

MENTAL STATE ACROSS EIGHT CENTURIES OF ENGLISH LAW: 1235-2005

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Abstract of the U.K. Statutes Project

The origins of legal standards of mental state have always been a mystery. Yet, terms such as "intent," "recklessness," and "negligence" have a huge bearing on how courts and juries determine the guilt or innocence of defendants. In order to address this gap in knowledge, this paper describes the nascent beginnings of the U.K. Statutes Project, a book-length undertaking designed to trace the development of mental state terms across eight centuries of U.K. law. Specifically, the project will analyze a file containing every statute ever published in the U.K., starting from 1235 (soon after the Magna Charta) to the present day. The project will probe many questions, including the following: How and when do mental state terms originate and start to change? Do the terms vary by monarch, by type of statute, by societal events? Do the terms show a steady increase over the centuries or are there clear cultural landmarks that reveal significant effects on their application? The project discusses many significant influences that also bear on other legal developments, such as the origins of particular defenses and doctrines.

PREFACE

This paper presents the bare-bone beginnings of the goals that the paper's abstract describes for the U.K. Statutes Project, a long-term undertaking that is intended to result in a book. The U.K. Statutes Project is designed to trace the development of mental state terms across eight centuries of U.K. law by way of analyzing the JUSTIS Statute Law file (please refer to Charts I-VIII at the end of this paper, which I will be referencing in my talk). The JUSTIS file organizes over 750 years of U.K. legislation (nearly 400,000 statutes), starting from 1235 (soon after the Magna Charta) to the present day. According to JUSTIS, the file "is the only complete electronic source of primary and secondary legislations available."² This file creates a unique opportunity to examine the origins and development of mental state (*mens rea*), the most significant component of criminal law but also

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² See (www.justice.com).

the most confusing and mysterious.

This draft is constrained to a selected number of preliminary analyses that provide a foundation and some background information on the project which again, has basically just started. The focus is on the beginning centuries, about which less is known, with the goal of examining and integrating other centuries at a later time. It is expected that findings, theories, and conclusions about what is discovered with this file will change over time as more information is gathered.

INTRODUCTION

The concept of “mens rea” has always been given an aura of profundity in first-year law school classes. This is understandable, as the level of mens rea applied to a particular crime can, in the U.S., mean at times the difference between life and death to any given defendant. However, an initial examination of mens rea terms in English statutory law shows that the development of selected mens rea concepts was spurred far less by heady concepts of human morality than by a pragmatic approach to historical trends. Additionally, the view that each mens rea term has a concrete and specific meaning is also questionable. Rather, some mens rea terms have been used interchangeably with each other, and their meanings have changed within periods of time to more pragmatically fit the situation of any given policy goal. Because of the large scope of the subject matter, this paper aims to illustrate historical trends of mens rea use in a very broad historical context.

This paper will analyze the application of mens rea in the contexts of five different historical periods. The first period is medieval England immediately following the completion of the Norman Conquest. The second is the fourteenth century, in the backdrop of the Black Death and the Hundred Years’ War. The third period deals with the relatively mens rea-silent large part of the fifteenth

century. The fourth period discusses the use of mens rea from the late fifteenth century through the sixteenth century as the rule of law started to take hold in England against the international backdrop of the Renaissance. The fifth and final period discussed in this paper examines mens rea use in the seventeenth century. The seventeenth century can be basically divided into two parts- before and after the English Civil War. The English Civil War was arguably the most formative event in the creation of modern England, and to illustrate the effect on mens rea most accurately, this paper's analysis will span both periods.

I. THE BEGINNING OF MENS REA CODIFICATION AT THE START OF POST-NORMAN ENGLAND

Of the five mens rea terms examined in this analysis (negligent, wilfull, reckless, malice, and furious), negligence appears among the first, in 1279, and in the intriguing context regarding property rights of heirs:

“But in such Cases, where the Wardships belong to the Guardians of Wards being within Age, and where the Guardians demand a Wardship which belongeth to the Heir, or as appertaining to their Inheritance, such Heirs within Age shall not leese their Inheritance by the *Negligence* or Rebellion of their Guardians, as in the Case aforesaid; but let the Common Law run in like manner as it hath been accustomed to do.”³

Thus, the first English statute to mention negligence used it in the context of protecting an inheritance right of heirs against the negligence of their guardians. Protecting property rights is central in the majority of the first cluster of mens rea citings occurring in the late 13th century; a similar statute from 5 years later is indicative of the period:

“...Heirs within Age, by Fraud, or else by Negligence of their Wardens, and Heirs both of great and mean Estate, by Negligence or Fraud of Tenants by the Courtesie, Women Tenants in Dower, or otherwise, for Term of Life, or

³ A Statute of Mortmain, made 15 Novemb. Anno 7 EDW. I. * and Anno Dom. 1279, preamble (Eng).

for Years, or in Fee-tail, were many Times disherited of their Advowsons, or at least (which was the better for them) were driven to their Writ of Right, in which Case hitherto they were utterly disinherited; [internal quotations removed]... it is provided, That such Presentments shall not be so prejudicial to the right Heirs or to them unto whom such Advowsons ought to revert after the Death of any Persons...”⁴

An “advowson” is the right to recommend a member of the clergy to an appointment for the title of “benefice,” which grants tenure and payments to that member⁵.

Likewise, the only other mens rea term to surface in this period -- malice -- also makes its first appearance in 1275 in the domain of property law, to protect the inheritance rights of female heirs:

“And if they of Malice, or by evil Counsel, will not be married by their chief Lords (where they shall not be disparaged) then their Lords may hold their Land and Inheritance until they have accomplished the Age of an Heir Male, that is to wit, of One and twenty Years, and further until they have taken the Value of the Marriage.”⁶

Most other mentions of “malice” in this era deal with property rights, including a malice requirement for an early trespassing statute.⁷ There is however a notable exception that is significant of later contextual uses of mens rea terms- the use of mens rea as a means of regulating the conduct of public officials. First consider the Execution of Process Act, 1285:

“Forasmuch as Justices, to whose Office it belongeth to minister Justice to all that sue before them, are many Times disturbed in due Execution of their Office, for that Sheriffs do not return Writs original and judicial; (2) and also for that they make false Returns unto the King's Writs;” (3) our Lord the King

⁴ Recovery of Advowsons Act, 1285, 1285 (13 Edw. 1) C A P. V., preamble (Eng).

⁵ Oxford American Dictionaries, computer program.

⁶ Wardship Act, 1275, (3 Edw. 1) C A P. XXII., (Eng)

⁷ Trespassers in Forest, etc. Act, 1293, Anno 21 Edw. I. Stat. 2. and Anno Dom: “That if any Forester, Parker, or Warrener shall find any Trespassers wandering within his Liberty, intending to do Damage therein, and that will not yield themselves to the Foresters, Warreners, or Parkers after Hue and Cry made to stand unto the Peace, but do continue their Malice, and, disobeying the King's Peace, do flee, or defend themselves with Force and Arms.”

hath provided and ordained, That such as do fear the Malice of Sheriffs, shall deliver their Writs original and judicial in the open County”⁸

“Malice” in this context is used to make sure that sheriffs deliver their judicial writs in an orderly manner. These statutes appear to set the precedent for the future expanded use of mens rea terms as means of regulating public officials⁹.

Another exception is the use of malice in a criminal law context, but again, in a procedural rather than substantive setting:

“Forasmuch as many, through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors... it is ordained, That when any, being appealed of Felony surmised upon him, doth acquit himself in the King's Court in due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices, before whom the appeal shall be heard and determined, shall punish the Appellor by a Year's Imprisonment...”¹⁰

This statute deals with a criminal appeal motivated by malice, rather than any mention of malice being behind the underlying offense.

Very generally, it appears that one reason the codification of mens rea came into legal existence was because of concerns over property rights or the regulation of institutions in medieval England. It is worth mentioning that during this initial period, the two mens rea terms that are used are at one end of the spectrum, so to speak- “negligent” and “malice” (since malice has often been treated synonymously with recklessness). The fact that the more intermediary terms do not appear until later eras possibly suggests that these two terms were inadequate for all the potential contingencies that resulted from an ever more complex world.

⁸ Execution of Process Act, 1285, (13 Edw. 1) C A P. XXXIX., preamble (Eng).

⁹ Another use of “malice” in a regulatory context in this period is found in the Freedom of Election Act of 1275: “...because Elections ought to be free, the King commandeth upon great Forfeiture, that no Man by force of Arms, nor by Malice, or Menacing, shall disturb any to make free Election...” Freedom of Election Act, 1275 (3 Edw. 1) C A P. V. (Eng).

¹⁰ Appeal of Felony Act, 1285, (13 Edw. 1) C A P. XII. (Eng).

There are also a few historical trends converging at this time that are worth mentioning. First, around 1250, the population in Europe peaked at levels not to be reached again until the Nineteenth century.¹¹ Second, the Normans completed their conquest of Wales in this era, in the year 1282.¹² Henry III was the king during the creation of the first mens rea statutes, but the remainder of statutes in this era were created under the reign of his son, Edward I.¹³ This era coincides with the beginning of the jury trial as a means of decision-making in England.¹⁴ Thus, it possible that the introduction of mens rea terms in statutes around this time served no other purpose than to serve as a guide for members of juries.

A related development of the reign of Edward I was that for the first time, insanity became a criminal defense.¹⁵ Thus, there can be an argument that more profound interests relating to the human psyche were prevailing in the legal world; however, as the statutory application shows, mens rea was initially used in an extremely mundane context.

II. REGULATION, REPRESSION, AND RETRIBUTION: MENS REA IN THE FOURTEENTH CENTURY

Following the initial period, there is a 30-year period without any mention of one of the mens rea terms between 1306 and 1336.¹⁶ This period roughly coincides with the reign of Edward II (1307-1327), whose leadership was weakened by a massive military defeat in Scotland and tensions

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¹⁴ Jonathan L. Mayes, The Right to Trial by Jury In Environmental Cost-Recovery And Contribution Actions: United States v. England, 10 Alb. L. Envtl. Outlook 71, 103 n. 250 (2005).

¹⁵ Anne C. Gresham, The Insanity Plea: A Futile Defense for Serial Killers, 17 Law & Psychol. Rev. 193, 193 (1993).

¹⁶ The last mentions of “negligent” or “negligence” occurs in 1285; “malice” last appears in 1293 and “maliciously” in 1306. The next time any of these terms comes up again is “malice,” which appears in 1336.

with the Barons. The Barons took over parliament and exercised veto-power over the lawmaking process and also banished Edward's son from the kingdom.¹⁷ A dispute with France eventually ended his reign when his wife, Isabella of France, removed him by force, and Parliament instated his son, Edward III, as king.¹⁸

Edward III ruled from 1327 to 1377; he was one of the longest-serving kings in English history and presided over one of the most violent and depressing centuries in English history that included the Hundred Years's War (which commenced in 1337) and the first outbreak of the Black Death (bubonic plague), that killed about a third of Europe's population between 1347 and 1350.¹⁹

The first mens rea mention of this period is also the first statute to apply mens rea to a criminal offense: "BECAUSE our Lord the King, EDWARD the Third after the Conquest... coveting to obviate the Malice of such Felons, and to see a convenient Remedy... Pardons shall not be granted contrary to the Statute of 2 Edw.3. cap. 2"²⁰ This statute restricted the ability of felons of crimes of "malice" to be pardoned. Similar acts during this period were passed for the same intention.²¹

However, "malice" is also used in the fourteenth century in a regulatory context. One very interesting statute appears to have been passed in response to events of the Black Death:

"WHEREAS late against the Malice of Servants, which were idle, and not willing to serve after the Pestilence [emphasis added], without taking excessive Wages... should be bound to serve, receiving Salary and Wages, accustomed in ... the Reign of the King that now is, or five or six Years

¹⁷ Edward II of England

¹⁸ Id.

¹⁹ Edward III of England

²⁰ Pardons, etc. Act, 1336, (10 Edw. 3 St. 1) C A P. II., preamble (Eng.).

²¹ See Pardon of Offences Act, 1389 (13 Ric. 2 St. 2) C A P. I. (Eng) (preventing pardons for "Murder, or for the Death of a Man slain by Await, Assault, or Malice prepensed, Treason, or Rape of a Woman...).

before”²²

The Black Death had created a serious labor shortage²³ and this statute prevented survivors from earning the market value of their services at the expense of the wealthy. Later in the century, “malice” is again applied as a tool to suppress the lower classes, as it is used in a statute passed in response to peasant revolts in 1381 against higher taxes passed by Richard II’s government to pay for the many calamities of the 14th Century:²⁴

“diverse People... have made such Assemblies in outrageous Manner, to accomplish their Malice against the King's Peace, his Crown, his Dignity and the Laws of his Land... Sheriffs and other the King's Ministers may thereof have Knowledge, they... shall set Disturbance against such Malice with all their Power, and shall take such Offenders, and them put in Prison”²⁵

Interestingly, in this context “malice” is used as a noun rather than an adjective or adverb.

The word “negligent” appears three times in the fourteenth century, all in the context of regulating public officials; one to impose fines on dockworkers who are “found negligent or disobedient in making such Searches” for silver,²⁶ one to punish “Mayors and Bailiffs [who] be negligent in” inspecting food merchants to prevent price-gouging,²⁷ and one allows common-law punishments for “any Sheriff of the Realm be from henceforth negligent in making his Returns of

²² Labourers, Artificers, etc. Act, 1350 (25 Edw. 3 St. 2) C A P. VII. (Eng).

²³ See William P. Quigley, Five Hundred Years of English Poor Laws 1349-1834: Regulating the Working and Non-Working Poor, 30 Akron L. Rev. 73 at 83 (1996) (“Before the Black Death, England had plenty of workers. Workers with skills were valued but if they did not work out they could be replaced. While the plague killed skilled and unskilled workers and drastically reduced those available, the lord's manor still needed upkeep in much the same fashion as before. When nobles died, their inheritances still needed upkeep. This shortage of labor coupled with the same demand for workers, gave workers a stronger bargaining position.”).

²⁴ Peasants' Revolt . . .

²⁵ Suppressions of Riots Act, 1393 (17 Ric. 2) C A P. VIII. (Eng).

²⁶ Money, Silver Act, 1343

²⁷ Labourers Artificers, etc. Act, 1349 (23 Edw. 3) C A P. VI., (Eng).

Writs of the Parliament; or that he leave out of the said Returns any Cities or Boroughs, which be bound.”²⁸ The word “negligence” appears two times in this period, also in similar regulatory contexts.²⁹

III. THE SILENCE BEFORE THE STORM: MENS REA AND THE FIFTEENTH CENTURY

The fifteenth century was an era almost completely devoid of mens rea terms. “Negligent” was not used a single time between 1382 and 1503; “negligence” had zero mentions between 1381 and 1487; “maliciously” was used exactly once between the years of 1363 and 1530, in 1429.³⁰ However, during this period, the word “malice” began to take its place in criminal law that it occupies today. The Maiming Act of 1403 is typical of the period: “...in such Case the Offenders that so cut Tongues, or put out the Eyes of any the King's liege People, and that duly proved and found, that such Deed was done of Malice prepensed, they shall incur the Pain of Felony.”³¹ Additionally, during this period, some malice statutes are written in what appears to be medieval French³², which is not the case with any of the other mens rea terms. Another common use of malice

²⁸ Summons to Parliament Act, 1382 (5 Ric. 2 St. 2) C A P. IV. (Eng).

²⁹ See Provisors of Benefices Act, 1350 Anno 25 EDW. III. Stat. 6 (Eng) (protecting the Church’s collection of donations); see also Confirmation of Liberties; Charters and Statutes, Exportation of Gold, Silver, Leaving the Realm, etc. Act, 1381 (5 Ric. 2 St. 1) C A P. II. (punishing border inspectors of gold and silver for not conducting searches because of negligence).

³⁰ See Malicious Indictments, etc. Act, 1429 (8 Hen. 6) C A P. X. (Eng) (“Our Lord the King considering how divers Persons for their private Revenge, and not of Right, maliciously by subtile Imagination have caused and procured many of his faithful liege People falsly to be indicted and appealed of several Treasons, Felonies, and Trespasses, before Justices of the Peace, and other Commissioners and Justices...”).

³¹ Maiming Act, 1403 (5 Hen. 4) C A P. V. (Eng).

³² See Suppression of Heresy Act, 1414 (2 Hen. 5 St. 1) C A P. VII. (Eng); Robberies on the Severn Act, 1429 (8 Hen. 6) C A P. XXVII. (Eng); John Cade, Writs, Attachments, Safe Conducts, etc. Act, 1452 (31 Hen. 6) C A P. III. (Eng); Repeal of 38 Hen. 6, etc. Act, 1460 (39 Hen. 6) C A P. I. (Eng).

is within the context of people falsely accusing other people of crimes through the manipulation of the criminal justice system.³³ Outside of these developments, most of the 15th century was relatively uneventful regarding the statutory use of mens rea language. This could possibly be due to the unstable nature of the English government during this time- during the 15th century, a total of 5 kings were deposed.³⁴

IV. REGULATION AND RETRIBUTION REDUX: THE SIXTEENTH CENTURY

The statutory use of mens rea terms underwent a radical transformation starting at the end of the 15th century. This is likely catalyzed by the transformation of the English language from middle English to early modern English that occurred around this time, largely influenced by the development of the printing press.³⁵ This period was also marked by reign of the Tudors in England.³⁶ The end of the 15th century saw the appearance of an extremely versatile and heavily-used mens rea term- “wilful/ly.” “Wilfully makes its first appearance in what appears to be a regulatory context, regulations of hunting, but a attempting to conceal one’s guilt will result in a felony: “. . .and if the same Person wilfully conceal the said Huntings, or any Person with him defective therein, that then the same Concealment be against every such Person so concealing Felony...”³⁷ The first appearance of “wilful” occurs in a statute passed in response to a murder of a specific individual, as the statute mentions:

³³ See Indictments, Forgery Act, 1419 Anno 7 HEN. V. (Eng) (“That forasmuch as divers Men of Malice and Envy, and for Gain and Revenge, have often caused to be indicted and appealed divers of our true liege People, of Treasons or Felonies”) ; see also Malicious Indictments, etc. Act, 1429 (8 Hen. 6) C A P. X. (Eng); Indictments, etc. Act, 1439 (18 Hen. 6) C A P. XII. (Eng).

³⁴ Middle English

³⁵ Id.

³⁶ Henry VIII of England.

³⁷ Hunting in Forests Act, 1485 (1 Hen. 7) C A P. VII. (Eng).

“WHERE abominable and wilful prepsed Murders be by the Laws of GOD and of natural Reason forbidden... unreasonable and detestable Persons, lacking Grace, wilfully commit Murder, to the high Displeasure of GOD, and contrary to all the Laws abovesaid, (2) and moreover against their natural and obliged Duty, wilfully commit prepsed Murder, in slaying their Master... James Grame, late of London, Yeoman, wilfully assented and prepsed the Murder of one Richard Tracy Gentleman, then his Master, by him and his prepsed Assent, the Ninth Day of February last past, at Brentwood in the County of Essex, murdered and slain... for the Murder of the said Richard Tracy his late Master, be attainted of the said Murder as a Felon that hath offended in Pety Treason; and that the same James, for the same Murder, shall be drawn, and hanged in such Manner and Form...”³⁸

This statute is interesting for a few reasons. First, the statute mentions the reason for its own existence (attempted research on the history of Richard Tracey was inconclusive). Second, because of this context, it appears “wilful” was to be selected as an adjective more egregious than “malice” in the context of murder *mens rea*; it appears that this murder shocked the public consciousness so much that a new level of *mens rea* had to be invented to describe it. This theory of “wilful” being a level worse than “malice” is buttressed by the very next statute to use “wilful;” that statute didn’t occur until 34 years later- the Poisoning Act of 1530, which, after an introduction in Latin, reads simply “Wilful Poisoning shall be adjudged High-Treason, and the Offender therein shall be boiled to Death.”³⁹ Finally, it is the beginning of what will be a numerously repeated connection between a “wilful” crime and a lack of reason that the British Parliament will make many times up until the present day.

Following the initial entrance of “wilful” into the statutory canon, the term initially remained as a precursor for the most severe punishments, either the death penalty or life in prison, throughout

³⁸ Benefit of Clergy Act, 1496 (12 Hen. 7) C A P. VII. (Eng).

³⁹ Poisoning Act, 1530, (22 Hen. 8) C A P. IX. (Eng).

the 1530's.⁴⁰ During this period, the term was also used in conjunction with “malice” to augment the mens rea of the accused, often with the phrase “wilful murder of malice.”⁴¹ This is the beginning of the use of “wilful” as a chameleon-type of mens rea term, that continues to the present day because wilful has been used interchangeably with most other mens rea terms.

Interestingly, this same decade was marked by large religious unrest in England due to Henry VIII's excommunication by the Catholic Church because of his divorce to Queen Catherine.⁴² This event coincided with the weakening of the absolute power of the monarch, the rise of Parliament's power and the rule of law.⁴³ The reign of Henry VIII also vastly reduced the influence of the church in the legal system.⁴⁴ It's possible that because the King could no longer dictate his wishes at his

⁴⁰ See Breaking Prison Act, 1531 (23 Hen. 8) C A P. XI. (Eng) (“Persons being convict of Murder or Felony...wilfully break the Prisons of the Ordinaries, and escape...for such wilful breaking of Prisons... [the offender shall] suffer such Pain of Death.”); Benefit of Clergy Act, 1531 (23 Hen. 8) C A P. I. § 3 (Eng) (for any wilful Murder of Malice prepensed... or for wilful burning of any Dwelling Houses, or Barns... shall... suffer Death; id, § 4 (“every such Person...found guilty...of any Murder of Malice ... [or] wilful Murder... shall... remain and abide in perpetual Prison...during the natural Life of every such Convict...”); Standing Mute, etc. Act, 1533 (25 Hen. 8) C A P. III., preamble (Eng) (no Person or Persons... found guilty... of any wilful Murder of Malice prepensed... [or selected property crimes]... or for wilful burning of any Dwelling-houses or Barns... be admitted to the Benefit of his or their Clergy... and suffer Death...”); id, § 2 (every Person... ndicted of Petit Treason, wilful Burning of Houses, Murther, Robbery, or Burglary, or other Felony... and do stand mute of Malice or froward Mind...[will be treated] as if he had directly pleaded... Not guilty, and thereupon had been found guilty).

⁴¹ Id.

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⁴³ See Sir John Baker, At Century's Dawn: The Future and Past of Human Rights and the Rule of Law: Human Rights and the Rule of Law in Renaissance England, 2 Nw. U. J. Int'l Hum. Rts. 3 ¶ 1 (2004) (“No one questions that England, by the time of Henry VII, was a limited monarchy, which meant that government was conducted according to legal forms and procedures. The king could not change the law or break it. Everyone, including the king, was subject to the law; and the law could only be changed by Parliament.”).

⁴⁴ See Jack Moser, Essay: The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, And Medieval Authoritarian Impacts On The Evolution Of Legal Equitable Remedies, 26 Cap. U.L. Rev. 483 (1997) (“By the end of Henry VIII's reign, the king's courts had adopted many canonical precepts and judicial reasonings to overcome the struggle between Church and state. The jurisdiction over equitable remedies, in turn, fell solely within the secular

will, Parliament had to increase the number of regulatory statutes in order to keep the status quo in harmony with the rule of law.⁴⁵

In the 1540's, "wilful" additionally began to be used in a regulatory context. The Physicians Act of 1540 empowers a 4-person regulatory agency to inspect physicians offices to see if their "Wares, Drugs and Stuffs" are not suitable to be administered to patients.⁴⁶ If this team of inspectors does not make their inspections at least once a year without a good excuse (like sickness), every violation of "wilful and obstinate Default" merits a 40-shilling fine.⁴⁷ During the same year, 1540, the word "negligently" makes its first appearance, also in a medical regulatory context; the Hospital of Saint John of Jerusalem (Possessions, etc.) Act of 1540 allows the King to grant pensions to anyone who "bee negligently forgotten or omitted out of this present Acte for lacke of knowlege of their names..."⁴⁸ "Negligently" only appears once more in the 16th century, also in a regulatory context.⁴⁹ "Negligence" continues to be used throughout the 16th century, also almost exclusively in regulatory contexts, regulating everything from tax payments⁵⁰ to the quality of cloth⁵¹ to the sale of horses⁵² to aid for the poor,⁵³ among others.

courts, leading to absolute secularization of the English legal system.").

⁴⁵ See Baker, supra note 42, ¶ 6.

⁴⁶ Physicians Act, 1540 (32 Hen. 8) C A P. XL. § 2 (Eng.).

⁴⁷ Id.

⁴⁸ Hospital of Saint John of Jerusalem (Possessions, etc.) Act, 1540 (32 Hen. 8) C A P. XXIV.

⁴⁹ See Thames Watermen Act, 1555 (2 & 3 Ph. & M.) C A P. XVI. § 10 (Eng) (establishing a regulatory framework for the Thames River and levying fines on regulators who "do happen negligently to use and exercise his or their Room or Place").

⁵⁰ Payment of Tenths to King Act, 1548 (2 & 3 Edw. 6) C A P. XX. § 2 (Eng).

⁵¹ Woollen Cloths Act, 1549 (3 & 4 Edw. 6) C A P. II. § 11 (Eng); Woollen Cloth Act, 1551 (5 & 6 Edw. 6) C A P. VI. § 38 (Eng); Woollen Cloths Act, 1557 (4 & 5 Ph. & M.) C A P. V. § 17 (Eng).

⁵² Sale of Horses Act, 1555 (2 & 3 Ph. & M.) C A P. VII. § 3 (Eng)

⁵³ Poor Act, 1597 (39 Eliz. 1) C A P. III., preamble (Eng).

For the rest of the 16th century after 1558, “wilful” also began to be predominantly used in a regulatory context.⁵⁴ “Wilful” was used in the context of regulating public officials regarding taxation⁵⁵ and the navy,⁵⁶ and the general public regarding fishing.⁵⁷

A very important development of the use of the word “wilful” also took place at this time. In the Perjury Act of 1562, Parliament added a mens rea requirement to the law of perjury: the offender had to be “wilful” in committing it.⁵⁸ The requirement of a wilful element to perjury would be repeated in the statutory language a total of 594 times after 1562⁵⁹ and would be used to respond to the current events of different times. The word “perjury” made its first appearance in 1433⁶⁰ and was the subject of legislation as early as 1495, allowing for the discretionary punishment of “Perjury committed by unlawful Maintenance, Imbracing, or Corruption of Officers, or in the Chancery, or before the King's Council...”⁶¹ It appears in this statute there is a pseudo-mens rea requirement

⁵⁴ “Wilful” still continued to be used in a criminal context after 1540; see Repeal of Statutes as to Treasons, Felonies, etc. Act, 1547 (1 Edw. 6) C A P. XII.; Robbery Act, 1551 (5 & 6 Edw. 6) C A P. IX.; Accessories in Murder, etc. Act, 1557 (4 & 5 Ph. & M.) C A P. IV. (Eng).

⁵⁵ See Taxation Act, 1558 (1 Eliz. 1) C A P. XXI. (Eng).

⁵⁶ See Maintenance of the Navy Act, 1562 (5 Eliz. 1) C A P. V. (Eng).

⁵⁷ See Unlawful Fishing, etc. Act, 1562 (5 Eliz. 1) C A P. XXI. (Eng).

⁵⁸ Perjury Act, 1562 (5 Eliz. 1) C A P. IX. § 6 (Eng) (“if any Person or Persons after the said tenth Day of April next coming, either by the Subornation, unlawful Procurement, sinister Persuasion or Means of any others, or by their own Act, Consent or Agreement, wilfully and corruptly commit any Manner of wilful Perjury... shall for his or their said Offence lose and forfeit twenty Pounds, and to have Imprisonment by the Space of six Months without Bail or Mainprise”).

⁵⁹ Search performed for “wilful perjury,” “wilful or corrupt perjury,” and “willful and corrupt perjury,” on www.justus.com (last visited December 3, 2005).

⁶⁰ See Attaints Act, 1433 (11 Hen. 6) C A P. IV. (Eng) (“Our Lord the King, by the grievous Complaint of his Commons, considering the Mischiefs had within the Realm, and yet not remedies, and also the great Damage and Dishonour that cometh by the usual **Perjury** of Jurors impanelled upon Inquests, as well in the Courts of our Lord the King, as of other, the which **Perjury** doth abound and increase daily more than it was wont, for the great Gifts that such Jurors take of the Parties in Pleas sued in the said Courts...”).

⁶¹ Perjury Act, 1495 (11 Hen. 7) C A P. XXV. (Eng).

regarding the perjury committed because of “corruption,” but it also apparently allows strict liability for any perjury in the Chancery or King’s Court. After 1562 however, the use of “wilful” perjury became the standard for language for the regulation of vast swaths of the working of an ever-expanding government.

V. THE SEVENTH CENTURY: MENS REA AND THE BIRTH OF MODERN ENGLAND

The seventeenth century was very formative in English political history because the era was marked by what is known as the English Civil War or Wars, which took place between 1642 and 1653.⁶² The conflict originally started because of the odd personality of Charles I, who ascended to the throne in 1625. Charles I was opposed to reformist elements in the English political structure and created his own brand of Anglicism, called “High Anglicanism,” in an attempt to strengthen the holy legitimacy of his throne by reinforcing the notion of his divine right.⁶³ In the late 1620’s, Charles participated in a number of unsuccessful European Wars that left the Army in need of Parliament-appropriated money.⁶⁴ In 1628, as a condition of this appropriation, Parliament drew up the Petition of Right, which declared that citizens have freedom from arbitrary arrest and imprisonment, non-parliamentary taxation, the enforced billeting of troops, and martial law.⁶⁵

Although Charles accepted the petition, he responded by not calling a parliament for the following decade, until 1639.⁶⁶ During this time, Charles also attempted to enforce his “High

⁶² English Civil War.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

Anglicanism” upon his subjects,⁶⁷ in what was known as the “eleven years of tyranny.”⁶⁸ This led to local rebellions in the early 1640’s, which forced Charles to finally summon Parliament again for money, and this Parliament passed laws greatly restricting Charles’ power, including removing the King’s power to dissolve Parliament or raise his own taxes.⁶⁹ When Charles tried to arrest some members for treason, Parliament raised an army and defeated the king’s forces in fighting between 1642 and 1645 to control most of the country.⁷⁰ However, while in Prison in 1647, Charles brokered an agreement with Royalist supporters in Scotland who rose to fight Parliamentary forces in what is known as the “Second English Civil War” in 1648.⁷¹ Parliament won that conflict as well, and tried and beheaded Charles for treason in 1649.⁷² Between 1649 and 1659, Oliver Cromwell would lead the English government as a commonwealth and a protectorate.⁷³

Following Charles I’s execution, his son, Charles II, started the “Third English Civil War,” supported by Scottish and Irish forces who wanted independence from England.⁷⁴ The Royalists would lose their last battles in 1653, but Charles II ascended to the throne in 1660 when the army

⁶⁷ This was a main catalyst of the Puritans’ emigration to the American Colonies in New England; See Carl H. Esbeck, Dissent and Disestablishment: The Church-State Settlement in the Early American Republic, 2004 B.Y.U.L. Rev. 1385, 1412 (2004) (“Puritanism’s more personal and emotional Protestantism was intertwined with sympathy for greater popular governance and Parliamentary rule. Under James’ son, Charles I (1625-1649), the Puritans began to practice an aggressive resistance to monarchial absolutism and high-church Anglicanism. This led Charles to seek to rule without Parliament. However, his attempt to impose Anglican-style worship in Scotland in 1637, and the resulting Scottish revolt, forced Charles in 1640 to summon Parliament... Throughout the period of conflict with the Stuarts, many Puritans left for New England. Between 1629 and 1642, over 25,000 Puritans immigrated to the Massachusetts Bay Colony.)

⁶⁸ English Civil War.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

dissolved Parliament after a lack of confidence in Cromwell's successor, Richard.⁷⁵ This was the English Reformation. This series of events is what created the modern British parliamentary democracy, and supporters of the two sides became the political parties of the Tories and the Whigs.⁷⁶

Most likely as a result of all of these events, the word "wilful" was not used once between 1609 and 1660 and "willfully" was used only once between 1623 and 1660.⁷⁷ "Malice" was not used between 1623 and 1660 and "maliciously" was not used between 1592 and 1660. "Negligent" was not used between 1601 and 1660, "negligence" was not used between 1623 and 1660, and "negligently" was not used between 1603 and 1661. Yet all of these terms resumed use immediately following the English Restoration of 1660.

In the period following 1660, "wilful" continued its dual role in criminal and regulatory law. The movement of "wilful" into the regulatory realm was not conducted exclusively in the context of wilful perjury, however. The year 1660 marked the beginning of the second major characteristic of the use of the word "wilful"- as an interchangeable regulatory tool along with the term "negligent." The first conjunction of these two terms occurs in the Restoring of Ministers Act of 1660: "And that every Parson or Minister who shall be removed by this Act, shall pay all Tenths not pardoned, and repair or make Satisfaction for all wilful or negligent Dilapidations made or suffered

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Habeas Corpus Act, 1640 (16 Cha. 1) C A P. X. § 8 (Eng) ("...if any Thing shall be otherwise wilfully done or omitted to be done by any Judge, Justice, Officer or other Person aforementioned contrary to the Direction and true Meaning hereof, that then such Person so offending shall forfeit to the Party greived his treble Damages, to be recovered by such Means, and in such Manner as is formerly in this Act limited and appointed for the like Penalty to be sued for and recovered.").

by him...”⁷⁸ This is in the context of regulating public officials, which both terms begin to be used extensively around this time; however, the next time their paths intersect in the same statute will not occur again for another 50 years⁷⁹.

Regardless, the second half of the 17th century saw an explosion of mens rea terms regarding regulations. Interestingly, as the use of “wilful” and “negligent” greatly expand during this period, “malice” sees a decline. “Malice” is only used seven times between the years of 1571 and 1731.⁸⁰ However, even during this lean time, “malice” is used interchangeably with “wilful.”⁸¹ “Maliciously” is also used sparingly during this period, and also follows the same pattern as “malice” by being used interchangeably with “wilful.”⁸²

Between 1660 and 1700, “wilful” is used exclusively in a regulatory context, with two exceptions.⁸³ The use of “wilful” spans many mundane regulatory contexts, including eminent

⁷⁸ Restoring of Ministers Act, 1660 (12 Cha. 2) C A P. XVII. § 7 (Eng).

⁷⁹ Taxation Act, 1710 (9 Ann.) C A P. XI.(12) § 11 (Eng) (“...if the Raw Hide of any Ox, Bull, Steer or Cow, or the Skin of any Calf, shall wilfully or negligently be gashed, slaughtered or cut in the Flaying thereof...”).

⁸⁰ Search for “malice” on www.justus.com (last visited December 3, 2005).

⁸¹ See Benefit of Clergy Act, 1670 (22 Cha. 2) C A P. V. § 3 (Eng) (persons who “stand wilfully or of **Malice** and obstinately mute” and have committed certain other crimes will get the death penalty); Outrages in Northern Counties Act, 1601 (43 Eliz. 1) C A P. XIII. § 2 (Eng) (giving the death penalty to those who “...shall wilfully and of Malice burn or cause to be burned, or aid, procure or consent to the burning of any Barn or Stack of Corn or Grain, within any the said Counties or Places aforesaid...”).

⁸² See General Pardon Act, 1660 (12 Cha. 2) C A P. XI. § 32 (Eng) (making it illegal to “wilfully, **maliciously** and traitorously [hold] Intelligence with any foreign Prince or Princes, State or States, or with any Person or Persons usurping supreme Authority in this kingdom or other his Majesty's Dominions...”); Parliamentary Elections (Returns) Act, 1695 (7 & 8 Will. 3) C A P. XII. § 3 (providing remedy against “...any **Officer** shall wilfully, falsely and **maliciously**, return more Persons than are required to be chosen by the Writ...”).

⁸³ See Administration of Justice Act, 1696 (8 & 9 Will. 3) C A P. XI. § 4 (Eng) (“And for the preventing of **wilful** and malicious Trespasses, be it further enacted...that the Trespass upon which any Defendant shall be found Guilty, was **wilful** and malicious, the Plaintiff shall recover not only his Damages, but his full Costs of Suit; any former Law to the contrary notwithstanding.”); Burning of Houses, etc. Act, 1670 (22 & 23 Cha. 2) C A P. VII. (Eng)

domain,⁸⁴ preventing supporters of the pope from holding office,⁸⁵ taxes,⁸⁶ and hunting.⁸⁷ “Negligence” follows this trend as well, being used to regulate issues such as infrastructure maintenance,⁸⁸ imports,⁸⁹ and cloth.⁹⁰ Following the chaos of the English Civil Wars, Parliament apparently used the new stability for the luxury of legislating mundane matters.

CONCLUSION

This paper discussed the main themes of mens rea use in English statutory history. As illustrated, the terms analyzed here do not have singular definitions (with the possible exception of “malice”), they were created to adopt to relatively mundane footnotes in the scheme of history, and are overwhelmingly used in the context of government regulation. The only mens rea pattern that appears to have a semblance of running through every period is that mens rea terms seem to increase in times of stability, and decrease or disappear in times of conflict. However, after each period of instability, mens rea terms return with a spurt at the beginning of the following stable period, perhaps giving some credence to the ‘monopoly of violence’ theory as espoused by James. Q. Whitman.⁹¹ Regardless, the application of mens rea in English statutory law also illustrates how its development was spurred not by profundity, but by pragmatism.

(“Felony for wilful burning of any Ricks of Corn, Hay, &c. or Barns, &c. in the Night-time.”).

⁸⁴ Rebuilding of London Act, 1670 (22 Cha. 2) C A P. XI. § 4 (Eng).

⁸⁵ Parliament Act, 1678 (30 Cha. 2 St. 2) S T A T. II. § 6 (Eng).

⁸⁶ Taxation Act, 1688 (1 Will. & Mar.) C A P. XX. § 7 (Eng).

⁸⁷ Game Act, 1692 (4 Will. & Mar.) C A P. XXIII. § 10 (Eng).

⁸⁸ Bridges Act, 1670 (22 Cha. 2) C A P. XII. § 2 (Eng).

⁸⁹ Importation Act, 1680 (32 Cha. 2) C A P. II. § 10 (Eng).

⁹⁰ Woollen Manufactures Act, 1688 (1 Will. & Mar.) C A P. XXXII. (Eng).

⁹¹ See generally James Q. Whitman, Symposium: Twenty-Five Years of George P. Fletcher’s Rethinking Criminal Law: Between Self-Defense and Vengeance/ Between Social Contract and Monopoly of Violence, 39 Tulsa L. Rev. 901 (2004).