1968

Science and Morality of Criminal Law

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It may seem paradoxical in these times of confusion and uncertainty not only for students but also for older persons, that the study of criminal law can be, if not a Gibraltar, certainly a vantage-point on and from which one can build a significant philosophy of life. Yet, on reflection, there is no actual paradox because most thoughtful persons would agree that, in the present, often bewildering situation, it is the moral problems that are most perplexing and challenging. And in our culture “criminal law” refers primarily to the common law of crimes, the well-known felonies and misdemeanors, and to an institution and a body of knowledge that extend from the 18th century to the present time; a law and a discipline that reflect more than seven centuries of thoughtful experience, discussion, consultation with experts and the dedication of a skilled profession. This law, “the common law of crimes”, represents the realism, rationalism and moral outlook of western civilization. No problem of moral philosophy is beyond its bounds, and those who would refute the moral skepticism and positivism of our age can find in this field of law and in the knowledge of it, more abundant support than anywhere else.

Equally significant is the fact that our basic criminal law, the common law felonies, is almost universal law. If one examined the European codes of criminal law and the South American and Asiatic codes stemming from the European codes, and compared them with our law, which came from England, one would find great uniformity there; indeed, the criminal law of India, for example, is the common law of crimes. There are, of course, differences, e.g. in the scales of punishment, but by and large, the scheme of values as well as the graduation or hierarchy of harms are remarkably similar. Nor is this well-nigh universal uniformity in the basic criminal law of advanced societies the product of conquest or of blind imitation; on the contrary, it was for the most part, freely and thoughtfully discovered or accepted. There is no time to discuss the implications of this for moral philosophy, but I am confident you see what I am intending with reference to the validity of these simple valuations about persons, property, and social institutions.

From a point of view to which I shall shortly refer, “criminal law” has a much wider range than that which includes only the felonies, the
major misdemeanors and many similar statutory crimes. From that point of view, which differs in important ways from what I shall submit, any law that has a punitive sanction is a criminal law. I shall discuss the significance of that later, but for the present I should like to keep before you the common law felonies and major misdemeanors, what every person usually thinks of when he thinks of crimes or criminals — murder, burglary, arson, robbery and so on.

The other term in the title of this lecture is “science”, and that is even more ambiguous in daily speech where it is employed in the “science of prize-fighting”, the “science of cooking” and so on. But the minimum of any definite use of that term must mean an organization or a system of ideas, and in this sense it is exemplified in the formal sciences, such as mathematics and logic, and in the empirical-formal sciences like physics and chemistry. In this more precise use, what is distinctive and, indeed, the very essence of science, is an organization of ideas. Without pressing for too close an analogy with physical science, when I submit that there is a science of criminal law, I am referring to an organization of ideas.

What are these ideas and how are they organized? I distinguish three terms or conceptions, which I call “rules”, “doctrines” and “principles”, and it is by use of these conceptions and their interrelations that one constructs an organization of ideas that may be called a science of criminal law. Those of you who have seen European criminal codes know that they are divided into two parts — a general part and a special part. The latter deals with the various specific crimes, and this is what I refer to as comprised of rules. The statute book is full of such rules. They are more specific than either the doctrines or the principles. Secondly, they include verbs, such as kills, burns, takes and carries away. And thirdly, they specify what is distinctive about each crime; if you wish to know the difference between murder and arson, or between burglary and larceny, you read the rules. They tell you what is specific about each crime and how to distinguish one crime from another.

The second concept referred to, the doctrines, are concerned with insanity, infancy, intoxication, coercion, mistake, necessity, attempt, solicitation and conspiracy. These are wider propositions and they qualify and limit all the rules. Take the doctrine of insanity, for example; the rule that specifies what is larceny, robbery or murder does not state the entire definition of those crimes because if the person who did the forbidden acts was insane at that time, no crime was committed. One might say that the rules are complete as regards normal persons and normal situations. But the meaning of “normal” depends on that of the doctrines; these must therefore be taken into account in defining the
specific crimes. Lawyers refer to them as “defenses”, and linguistic philosophers call them “excuses”. That may be proper from a proce-
dural or philosophical point of view, but what is finally involved is the definition of a crime. If the behavior was that of an insane person or an infant, it is not a crime. Since insanity (and infancy, mistake of fact, etc.) affect all of the specific rules, the doctrines are essential in the definition of every crime; they limit all the rules.

If you will imagine a musical scale or, better, draw a hundred horizontal lines and let every one of them represent a rule of criminal law — a hundred different definitions of crimes. Then draw nine or ten vertical lines, each intersecting every one of the hundred horizontal lines. Each of these vertical lines then represents a doctrine (e.g., insanity, intoxication, coercion, etc.). Not until all of the hundred rules have been “joined” to or intersected by these nine or ten doctrines, is the criminal law stated. Unlike the implication of the general part of European penal codes, which includes very different kinds of general propositions, doctrines should be distinguished from the third type of concept, noted above, which is wider than either of the others; and these are the “principles” of criminal law. If you view the above imagined “tennis court net”, made up of many specific rules and the nine or ten doctrines, and you stand back from it and ask yourself, “What, if any, are the fundamental ideas that run through this entire tennis court net, this fusion of the specific rules and the nine or ten doctrines?”, then, it has seemed to me, one discovers seven fundamental ideas that permeate the entire corpus of the criminal law, namely, legality, mens rea, act, the concurrence or fusion of the act (effort) with the mens rea (the criminal state of mind), harm, causal connection between the conduct and the harm, and punishment, the punitive sanc-
tion.

Accordingly, e.g. everything I have said about the rules and the doctrines implies and must be placed within the frame of legality. No matter how immoral or anti-social or sinful an act may be, if there is no positive law which forbids that conduct, it is not a crime. So, too, of all the other principles — every crime satisfies every one of the seven principles and if any one of them is lacking, the conduct in issue is not a crime — in terms of the present theory.

Think next, of any legally forbidden conduct, e.g., setting fire to another person’s building. This conduct is a fusion of a mental state (mens rea) with an act or effort and thus reflects three criteria expressed in the three state principles. The remaining principles are expressed in the statement that such conduct causes harms for which the legally specified punishment must be applied. From the great variety and complexity of the specific rules and from the doctrines that, combined
with them, define all of the very large number of crimes, what emerges in the final analysis is a very simple proposition in terms of the stated seven principles — every crime is conduct that produces a harm for which certain punishment is prescribed — all within the frame of legality.

The *mens rea* principle (the Latin equivalent of "evil mind") is taken here to mean intentionality and recklessness; or more fully, *mens rea* is the state of mind expressed in the intentional bringing about of a legally forbidden social harm or in recklessness regarding the occurrence of that harm. This plainly excludes the inadvertent negligent harmdoer or, in other words, in terms of the suggested interpretation, it is the voluntary harmdoer who is the criminal, not the inadvertent one. The latter may be awkward or calloused or insensitive to danger, including danger to himself, but he is not a voluntary harmdoer and, therefore, in the present view, he is not a criminal. Far from this being a merely personal predilection or a recent thesis, this principle stems from the very beginning of western philosophical thought, and it is also expressed in the earliest Chinese ethics, *e.g.*, by Mencius. As with Aristotle, Aquinas and Kant, what in this tradition is at the bottom of both blame and praise is the voluntariness of action. When those philosophers blamed drunkards and ignorant persons for the harms they committed, they based their judgment on the prior voluntary misconduct that culminated in the present incompetence.

Before discussing this, it may be helpful to point out the further significance of the *mens rea* principle by showing more definitely how it is related to the entire criminal law. In the first place, the principle of *mens rea* is a generalization of all of the *mentes reae* expressed in the whole array of specific crimes. Obviously, the state of mind of one who is setting fire to a house is different in some ways from the state of mind of one who is killing someone, or of that of a thief. But what is common to all of their states of mind or, better, to their respective actions is their voluntary character; there is awareness and a voluntary movement towards a proscribed actual harm. Such generalization of what is common is the function of a principle; thus, similarly, *e.g.* as regards the principle of harm. Obviously, again, a burned dwelling house is a different harm than that of a killed human being, and both are different from the harm of losing one's property. But the principle or concept of harm signifies that all of these consequences of criminal actions are alike in being actual disvalues. Thus the principles are high-level generalizations unifying what is common in the vast array of specific rules qualified by the doctrines. As stated, *mens rea* is the generalization of what is common in all the *mentes reae*; however different these criminal states of mind are in some respects, they and the congruent conduct express intentionality or recklessness with reference to the com-
mission of a legally proscribed actual harm. Secondly, *mens rea* is the distillation of the negation of all the so-called "excuses" (which I include among the "doctrines"). In other words, *mens rea* represents what is left after all the excuses have been excluded. Thus, conversely, one could say that *mens rea* signifies the state of mind of a sane, sober adult who was not mistaken or coerced, and so on. That was expressed above in the statement that *mens rea* is constructed by "adding" the (relevant) doctrines to the rules.

I must now say that there are two areas which the above science of criminal law does not fit. One is what lawyers call "strict liability" or "action at peril," where punitive-sounding sanctions are imposed regardless of the lack of any *mens rea*. These include violations of food and drug acts, dealing with alcohol, and many economic regulations where small fines are imposed; but it is necessary to add that this type of law has gone far beyond that initial restriction, e.g., bigamy, statutory rape and other crimes where the defendants are imprisoned for long terms despite the lack of any fault. One of the typical cases of ordinary strict liability is *Dotterweich.*

He was employing able persons and using sound methods of operating his business, but some jars of spoiled merchandise were shipped out and he was found guilty under a "strict liability" penal statute. In another case the defendant, who sold grain, employed the best chemists in the vicinity and they told him that the grain had 40% oil and, being a very cautious person, (an English businessman of the old school) he represented that there was 30% oil. But it turned out that the oil content was only 25%, and he was fined. It is impossible here to discuss the various ramifications of strict liability, but it may be added that Anglo-American law is peculiar in this regard; on the Continent and elsewhere negligence must be proved. Most students of criminal law, though not all of them by any means, agree that strict liability is not properly included in the criminal law since *mens rea* and even the highest possible care are irrelevant.

But the other exception, the other area where the theory I have

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1 United States v. Dotterweich, 320 U.S. 277 (1943). Dotterweich was the president and general manager of Buffalo Pharmacal Company, Inc. The Company was a jobber in drugs, purchasing drugs from manufacturers, repacking them under their own labels, and shipping them in interstate commerce. Having shipped a bad batch of drugs, the Company and Dotterweich were prosecuted for violation of the Federal Food, Drug and Cosmetic Act. The act prohibited "[t]he introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded." The act made any violation a misdemeanor, and contained no requirement of *mens rea*.

In affirming a conviction of Dotterweich for his innocent violation of the Act, the court justified this "strict liability" without moral fault by saying that "[i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." 320 U.S. at 281. [Ed.]

2 Laird v. Dobell, 1 K.B. 131 (1906).
presented does not fit, is much more troublesome. This concerns the inadvertent negligent harm-doer. The inadvertently negligent harm-doer, of course, should be controlled and the community should be protected by way of civil damages, stricter licensing, more frequent revocation of licenses, and education. I have never seen any evidence supporting the belief that assessing a small fine makes a person more sensitive or careful or a more skillful operator of a machine. But opinion among legal scholars is divided on this subject.

As I read the history of the common law of crimes, it seems to me that the judges, when directly faced with this question, have excluded inadvertent negligence from criminal liability, although there remain "objective" interpretations of recklessness that are at odds with the centuries-old drive to limit punishment to the voluntary harm-doer. As seen above, this movement in our legal history accords with the oldest and most enduring tradition of western moral philosophy. The opposition rests on utilitarian grounds, on deterrence. But not only has it no factual support, it is internally inconsistent: how can a person be deterred when he does not know, he does not think or advert to, the possibility of danger in what he is doing? And is it likely that hearing or reading about the punishment of negligent persons improves the character or the skill of insensitive or awkward persons?

More important in the present discussion than this ethical problem is the question, what is the consequence of this disagreement on negligence so far as the science of criminal law is concerned? The present situation is that there is the organization of ideas presented above, but it does not fit strict liability or liability for inadvertent negligence. It does not include such behavior because mens rea is restricted to intentionality or recklessness, to voluntary harm-doing. But suppose one rejects that limitation. How does that affect the science of criminal law presented here?

It certainly does not invalidate that theory since it does not prove it is fallacious in the area it covers. The alternative is to produce a better theory; and a better theory might be one which included negligence and strict liability as well as voluntary harm-doing and was expressed in an equally significant set of ideas.

In judging this question, one must recognize that there are limitations on any theory in any science. I am told that there are two competing theories of light, a wave-length theory and a quantum theory. One of them explains certain aspects of light phenomena but not others. In economics, theories about supply and demand are valid only under certain conditions, and the generalizations in chemistry and physics, i.e., those scientific laws, only apply in so-called ideal conditions. This is true of every theory.
“Theory” is a Greek word meaning the knowledge of oneness or sameness in a field of very disparate data. There are, e.g. trillions of things in the world and each grain of sand may be distinctive in some way. The chemists have discovered that there are $10^3$ elements; every one of these trillions of things is one of those elements or is a combination of two or more of them. Just think what that knowledge means in the march of human history which has led us from a crude ad hoc view of trillions of different things to a science that there are only 103 different kinds of things in the universe.

Thus, the question must be raised — if the theory presented here does not encompass inadvertent negligence and strict liability, what are the alternative possibilities of increasing our knowledge of the criminal law? Has someone come forward with a theory that encompasses the above areas and is also equally significant in specifying substantive criteria, and in organizing all of this? Professor Würzel of Bonn University maintains that the inadvertent harmdoer perceived stimuli of something dangerous and he turned his mind away from those warnings. But if this happened, then Professor Würzel is not talking about what I call “inadvertent negligence”; he is talking about recklessness, a voluntary turning-away from a recognized danger. Perhaps this is a verbal difference between German law and American law, a difference in the definition of the above terms. But as the matter stands, I can only say that I am not much taken with Professor Würzel’s position because if there is awareness of danger, there is an element of volition in the consequent action, and therefore recklessness.

Then there is the prevailing formal view of criminal law which holds that any statute that has a punitive sanction is a criminal law. But how far does that get one? Its inadequacy as a theory is shown in the fact that actually, when lawyers are working on their cases they talk about mens rea and act and the rest of the principles; but they haven’t organized these insights.

Most of the seven fundamental ideas or “principles” of the criminal law have been discussed in the literature for a long time; but Stephen, for example, did not make much of causation and harm. I emphasized the importance of these concepts but, most of all, I tried to set these and the other basic ideas into a scheme expressing especially the relations between the specific rules, the doctrines that qualify every one of them, and the fundamental principles represented in the entire corpus of criminal law (excepting the moot areas noted above).

Now, from the point of view of the student or lawyer, what is the advantage of the theory I have been presenting? Can they make any practical use of it? The answer is plain and easy — they can ask the seven questions (“principles”) about any conduct or any alleged crim-
inal law. They do not study more than 20 or 30 crimes in law school and there may be 10,000 or 30,000 crimes. But if they know the seven principles, then when they deal with other crimes, they need only ask: Where is the positive law (legality), what is the proscribed act, what is the mens rea involved here, what is the harm that is described here, and what about the punitive side and the strict interpretation of the prescription of that? They know what to look for, what constitutes a crime as developed in a theory which fits the largest part and the most significant part, not only of our formally designated "criminal law" but also of that of all advanced cultures.

Secondly, this knowledge, this set of organized ideas, provides a basis for criticism. Confronting, e.g. a case allegedly involving strict liability, the informed lawyer stands on the solid foundation of a body of knowledge which fits the felonies and the major misdemeanors and countless new statutes, a body of knowledge that has been pounded out in more than seven centuries of thoughtful discussion and criticism. He knows how to represent his client. If you read the Morissette\textsuperscript{3} case and others, you will find that able lawyers have narrowed statutes by use of the established criteria of criminal liability. Or, if you are on the other side, on the prosecution, that same knowledge helps you to maintain the opposite view.

Thirdly, and most important, this theory, like any theory that survives through criticism, maximizes understanding of the field. Instead of a scrapbag of disconnected information that clutters the mind, there is an organization of the knowledge of criminal law. Knowledge of the interrelations of the three types of ideas greatly maximizes the knowledge of all of them separated from each other.

This also increases one's knowledge of the morality of criminal law. I have referred to the common values, representing what might be called the "ordinary decencies" subsumed in "respect for human beings" which the criminal law expresses and protects. Every one of those values becomes more significant when it is placed in the network of interrelated ideas discussed above. Again, the criminal law expresses an objective

\textsuperscript{3}Morissette v. United States, 342 U.S. 246 (1952). The defendant, while deer hunting, came upon a pile of bomb casings which had been used in bombing practice and left in a pile on the bombing range. The casings were the property of the United States government. Believing that the bomb casings were not wanted by the government, the defendant took about three tons of them and sold them for scrap. All of the allegations of the prosecutor were admitted; the only defense offered was that the defendant did not intend to steal the casings. The defendant was convicted on the grounds that the statute under which he was being prosecuted did not make criminal intent a part of the offense. Reversing, the United States Supreme court stated that where crimes find their origin in the common law, failure to codify the requirement of intent will not eliminate this necessary element of the crime. The statute under which the defendant was convicted was simply a codification of the common law crime of theft, and the court held that the requirement of criminal intent was implied in the statute. [Ed.]
morality, so that if a person says he did what his conscience told him to do, that is not a defense although it raises difficult problems for administration. The philosophy of punishment is also rendered more cogent and more precise when it is constructed by reference to the science of criminal law. Then, there is the ultimate moral plank, that the criminal is the voluntary harmdoer, and this merits further comment.

Aristotle, and Aquinas following him, attached culpability to a drunkard's misconduct on the ground that many times in his past life, he voluntarily drank, resulting finally in his becoming an habitual drunkard. But they were not concerned with the lawyer's problem — just what should be done to such a person. Secondly, we are more receptive to the psychology of conditioning in families and in the environment of early childhood; we believe that insensitivity, ignorance and incompetence are often the product of what happens to people without any fault on their part. What in any case is more important than my disagreement with Aristotle and Aquinas in this particular respect is that the basis of their judgment regarding ignorance and intoxication remains the (alleged) prior voluntary wrong-doing of those persons. With this ground I am in full accord, and disagreement about the application of that principle to inadvertent negligence is a relatively minor matter.

Finally, it is very significant that the acceptance of the above basic principle of Western moral philosophy is not only compatible with but also facilitates the discovery of a science of criminal law. This knowledge of morality is the careful articulation of centuries of experience. There is much to recommend it now in our present dealing with the difficult and sometimes terrifying problem of crime. If people could be taught the simple message of our criminal law — not to harm a human being, and if we could persuade professors of ethics or sociology to read and study the criminal law, not only would crime diminish, there would also be much progress in moral philosophy and social science.

I have discussed the interrelationship of certain ideas and it is necessary to add (although little time remains for discussion) that, corresponding to the established factual sciences there is a sociology of criminal law or, at least, the beginning of such a discipline. For if the subject matter of the sociology of criminal law is comprised of the facts referred to by the science of criminal law, it should be possible to develop a relevant body of empirical knowledge. This unfortunately has not been done, partly because the model of physics has become dominant in social science. But if the concepts I have discussed and their interrelations were observed by social scientists, a significant body of knowledge might be discovered. There are already several important studies and types of knowledge, expressed in detailed case-histories, in
trend-generalizations, in wide generalizations regarding preceding and concurrent developments, and in definite propositions that resemble scientific generalizations.

Let me illustrate the last of these by citing some generalizations which I ventured to make some years ago. I was studying the prosecution of known embezzlers, cases where the employers had sufficient evidence to secure convictions, and I found that there were relatively very few prosecutions. The generalizations that emerged were that the rate of prosecution of known embezzlers is directly in proportion to the amount of money embezzled and to the amount of publicity given the crime and inversely in proportion to restitution and to the identification of the employer with his employee. If you compare that kind of generalization with Boyle's law, for example, (gases expand directly in proportion to increase in temperature and inversely as to increase in pressure), noting the interrelation of two variables, the similarity of the generalizations regarding the prosecution of known embezzlers is apparent.

It thus seems possible to advance toward an organized, if not rigorous, body of social knowledge if careful use is made of the science of criminal law. We would then see more clearly the place and functions of law in society, and would be well on the way to the construction of a philosophy of life.

**Questions and Answers**

**Question** (Dean Ares):

Does your system presuppose the existence of the rational man? Some people would say that there is no such thing as the rational man.

**Answer**:

I would say that if there is even a spark of rationality that this makes all the difference. On this I will not compromise. Some distinguished psychiatrists have said that all men are irrational but the implication is "all men except me." For either that psychiatrist is rational or there is no point in listening to him. If what he is emitting is the same kind of emotion he is accusing the human race of exhibiting, then what does he say that entitles him to be listened to? He claims to be saying something that is true, that has a point in it, and that implies that he has at least a spark or grain of rationality. There aren't many things that I would go down fighting for, but this is one of them — the most valuable characteristic of human beings. Think also of the physical sciences, chemistry and physics, and there is mathematics — how in the face of these achievements can one defend the thesis that people are 100%
emotional or irrational? The same applies to legal systems — the roman law and the common law, and to the science of criminal law.

Question:

What do you think of status crimes and the failure of the bar to keep up with scientific developments in the hard sciences and the social sciences, for example, as regards compulsive drinking?

Answer:

In regard to vagrancy, chronic drunkenness and drug addiction, we are moving in a direction that seems to me to be a sound one, that is, to distinguish the real criminal from the misfit, the sick, and the sub-normal. But I think it is very difficult to solve this problem. What’s been going on is that the notion of “disease,” especially “mental disease,” has been expanded to the point where many persons are troubled. Some distinguished psychiatrists have said that everyone is mentally diseased. This means that you or I might be brought before a judge, and on some kind of testimony of that sort we might be confined in what is euphemistically called a “hospital”; so there is plenty of reason to be concerned about this development. The solution, it seems to me, if you stand on the solid rock of what we have learned in 700 years of thoughtful dealing with criminal problems, is to insist on an act of some kind as the condition of the State’s exercising control over anyone; and also, once that is retained and insisted on, to take control for longer periods of time in the vast area of petty misdemeanors and to improve correctional treatment and vocational training of these people. A strict status crime, if there is any such crime, raises difficult problems because, even if it is granted that there is an act or an action-pattern, where is the harm in a culture that prizes leisure? The suggestion I offered above is premised on the assumption that many vagrants commit petty misdemeanors.

On the second question, I would say that after more than 40 years of work in law and the social sciences (which carries the plain implication that this was worthwhile) I must say that I am apprehensive about what is going to happen in many law schools in the next 10 or 15 years. Many law teachers who are able, critically minded scholars when they work on legal problems are naive and even gullible when they read social science and psychiatry. They think psychiatry is a definite body of established knowledge. Actually, there are a dozen schools of psychiatry. So, too, in criminology and the other social disciplines.

But there is a long range optimistic view of this question. If you were to name the greatest social scientist of this century, (an impossible sort of question) but if you had to pick one, my guess is that most
would choose Max Weber. He was a lawyer and his first post was that of professor of law at the University of Freiburg, Germany. He went from that into economics and sociology. Durkheim, though not a graduate of a law school, was also well-trained in the law. Legal scholars, Henry Sumner Maine among them, were the founders of modern anthropology. That's even truer of political science — no longer so in this country, but it still holds true in Latin America and Europe. I am constrained to think that legal scholars have much to contribute to social science if they work long and critically in one or two disciplines; not only will they advance their own knowledge of law, they will also make great contributions to the social sciences.

**Question:**

To what extent are legislators aware of the science of criminal law and utilize it?

**Answer:**

I have a feeling that a lot of what comes out of state legislators is hit and miss. We don't have many of the type of legislator Plato admired (Solon and Lycurgus) who, for him, represented the greatest perfection any human being could achieve. Every Greek citizen knew the fundamentals of his law. I would like to see at least criminal law taught in high schools and colleges in ways not intended to train practitioners. I also wish philosophers would study the criminal law, always, of course, with a searching attitude. The wonderful thing about the common law of crimes is that it was never taken as a set of dogmas laid down by power groups and imposed on the people. When we find ourselves struggling with these same kinds of difficult problems, we need not start from scratch. People who think they do that are only innocent of the history of the criminal law and of the thought that many able persons have devoted to the subject. If you are suggesting that many of our legislators ought to be trained in that kind of thinking, I would certainly second your proposal.

Dean Ares:

I might add a footnote. In the last few years there has been an effort to systemize the criminal law anew, influenced very heavily by Dr. Hall’s work: For example, the Model Penal Code which was promulgated in the last few years, was an attempt to state a complete system of criminal law.