the peace.¹⁹²

Given that acts that amount to punishable attempts must cause distress in the community and thereby threaten to undermine the public peace, attempt liability is not triggered in contemporary German criminal law until the latter stages of the criminal plan. This view is reflected in the German Penal Code, which criminalizes attempts only when the actor's conduct "will immediately lead to the completion of the offence."¹⁹³ The German Penal Code further specifies that whether or not the conduct is close to the

¹⁹¹ *Id.*

¹⁹² *Id.* This has come to be known in the German scholarly literature as the "distress theory" of the punishability of attempts. The theory locates the harm of attempts in the distress that attempting to cause harm inflicts on the community even if no actual harm comes about.

¹⁹³ STRAFGESETZBUCH [STGB] [PENAL CODE] § 22, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0138.

consummation of the crime is determined by reference to the actor's criminal plan.¹⁹⁴ It is important to note that the role of the actor's criminal plan is not to serve as a basis for inculcating the actor. Rather, the actor's criminal plan is relevant insofar as it provides a benchmark for assessing whether the actor has crossed the line between preparation and attempt.¹⁹⁵ That is, German courts and scholars care about the actor's criminal plan not because the plan is particularly relevant to gauging the actor's guilt or blameworthiness, but rather because it is helpful when assessing whether the actor's conduct comes sufficiently close to completion of the crime.

The notion of an attempt as conduct that causes distress to the community and that amounts to a breach of the peace also has implications for the punishment of so-called impossible attempts. More specifically, this view leads to punishing impossible attempts when an *ex ante* assessment of the conduct would lead a reasonable person to believe that the acts performed by the actor were well suited for completing the crime.¹⁹⁶ After all, conduct that reasonable spectators would consider apt for completing the offense can cause distress to the community even if an *ex post* analysis reveals that the attempt was impossible because the conduct was not actually suited for completing the crime.¹⁹⁷ If members of the community learn that someone shot an innocent person with intent to kill, they are likely to feel distressed about the event even if they later learn that—unbeknownst to the shooter—the gun was loaded with blanks instead of actual bullets. The same can be said with regard to the notion that attempts ought to be punished because they amount to breaches of the peace. Shootings intended to kill people thus breach the

¹⁹⁴ See *id.*; JESCHECK & WEIGEND, *supra* note 151, at 555.

¹⁹⁵ Invoking the actor's criminal plan as a frame of reference for ascertaining how close the conduct came to consummation is believed to be particularly helpful in determining whether so-called incomplete attempts ought to be punished. Attempts are incomplete when the actor fails to consummate the offense because she has not engaged in all the acts necessary to complete the crime. An example is that of a would-be bank robber who is arrested upon entering the bank but before he commands the teller to give him the money. Given that the actor has not performed all the steps that are necessary to complete the offense, such as asking for the money, his attempt is incomplete. The problem presented by incomplete attempts is that in many cases it is difficult to determine how many additional steps were necessary in order to complete the offense. In the case of that would-be bank robber, how do we know if entering the bank is an act that "will immediately lead to the completion of the offense"? To make headway in answering this question, one first needs to have a better sense of what else remained to be done prior to successfully robbing the bank. But in order to know this, it would be helpful to know what was the actor's criminal plan. If his plan was to shout out "this is a robbery, take out your wallets and hand me all your cash," then perhaps entering the bank is close enough to consummation to warrant imposition of attempt liability. If, on the other hand, the plan was to find his way to the bank's safe in the basement and dynamite his way into the safe, then perhaps entering the bank was not close enough to completion of the crime.

¹⁹⁶ JESCHECK & WEIGEND, *supra* note 151, at 570–71.

¹⁹⁷ *Id.* at 570.

community's peace even if the shooter fails to kill the victim because he unwittingly fires blanks instead of live bullets.¹⁹⁸

In recent years, an increasing number of German scholars have been distancing themselves from the "distress theory" of attempts, instead advocating what they call the "risk theory" of attempts.¹⁹⁹ Pursuant to the risk theory, attempts ought to be punished neither because they reflect an evil will nor because they cause distress to the community or amount to a breach of the peace, but rather because they create a substantial and unjustifiable risk of harm to important individual or collective interests. This view is forcefully defended by German criminal-law scholar Claus Roxin, who argues that if the purpose of the criminal law is to safeguard legally protected interests, it is sensible to affirm that this protection can only be achieved by prohibiting the creation of substantial and unjustifiable risks to those interests.²⁰⁰ If this is the case, then the creation of substantial and unjustifiable risks to legally protected interests represents an attempt, while the materialization of the risk would amount to a consummated offense.

Pursuant to this view, attempts ought to be criminalized only when the actor's conduct has progressed to the point where it jeopardizes a legally protected interest. This typically occurs when the acts come dangerously close to consummation. The theory also precludes imposing attempt liability for routine acts, even if they are performed with evil intent. Examples include buying rope, duct tape, or ski masks. Routine acts such as these are not considered objectively dangerous. The actor's will may, of course, be dangerous, but the theory strives to identify and punish dangerous acts rather than dangerous actors.²⁰¹ This is exactly what one would expect to see in a system of criminal justice that—like German criminal law in the aftermath of National Socialism—is committed to the pattern of manifest criminality.

In sum, the turn to the pattern of subjective criminality in Germany during National Socialism was followed by a slow but steady return to manifest criminality in the decades following World War II. Criminal law theorists began defending the control theory of perpetration, which—as was explained earlier—focuses primarily, if not entirely, on the objective nature of the actor's contribution to the offense. In the realm of attempts, German criminal theory once again gravitated toward objective theories that tended to draw

¹⁹⁸ Claus Roxin, *Acerca de la Punibilidad de la Tentativa Inidónea*, 5 REVISTA LATINOAMERICANA DE DERECHO 289, 293 (2008).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ The dangerousness theory also has implications for the punishability of impossible attempts. Advocates of this theory argue that the creation of a substantial and unjustifiable risk is something that can only be assessed *ex ante*. Risks of harm can only be assessed before the fact. After the fact, we no longer have risk but rather actual harm causation. If this is the case, then impossible attempts ought to be punished when they create an *ex ante* risk of harm that is both substantial and unjustifiable. This is the view of Roxin, who argues that, like any attempt, impossible attempts are also dangerous because risk is determined in accordance to what a reasonable person would know under the circumstances. *Id.*

the line between punishable and unpunishable attempts much closer to consummation of the crime.

III. SUBJECTIVE CRIMINALITY, THE MODEL PENAL CODE, AND THE HIDDEN RACIALIZATION OF AMERICAN CRIMINAL LAW DOCTRINE

Although to a somewhat lesser effect than the Nazi takeover in Germany, American criminal law's turn to subjective criminality created doctrines that often led to unfairly discriminating against historically oppressed minorities. This Part argues that this unsettling feature of American criminal law can be traced back to the framework that undergirds the influential Model Penal Code.

A. *The Hidden Oppressiveness and Racial Bias of American Criminal Law Doctrine*

The shifts in German criminal law doctrine before, during, and after National Socialism reveal quite clearly that there is a close connection between the dominant politics and the prevailing pattern of criminality. It is not coincidental that the pattern of manifest criminality became deeply entrenched in German criminal law during the golden era of the Weimar Republic. The constitutional values that prevailed during this period and the social progressive reforms inspired by them were very much in tune with a kind of criminal law that sought to punish harmful acts rather than evil actors. In contrast, the criminal law that emerged during the reign of the National Socialist party in Germany was patterned primarily on subjective criminality. The turn is not surprising. Subjective criminality is better suited to advance the interests of authoritarian regimes that are seeking to weed out threats to the stability of their command.

German criminal law doctrine wears its political valence on its sleeve because it is difficult—if not impossible—for law in general and for the criminal law in particular to remain unaffected by momentous political changes such as the ones that took place as a result of the rise and fall of National Socialism. In comparison, the political valence of American criminal law has largely remained hidden from plain view, at least during the twentieth century.

Much like in Germany, criminal law in America during the first half of the twentieth century was patterned mostly on the model of manifest criminality. As the midpoint of the century drew near, American criminal law—as had been the case with German criminal law—began a slow but steady shift towards the pattern of subjective criminality. Unlike in Germany, however, the changes in American criminal law doctrine were not the products of a tectonic shift in political ideology. American criminal law began to change in response not to politics but, rather, to the penological and

criminological ideas of the time. This time period featured the rise of a criminology that looked at crime as a disease and at offenders as victims of their internal and external circumstances. This model eschewed the view of the criminal as a subject endowed with free will that ought to be blamed for willingly choosing to do evil. Instead, it embraced the view of offenders as beings that often committed crimes as a result of either social conditions or mental illness. With the rise of these ideas, so too came the rise of the penological goals of treatmentism and correctionalism. According to these ideas, the criminal law ought to be aimed at treating the social or mental causes of crime and at correcting those individuals who could be corrected. Those who could not be treated or corrected would then need to be incapacitated. As the treatmentist and correctional approach gained steam in American criminal law circles, so too did the idea that criminal law doctrine ought to be modeled upon the pattern of subjective criminality. With its emphasis on mental states, the pattern of subjective criminality was ideally suited to the goal of identifying dangerous individuals in need of treatment and correction. This was the view of crime and criminal law that served as the driving engine for the drafters of the Model Penal Code.

Unlike in Germany, where the turn to subjective criminality during National Socialism reeked of authoritarianism, the rise of subjective criminality in America was originally viewed as quite progressive. After all, the turn to treatmentism and correctionalism was the product of the same view of human conduct that was partially responsible for the rise of the welfare state during the early to mid-twentieth century.²⁰² While the criminal justice system focused on treating actors after they had offended, the welfare state was designed to attack the social conditions that caused individuals to offend in the first place. The connection between social welfare and treatmentist criminal law reveals the liberal nature of the views undergirding the turn to subjective criminality in the mid twentieth century. By positing a worldview in which liability is at its core social rather than individual, the scholars behind correctionalist criminal law sought to humanize criminal law rather than to enhance its cruelty.²⁰³

But, however benign and progressive the motives underlying the turn to subjective criminality may have been, what once was viewed as necessary to effectuate a progressive agenda now serves primarily to oppress. To demonstrate this point it is useful to, once again, return to the *McQuirter* case. Contrary to the standard reading of the case, the defendant's conviction in *McQuirter* cannot be entirely explained by the racial prejudice that pervaded in the Jim Crow south. As this Article explains in the following section, the outcome was made possible not only by bigotry, but also by the turn to subjective criminality that undergirded the Model Penal Code and the corresponding emphasis on intent that this turn brought about.

²⁰² See DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 43–44 (2001).

²⁰³ See *id.* at 44.

B. *The Model Penal Code, Race, and McQuirter*

Although the turn to subjective criminality brought about by the MPC drafters was well intentioned, it had the unintended consequence of making it easier to punish individuals based on their race. This infelicitous outcome is evident not only in the *McQuirter* decision, but also in the basic structure of modern American criminal law.

1. The “Progressive” Views Underlying the Model Penal Code

Roughly one year before the Supreme Court of Alabama affirmed McQuirter’s conviction, Herbert Wechsler—the chief architect of the Model Penal Code—published an influential article in the *Harvard Law Review* titled “The Challenge of a Model Penal Code.”²⁰⁴ In it he explained that the American Law Institute first proposed the drafting of a Model Penal Code in the early 1930s, but the project was put on hold until 1951, when funds for the undertaking of such a massive project were finally secured.²⁰⁵ Wechsler further explained that criminal law was in dire need of reform because “in no other area of law have legal purposes and methods been subjected to a more sustained and fundamental criticism emanating from . . . the psychological and social sciences.”²⁰⁶

A more enlightened and scientifically informed view would lead to a “penal law [that] in general ought to concern itself with the offender’s personality.”²⁰⁷ The conception of crime that emerges is one in which the offense is viewed “primarily as a symptom of a deviation that may yield to diagnosis and to therapy.”²⁰⁸ Wechsler noted that this approach already informed the way juvenile and mentally incapacitated offenders were treated and that it was possible to adopt the method to help adult offenders as well.²⁰⁹

In terms of the kind of norms that this more enlightened and scientific approach would yield, Wechsler suggested that criminal law doctrines should be crafted with the goal of controlling future harmful conduct, and that an inquiry into past harm causation should be relevant only insofar as such past behavior has a “rational relationship to the control of future conduct.”²¹⁰ Wechsler contrasted his preferred approach with one that focused on providing punishment only when harm took place.²¹¹ This would produce criminal

²⁰⁴ Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

²⁰⁵ *Id.* at 1097.

²⁰⁶ *Id.* at 1102.

²⁰⁷ *Id.* at 1104.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Wechsler, *supra* note 204, at 1105.

²¹¹ *Id.*

law norms that prohibited conduct only when an injury of a sufficient magnitude occurred.²¹² While Wechsler seemed to concede that this harm- or injury-based approach to criminal law had considerable support, he argued that its support had waned, and that it “ha[d] small reflection in existing law and less support in morals or in social theory.”²¹³

Ultimately, then, Wechsler argued in favor of criminalizing conduct not when it caused harm but, rather, when it “show[ed] [that] the individual [was] sufficiently more likely than the rest of men to be a menace in the future.”²¹⁴ Punishment was needed in such cases in order “to measure and to meet the special danger [that the individual] present[ed].”²¹⁵ In keeping with the “scientific” approach to criminal law that Wechsler advocated, the danger presented by the actor should be assessed by reference to “social and psychological evaluations of [the relevant] behavior.”²¹⁶ The criminal law should, therefore, care about “results . . . only insofar as they may indicate or dramatize the tendencies involved.”²¹⁷

Results were largely irrelevant to the kind of criminal law that Wechsler was advocating in 1952 because his approach focused on identifying and neutralizing dangerous actors rather than on punishing harmful acts. By emphasizing the need to assess the offender’s personality in order to look for symptoms of deviations that signaled the need for diagnosis and treatment, Wechsler was essentially calling for the rejection of the pattern of manifest criminality. This was of significance not only because of Wechsler’s stature, but also because it would provide the blueprint for the doctrines that would eventually become enshrined in the Model Penal Code. Not surprisingly, Wechsler provided the law of attempts as his first example of a criminal law doctrine that was in need of a significant overhaul. In a subsection titled “Dangerous Persons,” he explained, “when both preparation and firm criminal purpose can be proved, there is a basis and a need for legal intervention.”²¹⁸ Punishing such cases would be useful both to “meet the special danger that the individual presents and to frustrate, if possible, commission of the crime that he intends.”²¹⁹

2. The Hidden Oppressiveness of Wechsler’s “Progressive” Views—*McQuirter* Under the Model Penal Code

A year after Wechsler published his important piece, *McQuirter*’s conviction was upheld despite the fact that his acts did not seem to go beyond

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Wechsler, *supra* note 204, at 1105.

²¹⁷ *Id.* at 1106.

²¹⁸ *Id.* at 1110.

²¹⁹ *Id.*

mere preparation and, therefore, would likely not generate liability under the common-law approach to attempts, which was premised on manifest criminality. McQuirter's acts could, however, generate liability under Wechsler's broader approach to attempts, as long as there was proof of a firm criminal intent. The Court of Appeals of Alabama believed such proof existed and, therefore, felt free to affirm the conviction even without proof of an act that came within dangerous proximity of causing injury. This Article is not, of course, claiming that there is a causal link between Wechsler's article and McQuirter's conviction. What it is suggesting, however, is that it is not coincidental that the view of attempts adopted in *McQuirter* reflects the more subjective approach to inchoate crimes that Wechsler advocated and that eventually found its way into the Model Penal Code.

It is impossible to know whether *McQuirter* would have come out differently had the court felt compelled to apply a more objective approach to attempts, such as the one that prevailed at common law. But it is difficult to deny that the emergence of a more subjective attempt doctrine made it easier for courts that were inclined to convict in cases like *McQuirter* to rationalize this outcome. In Part I, this Article argued that contrasting *McQuirter* with *Clarissa* reveals this effect quite nicely. Both McQuirter and Clarissa were black defendants accused of attempting to cause serious injury to white victims. Furthermore, both cases featured confessions in which the defendant professed to have intended to consummate the charged offense. Finally, both defendants were tried in the Deep South during times of rampant racism. Given the similarities between these two cases, one would expect the outcomes to be similar. Nevertheless, *Clarissa* resulted in an acquittal because the defendant had not engaged in conduct that came dangerously close to consummation, whereas *McQuirter* resulted in a conviction, in spite of the fact that the defendant had not engaged in acts that came close to completion. Racial bigotry did not meaningfully change between *Clarissa* and *McQuirter*, but the prevailing pattern of criminality did shift from manifest to subjective criminality. Since the shift in paradigm makes it easier to punish previously unpunishable acts of preparation, it is plausible to argue that the turn to subjective criminality created conditions that were ripe for a racist court to convict in a case like *McQuirter*.

Some readers may take issue with drawing too many parallels between *McQuirter* and *Clarissa*. They might argue that the outcomes in the cases were different because the defendant in *Clarissa* engaged in conduct that amounted to a completed but impossible attempt,²²⁰ whereas the defendant in

²²⁰ An attempt is completed when the actor engages in all of the conduct necessary to consummate the offense but the crime is nevertheless not consummated for reasons beyond actor's control. An example would be a person who shoots at another with intent to kill but fails to consummate the act because the intended victim was wearing a bulletproof vest. The actor did everything she wanted to do to consummate the offense (shooting the victim) but failed to do so because of circumstances she could not control (victim was wearing a bulletproof vest).

McQuirter performed acts that could at best amount to an incomplete attempt.²²¹ As a result, *Clarissa* can be bracketed as a case about impossibility that says nothing about non-impossibility cases like *McQuirter*. While this Article concedes that there are nontrivial differences between these cases, *Lewis v. State*²²²—an attempted rape case decided a little over a decade after *Clarissa*—supports the claims made here.

The *Lewis* case featured facts similar to those in *McQuirter*. While a white Alabama woman was walking toward her father's house, a black man wearing a shirt but no pants said to her, "Stop, gal, aint you going to stop?"²²³ Fearful, the woman started running. The man started to chase her. After chasing her for more than a mile, the man once again said, "stop, gal aint you going to stop?"²²⁴ The woman kept running toward her father's house as the man continued to chase her and ask her to stop. Eventually, the woman reached her father. The man finally stopped chasing her and left. The closest the man got to the woman was within ten steps. The chase lasted for over one and a half miles. In the end, the black man was charged and convicted of attempting to rape the white woman.²²⁵

The defendant's conviction was overturned on appeal.²²⁶ Among the conclusions reached by the court was that the jury had to be instructed that the defendant could only be convicted of attempted rape if his conduct was of such a nature as to have "put [the victim] in terror, and render flight necessary."²²⁷ In language reminiscent of the unequivocal tests for attempts frequently invoked at common law,²²⁸ the court cited approvingly to a North Carolina case in which the court stated that conduct constitutive of an attempt must amount to an "overt act" that is "expressive . . . of the [criminal] purpose itself."²²⁹ The consequence of this view is that if the defendant's acts standing alone did not clearly reveal his criminal purpose, then no amount of extrinsic proof of criminal intent would suffice to convict him of an attempted crime.²³⁰ While the court refused to assess whether the defendant's

²²¹ An attempt is incomplete when the offense is not consummated because the actor failed to engage in all of the acts necessary to consummate the crime. An example would be an actor who is apprehended by the police right before he is about to shoot the victim. In this case, the actor failed to engage in all the acts necessary to consummate the offense.

²²² 35 Ala. 380 (1860).

²²³ *Id.* at 382.

²²⁴ *Id.*

²²⁵ *Lewis*, 35 Ala. at 381.

²²⁶ *Id.* at 390.

²²⁷ *Id.* at 388.

²²⁸ In his brief discussion of the case, Professor George Fletcher—citing Oliver Wendell Holmes—appears to assume that the case presents an application of the unequivocal theory. FLETCHER, *supra* note 30, at 144. While the court never expressly said it was applying the unequivocal test, it did describe the *actus reus* of attempts in the kind of language that one would expect under this test.

²²⁹ *Lewis*, 35 Ala. at 388 (quoting *State v. Martin*, 14 N.C. (3 Dev.) 329 (1832)).

²³⁰ *See id.* Interestingly, the court even cites the Spanish Penal Code definition of attempts, which holds that a "criminal attempt is a direct commencement of execution [of the crime] by external acts." *Id.*

acts had “progressed far enough to put [the alleged victim] in terror,” and “render it necessary for her to save herself from the consummation of the attempted outrage by flight,” it did make it quite clear that a conviction could only stand if the jury so found.²³¹

If there were any doubts that something in addition to racial bigotry explains the different outcomes in *Clarissa* and *McQuirter*, those doubts should be put to rest once *Lewis* is taken into account. After all, the attempted rape conviction in *Lewis* was overturned by the Supreme Court of Alabama, even though the defendant had engaged in more acts indicative of sexual assault than the defendant in *McQuirter* had.²³² While both *Lewis* and *McQuirter* featured white women who accused black males of attempted rape for following them while they were taking a stroll, the defendant in *Lewis* was not wearing pants and ran after the alleged victim for over a mile and a half while repeatedly yelling at her to “stop.” In contrast, the defendant in *McQuirter* simply walked several steps behind the alleged victim for a certain period of time. The reactions of the victims in both cases were different as well. The victim in *Lewis* was frightened enough by the defendant’s conduct that she started running and kept running for an extended period of time. In contrast, there is no indication that the victim in *McQuirter* changed her pace after she sensed the defendant’s presence, let alone that she started running for over a mile.

If the defendant’s conduct in *Lewis* was more menacing and distressing than the defendant’s conduct in *McQuirter*, why was the conviction set aside in the former case but not in the latter? Once again, bigotry does not provide a satisfactory answer. Surely, race relations were not appreciably worse in 1953 when *McQuirter* was decided than in 1860 when the *Lewis* decision was handed down. This Article submits that what changed was not racial relations but, rather, the dominant pattern of criminality. While Alabama courts were probably as or more racist in 1860 as they were in 1953, the pattern of manifest criminality that shaped the doctrine of attempts in the 1800s made it difficult for the *Lewis* court to convict a defendant like Lewis, even if it had wanted to. By requiring that the defendant engage in conduct that is, standing alone, expressive of the criminal purpose, the court was unable to uphold the defendant’s conviction solely based on judgments about subjective blameworthiness or dangerousness. In contrast, by eschewing such objective tests and instead espousing a view of attempts focused on the presence of a wicked will that revealed the actor’s supposed dangerousness, it was easier for the *McQuirter* court to embrace its racist instincts and uphold the defendant’s conviction.

This Spanish provision basically tracks the German approach to attempts and therefore adopts an approach to the doctrine that is patterned on manifest rather than subjective criminality.

²³¹ *Id.* at 389.

²³² To be clear, the Author believes the acts in *Lewis* should not be sufficient to trigger attempt liability. But regardless of whether they should be, the broader point is that the conduct in *Lewis* was objectively more threatening than the conduct in *McQuirter*.

More broadly, these cases reveal that the turn to subjective criminality that Wechsler so enthusiastically advocated for, and that would later become dominant in America as a result of the Model Penal Code's influence, unwittingly facilitates the oppression of blacks and other historically discriminated-against groups. This, of course, was not what Wechsler and the drafters of the Code envisioned when they embarked on their criminal-reform project. It was, nevertheless, a foreseeable consequence of a criminal law that shifted its focus from punishing harm-causing acts to identifying and treating dangerous persons.

While the McQuirters of the world will likely avoid incarceration if the criminal law focuses on punishing harm, they are much more likely to be incarcerated if the criminal law is geared towards identifying "dangerous" individuals. More generally, the ruling classes have a tendency to project dangerousness onto minority groups that make them feel uncomfortable. But while dangerousness is easily projected, harm causation is not so easily concocted. By requiring manifestly criminal or harmful conduct as a prerequisite to criminal liability—as the common law did—minorities and other historically discriminated-against groups receive an extra layer of protection from abusive uses of the criminal law, such as the one illustrated by *McQuirter*. This is the lesson that German criminal law scholars and reformers learned from the failed National Socialist experiment with subjective criminality. It is also why post-World War II German criminal-law doctrine has trended back toward manifest criminality. In what follows, this Article will very briefly flesh out how the turn to subjective criminality ushered in by the Model Penal Code has contributed not only to isolated injustice but also to the most pressing criminal-justice issue of our time—mass incarceration.

C. *Mass Incarceration, the Model Penal Code, and the Racialization of American Criminal Law*

America has a mass-incarceration problem. Mass incarceration implies prison populations that are "markedly above the historical and comparative norm."²³³ As David Garland has pointed out, the United States prison system "clearly meets these criteria," given that imprisonment rates in America until 1973 fluctuated close to an average of 110 inmates per every 100,000 persons,²³⁴ but as of 2013 the rate had ballooned to around 716 inmates for every 100,000 persons.²³⁵ This amounts to a 550% increase in prison rates in the span of only forty years.

²³³ David Garland, *The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1 (David Garland ed., 2001).

²³⁴ *Id.*

²³⁵ ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (10th ed. 2013).

The other defining feature of mass incarceration is that it involves the “systematic imprisonment of whole groups of the population” as opposed to the piecemeal imprisonment of individuals.²³⁶ The group most impacted by mass incarceration in America is comprised of young black men living in urban areas.²³⁷ Approximately 33% of black males spend some time imprisoned, compared to just under 5% of white men.²³⁸ This Article will not detail the pernicious effects of mass incarceration here, as they have been well documented elsewhere. Suffice it to say some of the more deleterious ones include the “alienation” and “disenfranchisement of whole sectors of the [population],” “the normalization of the prison experience,” the deepening of racial tensions and divisions, and the creation of a “criminalized underclass.”²³⁹

While much effort has been devoted to exploring how mass incarceration has been used as a vehicle for perpetuating racial divisions and hierarchies in America, comparatively little attention has been paid to examining how the broader patterns of criminality that shape our foundational doctrines of criminal law generate many of the conditions that facilitate the rise of mass incarceration. Professor Michelle Alexander has argued that mass incarceration took the place of segregation as the mechanism through which whites continued to subordinate blacks.²⁴⁰ This explains why the rise of mass incarceration roughly coincided with the demise of legal segregation. But the emergence of mass incarceration also roughly coincided with the decisive turn to subjective criminality in America. More specifically, the beginning of the upward tick in prison rates that is attributed to mass incarceration broadly overlaps with the period shortly following the publication of the Model Penal Code. Much like Alexander argues that it is not coincidental that the fall of segregation was followed by the rise of mass incarceration, this Article argues that it is no accident that the embrace of subjective criminality and the Model Penal Code were followed by the ascent of mass imprisonment.

In much the same way as the turn to subjective criminality that would eventually be reflected in the Model Penal Code made it easier for the Supreme Court of Alabama to convict and imprison McQuarter, so too did it make it easier to convict and imprison blacks as a group. An approach to criminal law that focuses on identifying dangerous persons—like the one underlying the Model Penal Code—is likely to end up imprisoning a disproportionate number of people from historically discriminated-against groups. As the German experience with subjective criminality during National Socialism revealed, there is an uncanny resemblance between people who are perceived to be dangerous and groups that the ruling classes are prejudiced against.

²³⁶ Garland, *supra* note 233, at 2.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 200–01 (2012).

In addition, the logic underlying the Model Penal Code led to a proliferation and broadening of inchoate offenses. While the Code mostly focused on expanding attempts, conspiracy, and other previously existing inchoate crimes beyond their common-law scope, legislative efforts influenced by the Code's publication expanded the scope of possession offenses as well. The Author of this Article suspects that the enlargement of already existing inchoate crimes has played some role in racialized mass incarceration. Cases like *McQuirter* are probably not as uncommon as one might think, even today. But regardless of whether this is the case, there is absolutely no doubt that the rise and proliferation of possession offenses has contributed decisively to mass incarceration and its concomitant exacerbation of racial tensions.

The link between possession offenses and mass incarceration has been widely discussed in the literature. Two sobering statistics suffice to show the close connection. As of 2006, black men were “eight times more likely to be in jail or prison than white men.”²⁴¹ And as of 2004, “[t]hree-fourths of those imprisoned for drug offenses [were] black or Latino.”²⁴² There is also evidence that gun possession offenses play an important role in mass incarceration. An FBI report published in 1995 revealed that “weapons arrest rates were five times greater for blacks than white[s].”²⁴³ Furthermore, pursuant to data provided by the Bureau for Justice Statistics, as of 2014 there were more than twice as many black inmates in state prison for weapon offenses as white inmates.²⁴⁴ If Latinos are taken into account, there were almost three and a half times more people of color imprisoned for weapon charges than whites.²⁴⁵

Although it may not be obvious at first glance, the spectacular rise in possession offenses was facilitated by the Wechslerian logic that undergirded the Model Penal Code and the criminal-law reform projects undertaken after its publication. This can be seen more clearly in the context of statutes that prohibit the possession of firearms by convicted felons but not by persons who have not been convicted of such crimes.²⁴⁶ George Fletcher argues that provisions like this one are ostensibly justified on the basis that “possession of certain items by convicted felons is both more incriminating and more

²⁴¹ Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1047 (2010).

²⁴² *Id.* at 1048.

²⁴³ Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2194 (2016).

²⁴⁴ As of 2013, there were 24,400 black inmates in state prison for weapon offenses compared to 11,200 whites. BUREAU OF JUST. STAT., NCJ 248955, PRISONERS IN 2014, at 16 & tbl.11, app. tbl.4 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

²⁴⁵ As of 2013, there were 13,900 Latinos imprisoned for weapon charges. When added to the 24,400 inmates imprisoned for the same kinds of offenses, there are 38,300 people of color in prison for weapon charges compared to 11,200 whites. *Id.*

²⁴⁶ See, e.g., CAL. PENAL CODE § 12021 (repealed 2012; reenacted without substantive change as § 29800).

dangerous than the same act of possession by [an] ordinary citizen[.]"²⁴⁷ Enactment of this kind of offense thus represents "the culmination of the subjectivist philosophy that the purpose of inchoate crimes should be to identify and isolate dangerous persons."²⁴⁸ As Fletcher astutely observes, the creation of this type of crime is premised on a "style of reasoning [that] is an invitation to a class-oriented criminal law" that could very well "support the introduction of racist criteria into the definition of offenses."²⁴⁹ The danger is that this kind of possession offense can be used as part of a "systematic effort to use the nominal forms of the criminal law in order to prevent harm and weed out dangerous people."²⁵⁰

While Fletcher's analysis of statutes criminalizing the possession of weapons by convicted felons is quite illuminating, he failed to realize that his concerns about this specific kind of crime may generalize to most—if not all—possession offenses. After all, the punishment of possession offenses is quite compatible with the subjectivist philosophy of identification and isolation of dangerous persons. As Markus Dubber has persuasively argued, possession offenses ultimately serve to "assist the state in its identification and then eradication of human sources of danger."²⁵¹ With their focus on dangerousness, possession offenses bear the signature structure of crimes of the pattern of subjective criminality. The law of possession thus inquires into mens rea not to establish the need to exact retribution for a harm caused but, rather, to act as a "general, though cryptic, reference[] to dangerousness."²⁵² In this way, a person acting with subjective culpability "reveals himself to be abnormally dangerous," and the more blameworthy his mental state, "the higher the level of dangerousness."²⁵³

Once the link between subjective criminality and possession offenses is revealed, one can begin to see how the impetus that led to the enactment of the Model Penal Code is intimately connected to the rise in possessory crimes. This link has been most clearly shown by Dubber, who explains, "Consistent with its treatment—or rather its neutralization—of attempters as threats, the Model Code did not hesitate to criminalize possession as an inchoate inchoate offense."²⁵⁴ So it came to be that the Code's approach to inchoate crimes and possession offenses facilitated the casting of a "vast net of mass incapacitation" by providing lawmakers and courts with an expansive array of "mechanisms for the early detection and diagnosis of correctional needs."²⁵⁵ The end result was the transformation of possession offenses from

²⁴⁷ FLETCHER, *supra* note 30, at 202.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 203.

²⁵⁰ *Id.*

²⁵¹ Dubber, *supra* note 58, at 935.

²⁵² *Id.* at 865.

²⁵³ *Id.*

²⁵⁴ *Id.* at 983.

²⁵⁵ *Id.* at 992.

crimes that provided “opportunities for early correctional intervention,” as Wechsler had naively envisioned, into offenses that provided unique “opportunities for lengthy, perhaps permanent, incapacitation.”²⁵⁶ Such opportunities have contributed greatly to the current problem of mass incarceration in America.

What is missing from Dubber’s analysis is an attempt to connect the Model Penal Code with the racialized component of mass incarceration. Mass incarceration is pernicious not only because it leads to the imprisonment of an unreasonably high number of individuals, but also because the rise in prison populations is achieved by disproportionately targeting particular racial and ethnic groups. That the logic undergirding the Model Penal Code is also connected to this racialized feature of mass incarceration can be shown in three different ways. First, it is evidenced by the way in which possession offenses have been enforced over the last several decades—as instruments for racial oppression. Second, it is shown by cases in which criminal-law doctrine has been used to target blacks and how the Model Penal Code would facilitate or hinder such outcomes. And finally, the connection is clear in the German experience with subjective criminality during National Socialism, leading to a more racialized criminal law.

Interestingly, Fletcher was already aware in 1978 of the potential for possessory crimes to impact certain groups of people disproportionately. As such, he pointed out then that “[t]he deep problem raised by possession offenses is whether the apparatus of the criminal law may be used for regulatory purposes, with the implication that the offense may be directed at special classes of persons.”²⁵⁷ Almost forty years later we have empirical reasons to believe that what Fletcher had feared is, in fact, the case. Possession offenses are often directed at special classes of persons in America.²⁵⁸ Given that—as this Article has previously shown—there is a direct connection between the rise of the possession paradigm and the treatmentist approach espoused by Wechsler and the drafters of the Model Penal Code, it is plausible that the turn to subjectivism ushered in by the Code is related to the increasingly racialized enforcement of America’s current criminal laws.

With regard to the second point, this Article previously explained how *McQuirter* illustrates quite well the way the ideas that led to the enactment of the Model Penal Code make it easier for racially prejudiced judges and juries to justify reaching outcomes that discriminate against black defendants. Contrasting *McQuirter* with similar cases decided prior to the turn to subjective criminality further supports this claim. As *Clarissa* and *Lewis*

²⁵⁶ *Id.*

²⁵⁷ FLETCHER, *supra* note 30, at 204.

²⁵⁸ The most recent example of this is in the disproportionate enforcement of marijuana possession laws in New York City. During the months of January through March 2018, 93% of the people arrested by the NYPD for marijuana possession were people of color. *Racial Disparities Evident in New York City Arrest Data for Marijuana Possession*, INNOCENCE PROJECT (May 14, 2018), <https://www.innocenceproject.org/racial-disparities-in-nyc-arrest-data-marijuana-possession>.

illustrate, doctrines that track the pattern of manifest criminality serve as potential checks on convictions based on racial bigotry, by requiring judges to base convictions on objectively verifiable facts rather than on inferences of subjective intent, culpability, and dangerousness. In contrast, offenses that track the pattern of subjective criminality—such as possession offenses and inchoate crimes as defined under the Model Penal Code—invite courts to make decisions on the basis of the perceived dangerousness of the defendant, as *McQuirter* makes quite clear. This is a recipe for racial discrimination, as groups that are perceived as dangerous are typically groups that majorities are prejudiced against.

Finally, the German experiment with subjective criminality described in Part II of this Article shows how a criminal law patterned on subjective criminality is ideally suited for the neutralization of minority groups that are perceived to be dangerous. In fact, as Fletcher explains, some German scholars and reformers engaged in a campaign to create possession offenses that would allow them to “combat crime by taking special measures against the ‘criminal class.’”²⁵⁹ The efforts, which led to the enactment of special possession offenses in 1933, were criticized by a Heidelberg trial judge who claimed that this kind of statute embodied “the expression of a National Socialist legal philosophy.”²⁶⁰ In an effort to reverse the pernicious effects of the turn to subjective criminality brought about by the National Socialist regime, German lawmakers and scholars began advocating a return to the pattern of manifest criminality. This eventually led to the 1969 repeal of the controversial possession provisions.²⁶¹

As we can see, the story of mass incarceration—much like the story of *McQuirter*—is not only about bigotry. It is also about how criminal-law doctrine unwittingly creates ideal conditions for racial prejudice to flourish in the criminal-justice system. It does this “unwittingly” because those who advocated the turn to subjective criminality in America did so for benevolent reasons, unlike the National Socialist reformers who advocated the same turn in Germany. Wechsler was well aware of the atrocities perpetrated by the Nazis, as he labored as principal assistant to the U.S. Judge at the Nuremberg Trials. In spite of this, he failed to fully internalize the lessons derived from criminal law under National Socialism. More specifically, he did not foresee that a criminal law designed primarily to identify and treat dangerous offenders could serve to incapacitate as much as it could serve to rehabilitate. Because of his naïve optimism, Wechsler did not see that the subjective criminality that undergirds the doctrinal and theoretical structure of the Model Penal Code could be seized by the bigoted and prejudiced in order to oppress groups perceived to be dangerous. That is what happened in Germany under National Socialism and what has been happening in America since the mid-twentieth century.

²⁵⁹ FLETCHER, *supra* note 30, at 202.

²⁶⁰ *Id.*

²⁶¹ *Id.*

CONCLUSION

Justice Oliver Wendell Holmes famously said, “The life of the law has not been logic: it has been experience,”²⁶² and the German experience reveals that the pattern of subjective criminality is particularly susceptible to being used by authoritarian governments as a way of weeding out unwelcome elements of society. As we near the third decade of the twenty-first century, we see that the pattern of subjective criminality that inspired the Model Penal Code and the legislation enacted in its wake produces similar results. The ruling classes use expanded inchoate crimes and new possession offenses modeled on subjective criminality with great effectiveness to oppress and harass black males in America. The progressive jurists who advocated the turn to subjective criminality did not intend to contribute to racialized mass incarceration. Nevertheless, this outcome is one of the natural and predictable consequences of an approach to criminal law that—like the one underlying the Model Penal Code—focuses on curbing dangerous actors rather than on preventing harmful conduct. By revealing the hidden tendency of subjective criminality and the Model Penal Code to generate more authoritarian forms of governance, this Article hopes that those who continue to unwittingly advocate the use of this pattern come to see the dangers inherent in so doing.

²⁶² HOLMES, *supra* note 79, at 5.