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COMMENT ON STRUCTURE AND THEORY

Jerome Hall

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,¹ 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,"² 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

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1. Hall, "Negligent Behavior Should be Excluded from Penal Liability," 63 *Colum. L. Rev.* 632 (1963), cites some of the discussions of this problem.

2. Turner, *Kenny's Outline of Criminal Law* 34 (1962).

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-

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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 contextual approach to the analysis of penal problems while German analysis proceeds in three stages. To a common lawyer, this mode of analysis, 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 implication is the "possibility" of criminal conduct; but since that "possibility" 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 *Tatbestand*.

This is not the place for a detailed demonstration of the significance 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 thinking.

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

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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 acceptance 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 negligence is the contrary of the states of mind designated "intentional" or "reckless"; it is not characteristic of "voluntary conduct." Accordingly, 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 voluntary 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 theory 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 systems 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.