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Comment on Structure and Theory

Jerome Hall

*University of California, Hastings College of the Law*

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I should like to raise two questions about the new German Code and then discuss what seem to me to be the most important requirements of a criminal theory.

First, there is the often repeated claim that the new Code is based on fault (Schuld) in a moral sense. But German law relies rather heavily on inadvertent negligence as a sufficient ground of penal liability. This question has been widely discussed in Anglo-American journals, and only two brief comments will be made. The late Professor Turner's statement: "it should now be recognized that at common law there is no criminal liability for harm thus caused by inadvertence," representing centuries of thoughtful decisions by very able judges and applied even in cases where many deaths were caused by the defendant, must surely raise a doubt regarding the claim that harms caused inadvertently involve moral culpability, indeed, such a high degree of moral culpability that it should be dealt with by the imposition of punitive sanctions. It is true, of course, that American scholars disagree on this subject as do English scholars; in this discussion I only suggest that the claim that the new German Code is based on moral fault is debatable. Later, I shall discuss the reasons for thinking that the acceptance of inadvertent negligence handicaps the construction of a theory of penal law.

Before doing that may I note that § 46(1) of the new Code states that the offender's guilt is the measure of his punishment. It is only necessary to refer to assault and criminal attempt to see that this claim should be qualified by reference to the harms actually committed (or not committed) by equally culpable offenders. It is important, I think, to recognize the difference between a legal system that limits guilt by taking account of the harm committed and a moral philosophy focused solely on guilt.

I come now to the question of "penal theory," which represents knowledge of criminal law. It will be granted that the common objective of scholars of criminal law is to maximize that knowledge. It will also be granted, I trust, that the peak of scientific knowledge is found in mathematics and in physics. In both sciences there are very clear, definite concepts—the product of the work of generations of specialists in those sciences. Correspondingly, the respect in which German penal scholarship is universally held testifies to the thoroughness and profundity characteristic of its elucidation of the basic concepts

1. Hall, "Negligent Behavior Should be Excluded from Penal Liability," 63 Colum. L. Rev. 632 (1963), cites some of the discussions of this problem.
of that law. What is lacking, I suggest with deference, and what distinguishes current penal theory from science, is the failure to interrelate the basic concepts in a significant pattern. The importance of such interrelation cannot be exaggerated.

Although there must be differences between a science of criminal law (if and when such a science exists) and physical science, there are common attributes of both enterprises even if they do not exhaust the respective fields and leave some problems, say of criminal law, to be explored by other methods. These features are the interrelation of the concepts of a theory and their final reference to or "reduction" to a few basic categories. The literature on the philosophy of science is replete with evidence of this age-old quest for "the one among the many." "Science," said Einstein, "searches for relations. . . ."; he emphasizes "its coherent systems.""3 Perhaps such a system is implied in German cases and treatises on penal law just as it can be derived from the rich case law of Anglo-American criminal jurisprudence and its classical treatises; but implication is not the articulation of a theory and its use.

There is, of course, a logic in the relation of the General Part to the Special Part, but it is far short of a classification based on available knowledge; in addition, the General Part is indiscriminate not only in its inclusion of jurisdictional rules but, also and more importantly, in its confusion of types of propositions that should be distinguished, namely propositions which qualify the Special Part and wider propositions which are derived from the union of the above two types of propositions; these last comprise the basic or ultimate concepts of penal law, its "categories" or "principles."

I can elucidate the meaning of these statements if I describe briefly the theory of criminal law I constructed some years ago. I distinguish "rules," "doctrines" and "principles" of criminal law, terms that represent progressively wider concepts. Thus, the rules specify what is distinctive in each crime, and they also describe the specific mental states of the respective actors without reference to justification or excuse. Those "normal" meanings must be qualified by other, more general propositions, e.g. those concerning infancy, insanity, mistake, coercion, necessity and so on, propositions which I have called "doctrines." Among the "doctrines," in addition to the above references to "excuse" and "justification," are propositions concerning complicity, solicitation, conspiracy and attempt, i.e. doctrines that qualify "harm." When all the doctrines are applied as qualifiers to all the rules, the criminal law of any country is stated. But in advanced legal systems there is an additional feature that must be recognized; indeed, by reference to a science of criminal law, this is the most important feature of all. Thus, if one surveys the union of all the rules and all the doctrines with a view to discovering the basic ideas that are implied by that combined set of propositions, one may derive from that combi-

3. Quoted in Readings in the Philosophy of Science 779 (eds. Feigl and Brodbeck, 1953).
nation the ultimate categories, the principles of criminal law, namely legality, mens rea (Schuld), effort (or "act" but not in the sense of "conduct"), the fusion of mens rea with effort (or act) to comprise conduct, the harm, the causal relation between conduct and harm, and the punitive nature of the sanction.

I have pointed out the general interrelation of the rules, doctrines and principles—that the rules remain incomplete until the doctrines are added to them and that the principles represent the ultimate categories to which the diverse elements of the rules qualified by the doctrines are referred and reduced. We may now take a closer look at some of these interrelations. For example, the principle of mens rea is derived from all the relevant doctrines (e.g. insanity, mistake) and also by reference to the normal significance of the mens rea described in the rules. A defendant frequently does not plead an excuse or justification; he simply denies that he did what he is charged with doing. If he is found guilty, his mens rea is that expressed in the rules minus the doctrines, i.e. he was a sane adult, knew the facts, did not act in a state of necessity or in a condition of excuse, and so on. It should be added that while the principles are "ultimate" concepts, they must be distinguished from the simple uniformity characteristic of chemical elements. For example, mens rea is a composite of cognition and volition (e.g., an intention to ...), and the fact that mens rea qualifies the other principles implies that these latter concepts also are not simple ones. The principle of causation links conduct to harm. But "causation" is also qualified by the meaning of mens rea; and if, as I prefer, mens rea is limited to intentionality and recklessness, i.e. to mental states expressed in voluntary conduct, that determines the meaning of "causation." Again, mens rea qualifies "harm"; it is not simply a death or a loss of possession that is a harm in penal discourse, but a death or loss of possession caused voluntarily by a sane, sober adult without justification or excuse. So too harm, on the one hand, must be related to mens rea to define the latter concept; e.g. it is intending to or recklessly committing a proscribed harm (not mens rea in isolation) that determines its meaning. On the other hand, harm as the bridge between voluntary misconduct and punishment qualifies the meaning of the latter concept. The principle of legality serves as the formal vehicle to place definite bounds on all concepts and propositions of penal law. In sum, since the principles are interrelated, they accumulate the relevant contextual meanings; and they are "ultimate" in view of their role in the system, i.e. their relation to the doctrines and the rules. I trust I have sufficiently described the principal concepts of a theory of penal law and some of their interrelations to support the claim that they comprise a system of ideas and that the goal of scientific inquiry in any field has in a measure been satisfied.

There are additional points about mens rea (Schuld) that are relevant to the present inquiry. For example, it is said or implied in essays by our German colleagues that Schuld is not just the intention to kill or harm, etc.; it also includes blameworthiness or knowledge that the conduct is wrong. Now if that means that the defendant
must actually know he is acting in an immoral way, the statement is certainly questionable. Quite apart from offenders' frequent rationalization of their criminal conduct, it is clear that conscience sometimes errs. If the above statement means that in addition to intentionality there must be blame, and blame in the sense of actual knowledge of wrong is excluded, what does the statement mean? Plainly, if one knows only that a certain act was intentional, he is in no position to make any judgment of blame; to do that, one must find the defendant guilty of causing a proscribed harm and, also, exclude the doctrines of excuse and justification.

There are other aspects of German law regarding Schuld that puzzle a common lawyer, apart from the inclusion of motives in the definition of some crimes. Suppose a sane, sober adult, not mistaken regarding the relevant facts and so on, grew up and lives in a marginal group, a "sub-culture"; he practices plural marriage or, belonging to the "Peculiar People" and reading the Bible literally, he is convinced that for the true believer even the bite of a rattlesnake is not harmful, and he holds one which bites a nearby person. Or, as is more frequent, the marginal person believes that taking property from the rich is not wrong; instead, it is a just distribution of wealth.

It is unrealistic to assume that if he had "consulted his conscience," as German law seems to require, he would have discovered that his conduct was immoral. Accordingly, the modern judge in any advanced country faces a dilemma. On the one hand, he believes the above actions are immoral and that this view is commonly shared. On the other hand, he is an advocate of subjective guilt, and if this means that every defendant in a criminal case must actually know that his conduct was immoral, that bars criminal liability. The German solution seems to be to invoke "inadvertent negligence," but the Code may not include a relevant provision.

American law, with the unfortunate exception of the law on homicide, has also moved in the direction of subjective guilt, though not as definitely as has English law. But in England and the United States there are at least two aspects of the penal law that are not subjective, one of which is that the values expressed in that law must be treated as objective. (The other is the principle of legality which I shall discuss in a later Comment.) Instead of indulging in the fiction that the defendant's conscience would have guided him correctly had he consulted it, and instead of searching for a basis of penal liability in strained views of inadvertent negligence, the law of these countries allocates the above problem to the sphere of administration, where probation, suspended sentence or a minimum sentence may be appropriate. As regards both German and Anglo-American law, there is no escape from the fact that punitive sanctions are sometimes imposed on persons who actually did not know and could not have known that they were acting immorally. The meaning of "subjective guilt" should be limited to accord with the objectivity of the values expressed in
a sound body of criminal law. The sanction, mitigated to suit the
facts, can be defended on educational grounds applicable to voluntary
harmdoers who know the facts, but not to inadvertent harmdoers
whose behavior does not directly or deliberately challenge society's
values.

I submit that the lack of a systematic theory results in deficiencies
in analysis and I shall discuss them more fully in later comments.
At this point it is important to note that the above theory of penal
law and the general thrust of Anglo-American law employs a contex-
tual approach to the analysis of penal problems while German analy-
sis proceeds in three stages. To a common lawyer, this mode of analy-
sis, focused first on Tatbestand, then on legality, and finally on
Schuld, resembles, but also differs from, the common lawyer's prima
facie case. Even if both methods represent a defensible procedural
approach, they do not constitute a theory of penal law. In the German
method, when Tatbestand has been qualified by legality, the implica-
tion is the "possibility" of criminal conduct; but since that "possibil-
ity" is determined by reference to Schuld, it ("possibility") is only
a half-way house; actually, when the analysis has been completed, it
turns out that there is no such thing as possibility—conduct is either
criminal or it is not criminal, and the erection of "possibility" as a
third class is superfluous, if not misleading. It is not surprising that
this sort of analysis has stimulated a considerable literature on Tat-
bestand.

This is not the place for a detailed demonstration of the signif-
icance of the contextual theory or of comparison of analysis based on
it with other methods of analysis. But I should like to call attention
to the fact that the above system of ideas or propositions comprises
a descriptive theory which was made possible by the restriction of
mens rea to intentionality and recklessness, i.e. to what is common
in the states of mind manifested in the voluntary commission of the
specific crimes. In this respect English law and treatises evolved from
a moral to a positivist posture. Hale's 17th-century Pleas of the
Crown was based on the voluntary commission of harm.4 Bentham,
in the 18th century, dulled any substantive difference between civil
and criminal sanctions; they were all simply "evils." And Stephen,
in the 19th century, influenced by the diversity of the mental states
represented in the commission of various crimes, opted for mentes
reae, and that became standard in English law and treatises. As Lord
Atkin put it, the criminal law should be based on a moral foundation
but obviously morality and criminal law do not always coincide. This
may have been good judging but it did not represent scientific think-
ing.

The German Penal Code, as previously noted, purports to be based
on moral fault, yet it often relies on inadvertent negligence that, pre-

4. 1 Hale 14, 42.
sumably, is regarded as a moral fault. Thus, on the one hand, while
English criminal law and theory terminated in the simplicism that
the violation of any law carrying a punitive sanction is criminal law
or relied on a procedural criterion to distinguish it from civil law (lack
of control of prosecution), German law and theory sought to provide
a moral foundation for criminal law. The difficulty is that the ac-
ceptance by German theorists of inadvertent negligence as a sound
basis of criminal liability bars the way to valid generalization and thus
to systematic theory. The point here is not the validity of judgments
regarding negligence; as stated, on that question scholars are divided
in common-law countries. The present point is that inadvertent negli-
gence is the contrary of the states of mind designated “intentional”
or “reckless”; it is not characteristic of “voluntary conduct.” Accord-
ingly, a concept of mens rea or Schuld that includes these diverse
states of mind includes contraries or contradictions; it is a confused
concept, not a description of what is uniform among those states of
mind. That same confusion infests the concepts or principles of harm,
causation and punishment; and it plainly invalidates a theory that
purports to be “finalistic,” i.e. end-seeking. The difficulty cannot be
overcome by treating negligence as a type of actual fault, implying
that it is congruent or identical with the kind of fault found in volun-
tary misconduct. A descriptive theory is validated by reference to
the facts, and the judgment that negligence is a moral fault does not
annul the sharp differences among the states of mind designated by
Schuld.

The problem thus presented to the theorist of criminal law is like
that which besets any scientist who is bound to adhere to the actual
uniformity of the data that are the subject of his laws and theories.
One need not be a physicist to know that wave theory, quantum the-
ory and other physical theories are partial theories; they explain some
but not all the data, i.e. what physicists recognize as the data to be
explained. Nonetheless, the fact that physicists make very significant
use of those theories should encourage theorists of criminal law who
are also insistent on a moral basis of penal liability, to construct sys-
tems that, while they may be only partial (as regards the Code), are
nevertheless illuminating as far as they go. It is equally important
to distinguish methods of analysis and the need in that procedure to
consider one point at a time and in a rational order from a theory
of penal law.