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REFLECTIONS OF AN OCTOGENARIAN ON CRIMINAL LAW AND CRIMINOLOGY*

JEROME HALL**

Although one is apt to think he knows more at sixty than he did at thirty or forty, there is no universal positive correlation between age and wisdom or between the years spent in study and research and the significance of the product.

My reason for reference to personal experience is a simple one—theories learned as a student, even from the best of teachers, and theories learned from reading, although an important prerequisite of scholarship, are neither tested nor made part of one's equipment until they are used in actual research. Moreover, as a student or reader, one discovers that some theories conflict with other theories and that there are very different perspectives among the authors of those theories. For example, when I was a student and much later, indeed continuing into the present, social scientists were and are divided into humanists and behaviorists.

In the first of the three stages of my professional career, the chief product was my book, *Theft, Law and Society*,¹ reflecting my education in social science and philosophy, with considerable emphasis on interdisciplinary study. My purpose in the *Theft* book was to increase our knowledge of the most complicated, technical branch of the criminal law where, for example, nice distinctions were drawn between larceny by trick, embezzlement and obtaining property by false pretenses. There were also strange exceptions to what could be stolen, i.e., to the subject matter of larceny, such as real property, including crops and other fixtures, incorporeal property such as the illegal use of another's machinery, dogs, and negotiable instruments, all of which have, of course, been brought within the boundaries of present criminal law.

The obvious first approach to the acquisition of the desired knowledge was by way of history. There were two guidelines—first, the modern law of theft was an eighteenth century development, and second, the most important factor in that century was

* This was the address at the annual meeting of the Academy of Criminal Justice Sciences on March 30, 1984, where the writer was the recipient of the Bruce Smith, Sr. Award.

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¹ 1935; 2nd ed. 1952.

the Industrial Revolution, which transformed a rural, small-town, primary group society into an industrial, relatively impersonal society. My report consisted, in part, of a description of the social, political, and especially economic factors that influenced the modern development of the law of theft. For example, prior to the eighteenth century, there were only a handful of banks in England, while in the latter part of that century there were more than four hundred. Tellers and other employees yielded to temptation; and in 1799 the first general embezzlement statute was passed. Similarly, the numerous scandals concerning gave rise to the modern law of fraud which, no longer restricted to externals such as false weights, made false representation criminal.

In addition to this sort of descriptive correlation, there was also a report of pressure by industrialists and by large landowners that led to legislation on embezzlement and brought real property within the subject matter of larceny. It was this emphasis on the Industrial Revolution and the influence of wealthy landowners and banks which apparently led a Russian reviewer of my book to say that it was written from a Marxist point of view. In fact, my philosophy of history was pluralistic. In addition to the economic situation, there were political factors, the humanitarian influence of Beccaria and Voltaire, and the impact of the relevant law.

I used eighteenth century England as a laboratory where I might discover various types of knowledge helpful in understanding the present law of theft, i.e., my purpose was sociological rather than historical *per se*, which focuses on particular persons and events, presenting a chronological account of their purpose and development. Thus, my use of history was similar to that of Sir Henry Maine in his *Ancient Law* where, after a historical survey, he formulated certain generalizations, e.g., law in progressive societies has evolved from a law of status (feudal) to a law of contract. Thus, the use of history was to discover trends but, more importantly, to discover correlations between certain cultural facts and changes in the law of theft.

A pluralistic interpretation of history was not something I set out to demonstrate. I simply looked in every direction that seemed causally significant and ultimately found that I could not support the view that any single factor—economic, political, judicial or legal—accounts for the facts and the change in law.

The second part of the *Theft* book deals with automobile theft, receiving stolen property, and embezzlement. In addition to the descriptive correlations and case history discussed above, I venture to formulate several "laws." For example, the rate of automobile theft varies directly in proportion to the size of a city's population,

so that it is lower in San Francisco than in Chicago, and the rate for Chicago is lower than that for New York. On the other hand, the rate of arrests for auto thefts is in inverse proportion to the size of a city's population. Again, in studying embezzlement I found that prosecution was rare even in cases where there was ample evidence to convict. The rate of prosecution was in inverse proportion to restitution and to the degree to which the employer identified with his embezzling employee. Correspondingly, the number of prosecutions rose when there was no restitution or agreement to repay, or where the employer, e.g., the United States, did not (could not?) identify with mail clerks who made off with government money or stamps.

Now if we examine the structure of a highly developed science like physics, we find that the laws presented there have four structural characteristics: (1) they generalize beyond the known data; (2) they are verified by definite factual data; (3) they express a co-variation of variables, i.e., cause-effect statements; and (4) in a highly developed science like physics, the laws are interrelated to form a system.

The "laws" formulated in the *Theft* book also generalize beyond the known facts, are supported by statistical data, and express a co-variation of variables. They lack the fourth characteristic of physics, namely its systematic character. If one adds this kind of relatively rigorous knowledge to those previously discussed, one must conclude that the sharp dichotomy between behavioral science and humanist sociology is not valid. When the thesis that one must be either a humanist or a behavioralist was tested in my research, I inevitably found not only that there is a place for both, including their respective methods, but also that it is necessary to employ both perspectives in order to gain an adequate understanding.

Finally, in this first stage of my experience, interdisciplinary study was very much in the air, and my particular interest was to draw on the social disciplines to increase knowledge of criminal law. Despite considerable exhortation, I found no theory of interdisciplinary study, i.e., nothing that analyzed in clear and precise terms the relevant elements. The attempt by Otto Neurath to provide a general scheme and terminology for a unified science might be appropriate for natural science, but the diverse perspectives and subjects of the social disciplines make the model of unified science unpersuasive. However, I did learn some important facts during

the interdisciplinary research. It was especially my study of psychiatry's relation to criminal law² that compelled a critical examination of interdisciplinary study.

But my study of psychiatry, such as it was, made it clear that I could not accept the dominant perspective of that discipline, based as it was on a deterministic premise regarding human actions. Law, especially criminal law, is normative; if it is to make sense, it must assume a significant degree of freedom of choice and therefore make "responsibility" meaningful. Accordingly, while I found in psychiatry reasons to limit the degree of autonomy even in normal adults, I could not accept the wholly deterministic hypothesis expressed by many psychiatrists. I learned in effect that I could not simply lift factual data, explanations, and the various theories of social science and apply them literally to legal problems.

The principal caveat in doing interdisciplinary study is that one should not allow the distinctive concepts of his discipline to be dissolved into the theory and concepts of a different discipline. This was brought home to me by the publications on the Supreme Court justices and other judges written by political scientists. They took account of many facts about judges—e.g., their family backgrounds, their economic statuses, political affiliations, philosophical perspectives, the facts and decisions in past cases; and they made predictions on the basis of those criteria. What they omitted, sometimes explicitly,³ was the role and influence of legal rules, doctrines, and principles in reaching judicial decisions. Those norms were absent from the behavioral concepts employed to explain judicial decisions. That sort of effort might lead to a sociology or psychology of behavior, but not to a sociology or psychology of law.

II

In the second stage of my experience, in my jurisprudence was added to criminal law as a principal interest, I concentrated on the analysis of relevant legal concepts and on moral philosophy. The major publications in this period were my *General Principles of Criminal Law*⁴ and *Foundations of Jurisprudence*.⁵ In these books and in various articles, I presented a system of interrelated concepts of criminal law, and especially in my interpretation of *mens rea* and *actus reus*, I emphasized the moral foundations of

² J. Hall, *Law, Social Science and Criminal Theory*, Ch. 4 (1982).

³ See Schubert (1968) "Behavioral Jurisprudence," *Law and Society Rev.* 2: 409, 416.

⁴ 1947; 2nd ed. 1960.

⁵ 1973.

criminal law. Both are important—though debatable—in determining one's position regarding the relation of criminology to criminal law.

Is knowledge of moral principles and values possible, or are the subjectivists correct in holding that moral preferences are only a matter of personal taste or emotion? After many years' of reading moral philosophy and reflecting on their various postulates—the realism of Plato and Aristotle, the theological realism of Aquinas, the utilitarian premise of the greatest good for the greatest number, and the adverse deontological thesis of Kant—I concluded that it was time to rely on my own experience.

The other basic plank in my view of ethical principles rests on the use of language, on statements such as "X was the right thing to do," "he was wrong in abandoning his family," "Hitler and Stalin were evil men." We make such value judgments every day. Are we to believe that there is no truth in at least some of these valuations, that they are only the expression of emotions or personal taste? In writing *General Principles*, my position on these questions led to a definite distinction between the common law felonies, the major crimes that have evolved over many centuries, and the far more numerous minor offenses, many of which were technical and not found in the moral convictions of the community. This distinction between major and minor crimes was also important in my effort to construct a science of criminal law. For example, since scientific laws generalize over a field of uniform data, I could not include technical or strict liability laws in my generalizations.

I have previously noted the types of knowledge I would include in a science or sociology of criminal law, e.g., case history, description of historical events interrelating legal change with changes in other fields, and the four alleged "laws" regarding auto theft and embezzlement. In discussing these so-called "laws," I pointed out that the systematism characteristic of the laws of physics was lacking in my effort. I tried to improve on past efforts in this regard by constructing a system of interrelated criminal law concepts and the propositions where those concepts are expressed. I distinguished two kinds of propositions that have general significance: doctrines and principles. The specific crimes are referred to as "rules;" they are narrower in their scope than doctrines which, in turn, are not as wide as the principles of criminal law. More specifically, the rules are partial definitions of larceny, murder, arson, robbery, and so on. There are, in my view, ten doctrines: infamy, insanity, mistake of fact, mistake by law, coercion, necessity,

intoxication, and the relational doctrines of solicitation, attempt, conspiracy, and complicity.

The most fundamental principles of criminal law are legality, *mens rea*, act or conduct, the concurrence of *mens rea* with conduct, the harm, the causal relation between conduct and harm, and the punitive character of the sanction. The system, such as it is, results from the interrelations of rules, doctrines, and principles. Thus, the doctrines qualify the rules that partially define the specific crimes. For example, if one took and carried away the property of another, but was insane or an infant at that time, or was mistaken in thinking it was his property, he does not commit larceny. Similarly, all other doctrines are "excuses" which exclude criminality, or lessen liability (intoxication), or express the relation of certain "inchoate" crimes to the intended complete crimes, e.g., attempt to commit larceny to larceny, and so on. Thus, the criminal law of any country is delineated when all the doctrines are added to all the specific rules, as qualifiers or limitations on those rules.

But in advanced legal systems there are also the above-mentioned principles. The seven principles noted previously are apparent in the union of rules and doctrines. To illustrate—the principle of *mens rea* takes account of all of the specific *mentes reae* stated in the rules, viewed as the *mentes reae* of normal adults, and it also takes account of the relevant doctrines. The principle of *mens rea* is a general proposition derived from the rules, limited by the relevant doctrines. In other words, it is based on the fact that the defendant cannot successfully claim any relevant excuse, i.e., he was not insane, or an infant, or mistaken or coerced, etc. Stated affirmatively, the defendant was a normal adult who knew the relevant facts and voluntarily committed the legally forbidden harm. So, too, the principle of "harm" is the general summation of all the harms specified in the rules and is not qualified by a relevant doctrine.⁶⁷⁸

Turning to the application of this to the reciprocal relations of criminology and criminal law, our concern is with an empirical discipline, which involves both the factual verification of propositions comprising that discipline and their organization. I have been referring to physics, the most highly developed science, but there are also taxonomic sciences such as biology, which is expressed mostly in classifications. Taxonomy is the first objective to be sought.

⁶ See Hall, *supra* n.2, 157-164.

⁷ *Id.*, Ch. 2.

⁸ *Harvard Divinity Bulletin* 14(2): 16.

"Criminology" should be regarded as synonymous with the "sociology of criminal law," "sociology" being widely interpreted to mean "social science." The subject matter of the sociology of criminal law, or criminology in short, would be actions and other facts relevant to one or more of the three levels of abstraction previously discussed in terms of specific rules, doctrines, and principles.

CONCLUSION

I conclude with three suggestions drawn from my experience and comprising areas where I think important contributions can be made.

First, the older I have become, the more I have been persuaded of the unique value of oral dialogue among scholars who disagree on important questions. These might include: victimless crimes, capital punishment, insanity and the insanity plea, corporate criminal liability, psychiatry and the role, if any, of the psychiatrist as an expert witness; and lastly, for some the most important current question, the recent turn of some criminologists and legal scholars to Marxism and their consequent criticism of law as representing class domination. The critics of this perspective point to, among other issues, what they view as fallacies in the materialistic economic interpretation of history and to the flexibility of class structure; indeed, they question whether there is a class structure at all in this country.

Although one objective of dialogue is the discovery of common ground, the gain in understanding is of greater importance. Even one who has very strong convictions in favor of or against the capital penalty might, while not abandoning that conviction, qualify it in light of a dialogue between competent scholars. While I have long maintained that inadvertent negligent behavior should not be penalized—and I still adhere to that—I have learned from my critics that there are pragmatic reasons to support the penalization of negligent harm-doers. I have had similar help from scholars who disagreed with my rejection of the "irresistible impulse" test. But in these and other instances, it has taken years to qualify my original views, years between the publication of the various positions and theories. In addition, there remain gaps which could be filled by thoughtful oral dialogues where the speakers were subjected to instant questioning and criticism.

My second suggestion stems from my visiting membership on the faculty of Freiburg University in West Germany and particularly from my work there in the Max Planck Institute of Criminal

Law and Criminology. There are two main divisions in the Institute—criminal law and criminology. Each of the 30 scholars comprising the permanent staff is an expert on a foreign system of penal law. This includes the criminal laws of communist countries and of the relatively simple, even primitive, systems. Approximately 15 graduate students are granted fellowships each year, and scholars from various countries are visiting professors. The library has over 300,000 books, and the Institute publishes several journals. Funding is provided by annual grants from the Max Planck Institute and the federal government.

In this country several universities conduct large projects in criminal law and criminology; but none of them approach the magnitude of the research, especially in comparative criminal law and criminology, of the Freiburg Institute. As long ago as 1967, the President's Commission on Law Enforcement and Administration of Justice said that "Our greatest need is the need to know." It recommended the establishment of a National Foundation for Criminal Research. But even its relatively modest recommendations have not been implemented in this country.

There should be an Institute in this country where social scientists could study actions and other facts relevant to one or more legal concepts or propositions. This would include violations (offenses) and offenders, conforming conduct, and the related action of officials, prosecutors, judges, juries, police, and so on. Scholars of criminal law could work together with criminologists, making available to each other any specialized knowledge that is required for fruitful research.

Third, and lastly, I hope that certain directions I have taken to advance knowledge of criminal law and criminology will elicit critical examination. Is the system of ideas, the structure of penal law that I have formulated, sound? Is my identification of criminology and the sociology of criminal law valid, or are there problems in criminology that fall outside the legal system outlined above? Is there an alternative systematic model that promises to be more fruitful?

In sum, my thesis is that theory and practice should go hand-in-hand. Practice unenlightened by theory leads at best to pedestrian results, while theories not tested in practical research remain figments of armchair speculation. It is not easy to merge the two in a significant balance. But in the stimulating atmosphere of a well-organized Institute, it would be possible to march steadily towards that goal.