

Fall 1960

General Principles of Criminal Law, by Jerome Hall

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Recommended Citation

Fitzpatrick, James F. (1960) "General Principles of Criminal Law, by Jerome Hall," *Indiana Law Journal*: Vol. 36 : Iss. 1 , Article 7.

Available at: <https://www.repository.law.indiana.edu/ilj/vol36/iss1/7>

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BOOK REVIEWS

GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed.). By Jerome Hall. Indianapolis, Ind.: Bobbs-Merrill. 1960. Pp. 642. \$9.50.

The world of Jerome Hall is a rational world—one in which judges interpret statutes according to canons of construction, in which juries can differentiate the use of the reasonable man concept as a standard of liability from its use as a technique to determine the *mens rea* of the accused, where mental states have definite, objective meanings and where the function of a mind is divided between cognition and volition, and finally where conscience and intuitive knowledge provide internal guides for conduct and where penal liability is just because of an offender's moral responsibility for his choice in intentionally violating the public ethics formalized into criminal law. Or at least that is the picture of the world through the prism of the theory of criminal law which Professor Hall constructs. These features reflect the postulates with which Hall approaches his work—that man is a creature endowed with responsibility and choice and further that simple justice requires a sanction against one who intentionally disregards society's objective ethics. Upon these basic beliefs, Professor Hall has constructed a theory that is of great value and utility to legal theorists and to every criminal practitioner.

Hall has set his goal as the "inclusive systematization, disclosing the interrelations of the various parts of penal law—in short, the construction of a coherent theory of that law."¹ In the recent edition of his *General Principles of Criminal Law*, he refines the ideas and notions collected in the earlier edition.² At an earlier date, one reviewer commented that the first edition "applies the collected learning of the year 1947 in a large number of fields to an enormously old problem."³ This second edition, too, applies the collective learning of the year 1960 to these same persistent problems. By any standard, this edition is a success. It is not a mere annotation of Hall's earlier ideas; on the contrary, it represents a virtual revision and rewriting of the former edition. Much new material has been added, reflecting the broader perspective Hall brings to this work. His participation in the great legal debates and dialogues of the last twenty years is mirrored here. One is constantly

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1. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 13 (2d ed. 1960).
 2. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (1st ed. 1947).
 3. L. Hall, Book Review, 60 *HARV. L. REV.* 846, 850 (1947).

amazed at the skill with which Hall moves in a milieu of subjects—legal history, sociology, philosophy and jurisprudence, criminology, psychology and psychiatry, and even in that most pedestrian legal skill, the close, penetrating analysis of appellate cases.

The basic gridwork of Hall's theory remains intact. In an attempt to systematize the field of criminal law, Hall calls upon three levels of generalization. Principles are the most broad and delineate the area of positive law ("lawyer's law") that can properly be labeled criminal law. They "stipulate what is common in all crimes."⁴ The seven principles necessarily present in all "true" criminal law include legality; *mens rea*, act, and their concurrence; causation; harm; and punishment. Rules, at the other extreme, are most narrow and specific; they contain the verb of the legal equation (kill, assault, embezzle), define particular crimes, and fix the respective punishment and treatment. Doctrines—e.g., intoxication, ignorance and mistake, necessity and coercion, and insanity—are intermediary propositions describing personal characteristics or special external circumstances. Hall uses this theoretical framework, based on the general postulates of rationality described at the outset, as a springboard to powerful and effective advocacy of his program of reform in the field of criminal law. To a broad degree, these efforts have been successful. Hall's defense of the *M'Naghten* rules has made him a champion of retention or, at most, cautious amendment. And his vigorous attacks, theoretical and practical, on the concept of strict liability in criminal law have been cited by many courts.⁵ However, these views are well-known; this space is more profitably used to describe some of the changes in emphasis and additions to his theory which are presented in the new edition.

This new material includes expanded discussion on the intricacies of his own theory and a more broad analysis of the utility and limitation of any theory which a scholar constructs. As for the latter, Hall's concepts, relying so strongly on natural law and a layman's psychology, have unsurprisingly drawn sharp dissent from behaviorists, formalists, legal positivists and nominalists. In rebuttal, Hall's new edition presents not only a theory but also a theory of theory. Building on ideas enunciated in his recent *Studies in Jurisprudence and Criminal Theory*,⁶ the author defends his use of selective data with which to construct his "principles" of criminal law. Earlier he had said:

4. HALL, *op. cit. supra* note 1, at 103.

5. See *Smith v. California*, 361 U.S. 147, 149, 153 (1959); *Morissette v. United States*, 342 U.S. 246, 253 (1952).

6. HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY*, ch. 1 (1958).

For legal theory and jurisprudence, no less than science and economics, apply uniformly within a specified area. That area should be enlarged so far as is compatible with theory, and any theory is always subject to displacement by a better one, e.g. one which has at least equal significance over a wider range of data.⁷

Time and again in this edition Hall defends his descriptive theory as the most meaningful over the range of data selected. His subject matter is the hard core of major crimes. It is from our experience and knowledge there that he draws his "principles." Obviously, the model Hall constructs excludes certain petty crimes and those requiring strict liability. While recognizing formal definitions, he maintains that his theory is more significant. All this is a valuable demonstration of a scientist at work developing a theory to generalize about selected data, still conscious of the limitations of that theory.

One retreat, however, is sounded from this position. Hall emphasizes the difference between theory and reform, indicating that he is a theorist first and that defensible reform only thereafter results from flaws exposed in dispassionate analysis. "The only sound procedure is to cleave persistently to the single-minded goal of elucidating the existing penal law, asking only—which theory will maximize our understanding of that law?" Further, he states that "the subject matter of [his] theory * * * is the existing criminal law—the existing penal codes, statutes and decisions."⁸ Reform, however, would seem to play a much more decisive role. At first blush "existing criminal law" includes all law which is tried in a criminal court. But the theory Hall constructs generalizes about major crimes and excludes crimes of strict liability. This broad restriction of the data used is defended on the "postulate" that *mens rea* is properly defined to exclude negligence and that this definition has many advantages. This prior valuation, it seems, contains the very elements of reform that purportedly result from theoretical analysis.

These abstract matters apart, Hall here has helpfully expanded his discussion of the specific elements in his theory. Fortunately, the organization of this second edition is much better. The sometimes jerky style of the first edition has been largely replaced by more smooth writing and comprehensible explanation. However, this is still a book to be studied carefully, not merely read.

7. *Id.*, p. 17.

8. HALL, *op. cit.* *supra* note 1, at 2.

A number of chapters in this edition which concern doctrines—in-
toxication, attempt, and necessity and coercion—are retained virtually
with no addition. These chapters seemed to be the least successful. Per-
haps the challenge these problems raised was less, and Hall felt his state-
ments in the first edition were sufficient. But the remainder of the book
is rewritten and supplemented. Included are new discussions on harm,
actus reus, *corpus delicti* and possession; a classic analysis of legal causa-
tion; an examination of justification and excuse; a dissent from the the-
sis that use of official force distinguishes legal from sub-group sanctions;
and an evaluation of the relation of criminal theory to criminology. Each
is an important and perceptive contribution.

Three specific new areas warrant more detailed attention. First, in
reconstructing his theory of the principle of conduct, Hall introduces into
the model the concept of “effort.”⁹ He refers to the definitions of “act”
used by Austin and by Salmond and finds them wanting. Similarly he
rejects “behavior” because of its mechanistic connotation. In the alter-
native Hall prefers the use of “conduct” since it can more conveniently
refer both to voluntary action and intentional forbearance. In turn, con-
duct includes “manifested effort (‘act’) and an accompanying conscious
mental state.”¹⁰ Manifested effort, therefore, is what one sees a criminal
do. It is his voluntary, overt movement—in Hall’s terms, his “act.” But
in addition to manifested effort, there is another type of effort. The
conscious mental state, the second component of conduct, consists of two
elements—cognition (knowledge of the material circumstances) and an
internal effort (volition, a movement of the will). “The internal *mens
rea*, held in check, is by [additional] effort externalized. * * * It is mani-
fested by an effort of the same genus as, but in addition to, the effort al-
ready functioning in the intention of the *mens rea*. The additional ef-
fort may be viewed as the projection forward into conduct of the already
existent action-thought of *mens rea*.” To have manifested effort, inter-
nal effort must function. Therefore, the movements of an epileptic or a
sommnambulist are not criminally relevant “acts” since they do not result
from movements of the will. But once the will does function, there is
observable physical movement, the “act.”

This analysis is strained when applied to that bug-a-boo of the crimi-
nal theorist, the criminal omission.¹² Traditional theory describes a
criminal omission either as a mental function (voluntarily deciding not

9. *Id.*, p. 177-85, 196-201.

10. *Id.*, p. 177.

11. *Id.*, p. 179-80.

12. *Id.*, p. 197-98.

to do something) or as an alternative act done consciously in lieu of the legally required act. Professor Hall goes further. To make his "effort" concept consistent in all criminal conduct, he states that a forbearance itself includes manifested, physical effort, an "act." He illustrates his position with this hypothesis. A husband, intent on killing his wife, sees her in a perils-of-Pauline situation with her shoe caught in a railroad track and a train bearing down on her. In analyzing his subsequent voluntary forbearance, Hall argues that "[t]o sit in a chair * * * was staying away from the railroad tracks at the crucial time, and that involved physical effort." In other situations, there is "the evident experience of muscular effort under considerable provocation, hence the terms 'exercise' restraint, 'control' yourself, etc. are not mere metaphors. This physical effort in forbearance may even be perceptible in the tensing of muscles, 'holding one's self back.'" ¹³

By finding physical effort (an "act") present both in overt movement and forbearance, Hall advises a "correction" of the traditional view that a forbearance is a psychical experience. However, one might suggest that whatever theoretical symmetry this simplification produces, the relevant elements of conduct in a criminal omission are not a tensing of the muscles to hold oneself back or some measurable expenditure of caloric energy in sitting in a chair. What is relevant is that the defendant knew the facts and did nothing about them. Those matters are what the state shows in a criminal omission. If "act" or manifested, physical effort is to be a relevant part of criminal omission, it is therefore part of the conduct shown or inferred at trial. Consistent with the theory of internal and manifested efforts in overt movements, to close the theoretical gap between those movements and omissions, in the latter, the effort expended in sitting in the chair or holding oneself back is the physical, observable result of a movement of the will. As in describing overt movements, the "floodgates are removed and the internal *mens rea* is expressed in conduct."¹⁴ Yet in the case described, the husband continues to sit in the chair. It is at this point that the concept of physical effort ("act") in omissions loses its utility. The observed person does nothing new or different. He continues sitting or walking away from the railroad tracks. And the "act" in overt conduct is indeed doing something new and different, e.g. pulling a trigger or lighting a fire. Further, in the omission situations where the "act" is the effort of controlling or restraining oneself or tensing of the muscles, these "acts" seem to result from mental

13. *Id.*, p. 198.

14. *Id.*, p. 179.

pressures opposite to the internal effort, rather than from a manifestation of a "movement of the will."

In sum, while it is defensible to fragment the conduct of an overt movement (e.g. shooting) into cognition, internal effort, and manifested effort ("act"),¹⁵ to apply this same formula to the inertia of failing to move results in clouding the meaning of the relevant elements of a criminal omission.

A second area in the current work that merits extended comment is Hall's definition of the objective meaning of *mens rea*. This discussion and his chapter on ignorance and mistake, both new, provide additional insight into Hall's concept of the relationship of law to morality.¹⁶ Hall has written that law in general reflects value¹⁷ and that criminal law infers the immorality of one who breaches it. "[T]he logic of the substantive law excludes the possibility that there can ever be a violation of a penal law that is not a legal harm. The parallel ethical rationale implies equally that there can never be such action that is not immoral."¹⁸ However, to Hall, "immorality" has a special meaning. It is separate from "personal guilt." A judgment as to the latter refers to an offender's *mens rea*, his conscience, and his motive. But the immorality implied in legal guilt is limited to an intentional breach of society's objective ethics written into criminal law. The *mens rea* relevant to legal guilt, as "aptly" described by Justice Devlin, consists of "two elements * * * first of all * * * the intent to do an act, and secondly of the knowledge of the circumstances that makes that act a criminal offense."¹⁹ Hall, in a careful comparison of intent and motive, concludes that motive must be excluded as an element of legal guilt. He recognizes the range of situations in which an individual may violate a law for good and humane reasons. But the author argues that it is necessary to exclude an offender's motive because the alternative would undermine the objective ethics stated in the criminal law. Further, he objects on practical grounds to a judge and jury hearing evidence and making an evaluation of a defendant's motives. But Hall finds motive, which was too elusive for the judge or jury to evaluate as an element of guilt, sufficiently certain to enable a court to base mitigation of sentence on it. Consideration of motive, therefore, is a "safety valve," a technique of administration for the marginal case of

15. Compare Hall's insistence on the concept of an integrated personality in discussion of insanity. *Id.*, p. 494-97.

16. *Id.*, chs. 3 and 11.

17. HALL, *LIVING LAW OF DEMOCRATIC SOCIETY*, ch. 2 (1949).

18. HALL, *op. cit. supra* note 1, at 95.

19. *Id.*, p. 71.

an individual who breaks the law with good motives. The stress is on objective morality, but subjective punishment.

A further insight into the relationship of law to morality arises in the discussion of the doctrine of ignorance and mistake. Hall argues strenuously throughout the book that essential to the imposition of criminal liability is the defendant's awareness of the "circumstances that make [an] act a criminal offense."²⁰ This is the basis of his sharp attacks on strict liability and his dissent from the standard of a reasonable mistake of fact. Facts must be known subjectively. "[M]oral obligation is determined not by the actual facts but by the actor's opinion regarding them."²¹ Similar knowledge of the law is not essential. Generally, it is not necessary to prove that a defendant knew his intended conduct was illegal. Hall defends the doctrine that ignorance of the law does not excuse on dual grounds. First, since law is uncertain while fact is certain, there must be some institution to declare authoritatively whether specific conduct came within the proscription of the law. That a court must do this rather than an individual or his attorney is essential to the preservation of a legal order. Second, to declare that one's ignorance of the illegality of his act excuses would subvert and contradict society's objective ethics. But this generalization is qualified. In certain serious crimes, knowledge of the illegality of one's act is necessary to the formation of the relevant *mens rea*. Property crimes (larceny, embezzlement, receiving stolen property), income tax evasion, and bigamy are illustrations. Hall rejects the concept that a specific intent is required in property crimes or that private law is an exception to the ignorance of law doctrine. He bases his rationale squarely on the morality of the actor's conduct. It is not immoral conduct to carry away another's possession thinking it is one's own. A mistake about property law here functions like an error of fact. In contrast, shooting a trespasser is per se immoral conduct, and a plea that one did not know such killing was illegal contradicts the ethics of the criminal law. This same emphasis on immoral conduct applies to certain petty crimes. In that area Hall rejects the artificial distinction between *malum prohibitum* and *in se*. "The distinction * * * is that some acts are immoral regardless of the actor's knowledge of their being legally forbidden (e.g. the felonies and principal misdemeanors) whereas other acts are immoral *only* because the actor knows they are legally forbidden."²² As for the former, intuitive knowledge (conscience) indicates that an act is immoral. But in "some minor offenses, newly created ones, and those regulating certain businesses, there is frequently a

20. *Ibid.*

21. *Id.*, p. 363.

gap between public opinion and the policy of the enactment, between mores and morality."²³ Therefore, Hall recommends a complete reverse in applicable rules: "[I]nstead of saying that because an act is *malum prohibitum* it is unnecessary to find any criminal intent, the rule would be that, since the only rational basis for finding a criminal intent in these cases is knowledge that the act is legally forbidden, a finding of such knowledge is essential."²⁴ This clarification is properly the duty of the legislature, Hall argues, rather than the primary responsibility of the court. Hall's entire discussion on this point is relevant to the recent Supreme Court decision in *Smith v. California*.²⁵ There, the Court found the Fourteenth Amendment violated by a Los Angeles ordinance which imposed strict liability on a bookseller for possession of an obscene book. Because of the considerations of free speech, strict liability was rejected. But the Court deferred determining the nature of the required *mens rea*. In the light of the above discussion, there are a number of possible variations that might occur. Must the defendant know the contents of the books? Must he know that possessing obscene books is illegal? Must he have determined that the books are obscene in his judgment and proceed nevertheless to keep them? Or does an examination of the books and a conclusion that they are not obscene preclude the relevant *mens rea*? And indeed, is it immoral to possess books that one believes are not obscene? Finally, is obscenity a matter of law or of fact or is it a mixed question and what relation does this have to the doctrine that ignorance of fact excuses and law does not?

This short list indicates some of the many problems in a specific case where *mens rea* is at issue. The section of Hall's *Principles* that deals with *mens rea* and ignorance of the law should be required reading for anyone attempting to solve these problems.

A third section which deserves careful study is Hall's thoughtful discussion of the nature of penal and civil sanctions.²⁶ Hall offers a descriptive theory which sharply distinguishes penal from civil sanctions and is, admittedly, at odds with certain elements of current case law. The core of the theory he proposes is the significance of the relationship of the sanction to the harm. A sanction is by nature civil or criminal in relation to the type of harm to which it attaches. In discussing the principle of harm,²⁷ Hall analyzed the difference between tort and penal harms,

22. *Id.*, p. 403.

23. *Id.*, p. 402.

24. *Id.*, p. 403.

25. 361 U.S. 147 (1959).

26. HALL, *op. cit. supra* note 1, at 309-21.

27. *Id.*, p. 240-46.

concluding that they are substantively distinct. Moral culpability is essential in penal harms; economic damage to an individual is not. In contrast, torts almost invariably include damage, while immoral conduct is not essential but merely one of the ways by which an individual suffers economic damage. Therefore, "even intentional damage to a particular individual has a different meaning than the intentional commission of a social harm." A penal harm, in Hall's theory, has "normative-empirical references" and is a "complex of fact, valuation and interpersonal relations—not an observable thing or effect, as is sometimes assumed." This position "leads to the ultimate points of reference, the two elemental, irreducible realities—the individual and the community."²⁹ Just as there are substantive differences between tort and penal harms, there are similar differences in kind between punitive and civil sanctions. Civil sanctions "discharge certain economic functions" while punishment "implies the criminal's moral culpability and is apt (fitting, correct) in light of that * * *."³⁰

The fact that both tort and criminal sanctions attach to a single act of a defendant alters Hall's theory not a bit. He undercuts this argument by contending that the label "the same act" prejudices the meaning of act, and "ignores the relevant ideational factors."³¹ Even in the same act there can be distinguished the individual's economic interest and society's concern with moral standards. It is fair to infer, then, that in Hall's scheme, only those sanctions which correct or lessen individual economic hardship are properly civil, while all formal sanctions are penal which are intimately applied to an offender because of his voluntary, immoral commission of a penal harm. As an example of the lack of consistency of present analysis, Hall notes that deportation is "treated as a civil sanction even when it is based on the alien's commission of a serious crime."³²

It is suggested that the Hall analysis of sanctions has omitted one important element. Society legitimately has the right to set broad standards through laws other than penal statutes. These general standards are statements of qualifications, not societal standards of moral conduct. The police power of a state gives it wide discretion in setting these standards, e.g. for public office and for licenses to practice law and medicine. In

28. *Id.*, p. 242.

29. *Id.*, p. 217, 242.

30. *Id.*, p. 317.

31. *Ibid.*

32. Hall argues that a distinctive element of punishment is its intimate application to the personality of the offender. *Id.*, p. 318. For the view that a narrow, specific sanction is indicative of a civil sanction, see Note 34, *IND. L.J.* 231, 280-81 (1959).

33. HALL, *op. cit. supra* note 1, at 320.

many instances these general standards of fitness are directly related to a prior showing of moral turpitude, often the same immorality which was the basis of a criminal conviction. For example, a doctor convicted of a felony can be permanently barred from the practice of medicine. Being so restricted in his liberty and future freedom of choice, this bar is a sanction, a disvalue, of the most serious type. Further, if this disability is a punishment, it cannot constitutionally be applied retroactively. In analyzing this sanction, it is evident that the standard Hall sets up for civil sanctions—economic damage to the individual—is not involved. In Hall's terms of analysis, the sanction is more directly related to prior immoral conduct. But it cannot be denied that this sanction is part of a law whose purpose is to regulate standards of a profession and does not infer any intention of the legislature to punish. It would seem that a more complete theory of sanctions must include the civil consequences of a conviction, which in turn, reflect the defendant's immoral conduct. The recent Supreme Court cases of *Trop v. Dulles*³⁵ and *DeVeau v. Braisted*³⁶ indicate that this element is most important in a comprehensive analysis of sanctions.

Perhaps the restrictions in Hall's analysis of sanctions result from his prior discussion of harm limited to terms either of economic damage to the individual or an intentional breach of societal ethics. The latter element of penal harm, it is submitted, is relevant both as an indicator of the individual's immorality and as a proper factor in evaluating his fitness under a general standard of qualification. Setting such standards, a proper exercise of the police power of the state, is a civil function, and in the absence of any legislative intent to punish, cannot be said to carry a criminal sanction.³⁷

In conclusion, even the brief discussion above indicates the breadth of the problems considered in the *Principles* book. To each of these issues, Jerome Hall has brought his great skill as a theoretician. He has written a volume that bristles with ideas, insight and creative thought. It is presented with conviction but is always forthright and honest. No doubt it will stimulate much critical response. But Professor Hall has

34. *Hawker v. New York*, 170 U.S. 189 (1898).

35. 356 U.S. 86 (1958).

36. 363 U.S. 144 (1960).

37. Hall's analysis of punishment and penal sanctions is from the perspective of criminal law. However, the question of what is punishment is relevant in broader terms, completely divorced from penal harm or a criminal conviction. See *Flemming v. Nestor*, 363 U.S. 603 (1960); *Hannah v. Larche*, 363 U.S. 420, 441, 442-43 (1960); *Cf., id.*, 488, 497, 500-501 (concurring and dissenting opinions); *Uphaus v. Wyman*, 360 U.S. 72, 93, 108 (1959) (dissenting opinions); *Thompson v. Whittier*, 185 F. Supp. 306 (D.D.C. 1960).

faced and analyzed the major problems, the toughest problems, that arise in the field of criminal law. His criminal theory is well-organized, consistent, and useful. It deserves the most careful consideration in proposals to reform present criminal doctrine.

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SHALL WE AMEND THE FIFTH AMENDMENT? By Lewis Mayers. New York: Harper & Brothers, 1959. Pp. 332. \$5.00.

The answer given by the author to his provocative title is an enthusiastic and resounding yes, and for a number of reasons. As an original proposition, there is no good reason for the privilege: it "did not acquire constitutional status because it was deemed a palladium of individual liberty; it has become to be deemed a palladium of individual liberty because it has acquired constitutional status." Moreover, whether or not it was wise as an original proposition to insert a provision in the Bill of Rights that no persons "shall be compelled in any criminal case to be a witness against himself," "in its concrete application by the Supreme Court, the point of near-absurdity has frequently been reached." The time has come, says the author, for a re-evaluation of the privilege from two standpoints: "the practical necessities of the administration of justice and the equally practical necessity for shielding the individual from unfairness and oppression." The author concludes that the "practical necessities" call for amending the Fifth Amendment.

Discussing the "practical necessity for shielding the individual from unfairness and oppression" the author early points out that "Experienced prosecutors agree that a witness with a clear conscience almost never invokes the privilege." He then continues to discuss the problems in the context of "a conspiracy of bootleggers to defraud the revenue"; "A witness before a twentieth-century grand jury investigating police corruption or a combination to fix prices"; and the invocation of the privilege "by a public officer asked to account for the discharge of his public trust." Having discredited the individual who invokes the Fifth Amendment protection, the author next makes the point that in any event the privilege is of no use to the accused criminal at any stage of the judicial process. Although the arrested suspect is under no legal compulsion at the initial stage to answer questions asked by the police, "the psychologi-

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