The American Series

of

FOREIGN PENAL CODES

28

FEDERAL REPUBLIC OF GERMANY

THE AMERICAN SERIES
of
FOREIGN PENAL CODES

28

THE PENAL CODE
of the
FEDERAL REPUBLIC OF GERMANY

Library of Congress Cataloging-in-Publication Data

Germany (West)
The Penal code of the Federal Republic of Germany.

(The American series of foreign penal codes; 28)
Includes index.
1. Criminal law—Germany (West) I. Title.
II. Series.
KK7975.51871.A52 1987 345.43'002632 86-29731
ISBN 0-8377-0048-5 344.305002632

Published in the U.S.A. by
Fred B. Rothman & Co.
10368 West Centennial Road
Littleton, Colorado 80127

Published in Great Britain by
Sweet & Maxwell Limited
11 New Fetter Lane
London

Printed in the United States of America

COMPARATIVE CRIMINAL LAW PROJECT
Wayne State University Law School

Edward M. Wise, *Director*

I. THE AMERICAN SERIES OF FOREIGN PENAL CODES

1. The French Penal Code, transl. by Jean F. Moreau and Gerhard O. W. Mueller, intro. by Marc Ancel, 1960.
2. The Korean Criminal Code, trans. and with an intro. by Paul Ryu, 1960.
3. The Norwegian Penal Code, transl. by Harold Schjoldager and Finn Backer, intro. by Johs. Andenaes, 1961.
4. The German Penal Code, transl. by Gerhard O. W. Mueller and Thomas Buergenthal, intro. by Horst Schröder, 1961.
5. The Turkish Code of Criminal Procedure, transl. by the Legal Research Institute, the New York University Faculty Team, the Judge Advocate's Office of the Joint United States Military Mission for Aid to Turkey, William Belser, Yilmaz Altuğ and Tugrul Ansay, edit. by Charles Tenney and Mustafa T. Yücel, intro. by Feyyaz Gölzüklü, intro. transl. by Yilmaz Altuğ, 1962.
6. The Argentine Penal Code, intro. by Ricardo Levene, transl. by Emilio Gonzalez-Lopez, edited by Frederick W. Danforth, Jr., 1963.
7. The French Penal Code of Criminal Procedure, transl. and with an intro. by Gerald L. Kock, 1964.
8. The Japanese Draft Penal Code, 1961, transl. and with an intro. by Juhei Takeuchi, 1964.
9. The Turkish Criminal Code, orig. transl. by Orhan Sepiçi and Mustafa Ovaçik for the Judge Advocate's Office of the Joint United States Military Mission for Aid in Turkey, under the direction of William G. Belser, reviewed by Robert B. Levine, edit. by Tugrul Ansay, Mustafa Y. Yücel, and Michael Friedman, intro. by Nevzat Gürelli, 1965.
10. The German Code of Criminal Procedure, intro. by Eberhard Schmidt, transl. by Horst Niebler, intro. transl. by Manfred A. Pfeiffer, 1965.
11. The German Draft Penal Code E 1962, transl. by Neville Ross, intro. by Eduard Dreher, 1966.
12. The Austrian Penal Act, transl. by Norbert D. West and Samuel I. Schuman, intro. by Roland Grassberger, and Helga Nowotny, 1966.
13. The Israeli Criminal Procedure Law, transl. and with an intro by U. Yadin, 1967.
14. The Colombian Penal Code, transl. and with an intro. by Phanor Eder, 1967.
15. The Swedish Code of Judicial Procedure, transl. and with an intro. by Anders Bruzelius and Ruth Bader Ginsburg, 1968. (superseded by v. 24).

16. The Greenland Criminal Code, transl. at the Center for Studies in Criminal Justice, University of Chicago Law School, intro. by Verner Goldschmidt, 1970.
17. The Swedish Penal Code, transl. by Thorsten Sellin, amendments transl. by Jerome L. Getz, intro. by Lennart Geijer, 1972.
18. The Greek Penal code, transl. by Nicholas B. Lolis, intro. by Giorgios Mangakis, 1973.
19. The Penal Code of the Polish People's Republic, transl. by William S. Kenney and Tadeusz Sadowski, intro. by William S. Kenney, 1973.
20. The Penal Code of the Romanian Socialist Republic, transl. and with an intro. by Simone-Marie Vrăbiescu Kleckner, research associates were Bernard Stamler and Barbara Lacher, 1976.
21. Alternative Draft of a Penal Code for the Federal Republic of Germany, transl. and with an intro. by Joseph J. Darby, commentary by Jürgen Baumann, 1977.
22. The Social Protection Code: A New Model of Criminal Justice, by Tadeusz Grygier, 1977.
23. The Italian Penal Code, transl. by Edward M. Wise in collaboration with Allen Maitlin, intro. by Edward M. Wise, 1978.
24. The Swedish Code of Judicial Procedure, Revised Edition, edit. by Anders Bruzelius and Krister Thelin, 1979.
25. The Criminal Code of the People's Republic of China, transl. and with an intro. by Chin Kim, 1982.
26. The Criminal Procedure Code of the People's Republic of China, transl. and with an intro. by Chin Kim, 1985.
27. The Penal Code of Finland, transl. by Matti Joutsen, intro. by Inkeri Anttila, 1987.
28. The Penal Code of the Federal Republic of Germany, transl. by Joseph J. Darby, intro. by Hans-Heinrich Jescheck, 1987.

II. MONOGRAPH SERIES

1. The Legal Norms of Delinquency: A Comparative Study, by G. O. W. Mueller, Michael Gage, and Lenore R. Kupperstein, 1969.
2. Wiretapping and Electronic Eavesdropping: The Law and Its Implications: A Comparative Study, by Juris Cederbaums, 1969.
3. Horizons of Clinical Criminology, by Benigno Di Tullio, 1969.
4. Comparative Criminal Law in the United States, by G. O. W. Mueller, et al., 1970.
5. Delinquency and Puberty: Examination of a Juvenile Delinquency Fad, by G. O. W. Mueller, et al., 1971.
6. Responses to Crime: An Introduction to Swedish Criminal Law and Administration, by Alvar Nelson, 1972.
7. What Can a Police Officer Do? A Comparative Study: U.S.A.—German Federal Republic—Israel—Italy, 1974.
8. Perception of Police Power: A Study in Four Cities, by Anastassios D. Mylonas, 1973.

III. PUBLICATIONS SERIES

1. Essays in Criminal Science, G. O. W. Mueller, ed., 1961.
2. International Criminal Law, G. O. W. Mueller and Edward M. Wise, eds., 1965.
3. The General Part of the Criminal Law of Norway, by Johannes Andenaes, 1965.
4. Japanese Criminal Procedure, by Shigemitsu Dando, transl. B. J. George, Jr., 1965.
5. The Effectiveness of Punishment Especially in Relation to Traffic Offenses, by Wolf Middendorf, 1968.
6. Continental Police Practice, by Sheldon Glueck, 1973.
7. Legal Dimensions of Drug Abuse in the United States, by Harvey R. Levine, 1974.
8. Of Delinquency and Crime, by Sheldon and Eleanor Glueck, 1974.
9. Studies in Comparative Criminal Law, Edward M. Wise, and G. O. W. Mueller, eds., 1975.
10. Education for Crime Prevention and Control, Robert Joe McLean, ed., 1975.
11. The Criminal Justice System of the Latin-American Nations: A Bibliography of the Primary and Secondary Literature, by Richard Rank, 1974.
12. Sentencing: Process and Purpose, by Gerhard O. W. Mueller, 1977.
13. Prostitution: Regulation and Control, by John F. Decker, 1979.
14. Law, Social Science and Criminal Theory, by Jerome Hall, 1982.
15. Nations Not Obsessed with Crime, by Freda Adler, 1983.
16. Social Defense: The Future of Penal Reform, by Marc Ancel, 1987.
17. Eastern Importation of Western Criminal Law: Thailand as a Case Study, by Apirat Petchsiri, 1987.

IV. OCCASIONAL PUBLICATIONS

1. Les infractions contre la famille et la moralite sexuelle, G. O. W. Mueller, et al., eds. (published on behalf of the Comparative Criminal Law Project, as special issue 35/3-4, Revue Internationale de Droit Pénal. Paris: Recueil Sirey, 1964).
2. L'abus de drogues et sa prèvention, G. O. W. Mueller, et al., eds., (published on behalf of the Comparative Criminal Law Project, as special issue 44/3-4, Revue Internationale de Droit Pénal. Rennes: Imprimeries Simon, 1974).

The PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY

Translated by

JOSEPH J. DARBY
University of San Diego
School of Law

With an Introduction by

HANS-HEINRICH JESCHECK
Professor Emeritus
University of Freiburg
Director Emeritus
Max Planck Institute for Foreign & International Criminal Law

FRED B. ROTHMAN & CO.
LITTLETON, COLORADO

SWEET & MAXWELL LIMITED
LONDON

1987

EDITOR'S PREFACE

The present volume contains a translation of the Penal Code now in force in the Federal Republic of Germany.

The current Code was adopted in 1975. It purports to be a revision of the German Penal Code of 1871, but really is a new code and generally is referred to as such. The paragraph numbering of the Special Part follows that of the Code of 1871, although there are many changes in particular provisions; the General Part, which supposedly constitutes the most important part of the 1975 reform, has been extensively restructured.

A translation of the old Code of 1871, with amendments through 1961, appeared as volume 4 in the American Series of Foreign Penal Codes. Efforts to revise the Code had been underway throughout most of this century. In large part, the 1975 revision derives from the work of the general commission on penal reform, set up by the federal Ministry of Justice, during the years 1954–1959. The commission's final draft, as approved by the government, was submitted to parliament in 1960. A translation of portions of the 1960 draft is included as an appendix to Gerhard Mueller's article on "The German Draft Criminal Code 1960—An Evaluation in Terms of American Criminal Law."[1]

The parliamentary session ended in 1961, without the new code having been passed. The government's draft, with minor changes, was presented again to parliament in 1962. Volume 11 of this Series contains a translation of the full text of the draft submitted by the government in 1962. Volume 21 contains a translation by Professor Joseph J. Darby of the Alternative Draft of a Penal Code for the Federal Republic of Germany prepared by a group of younger criminal law scholars who were dissatisfied with the government's proposals.

The new Code finally enacted in 1975 was prepared by a special parliamentary subcommittee on penal law reform. It

1. 1961 *U. Ill. L.F.* 25.

draws on both the government's 1962 draft and the "alternative draft." The present translation of that Code is once more the work of Professor Darby, who again took on the onerous task of making an important German legal text available in English.

There is a growing English-language literature on German criminal law. It includes several accounts of the 1975 Code and events leading up to it.[2] The complete Code itself, in Professor Darby's careful translation, makes a significant addition to this literature.

In the translator's preface, Professor Darby alludes to the reasons for devoting attention to German criminal law. Not the least of these is the predominant place of German scholarship in criminal law theory. The same methodological virtues that led the German universities in the last century to perfect the techniques of modern scientific research also produced a body of doctrine that has served as the accepted paradigm for criminal law scholarship throughout much of the world. German criminal law therefore occupies a position of peculiar preeminence and, for that reason alone, a translation of the German Penal Code might well be regarded as one of the most important in this Series.

The German mode of scholarship has not been without its critics. Holmes warned, on the first page of *The Common Law*, against treating law "as if it contained only the axioms and corollaries of a book of mathematics." A. E. Housman similarly thought that the besetting fault of German classical scholarship was "to pretend that it is mathematics":

> In those periodicals which review work upon the classics you may note a perpetual recurrence of two favourite adjectives,

2. See, e.g., Artz, "An Introduction to the 1975 German Criminal Code," in *The Criminal Justice System of the Federal Republic of Germany* 15 (Association Internationale de Droit Pénal Nouvelles Etudes Pénales No. 2, 1981); "Symposium: The New German Penal Code," 24 *Am. J. Comp. L.* 589–788 (1976) (with papers by Artz, Binavince, Darby, Eser, Fletcher, Hall, Herrmann, Lüderssen, Oehler, Ryu & Silving); Eser, "The Politics of Criminal Law Reform: Germany," 21 *Am. J. Comp. L.* 245 (1973); Schroder, "German Criminal Law and Its Reform," 4 *Duquesne L. Rev.* 97 (1965–1966); Jescheck, "German Criminal Law Reform: Its Development and Cultural-Historical Background," in *Essays in Criminal Science* 393 (G.O.W. Mueller ed., 1961).

> one the conventional sign of approval, and the other of disapprobation. The one is the German word which means *methodical,* the other the German word which means *arbitrary.* Whenever you see a writer's practice praised as *methodish,* you find upon investigation that he has laid down a hard and fast rule and has stuck to it through thick and thin. Whenever you see a writer's practice blamed as *willkürlich,* you find upon investigation that he has been guilty of the high crime and misdemeanor of reasoning.[3]

Among the critics, within the citadel itself, were the authors of the "alternative draft" who complained about the pedantry and formalism of the government's 1962 proposals. The partial success of the "alternative draft" in influencing the 1975 Code is one sign that German criminal law may be becoming slightly less pedantic, at the same time that various kinds of legal formalism are on the increase in the United States. As George Fletcher has observed: the Germans seem to be "importing Bentham, and we, Kant and Hegel."[4] A short while ago, one could point to German criminal law as the polar opposite of criminal law in the United States—a model of systemic rigor from which Americans had much to learn. The 1975 Code provides perhaps the more equivocal and interesting example of legislative struggle with the abiding tension in criminal policy between the competing demands of formalism and a humane pragmatism from which there may be even more to learn.

In addition to the Code, Professor Darby also has translated for this volume a masterful introduction by Professor Hans-Heinrich Jescheck, former director of the Max Planck Institute for Foreign and International Criminal Law, Professor Emeritus of Criminal Law in the University of Freiburg, and one of the relatively "progressive" voices on the commission that produced the 1962 draft. This introduction originally appeared in the German edition of the Code published by C. H. Beck Verlag. I am grateful to Professor Jescheck and to Beck's for agreeing to its use in the American Series of Foreign Penal

3. A. E. Housman, *The Confines of Criticism: The Cambridge Inaugural Lecture 1911,* at 37 (J. Carter ed. 1969).

4. "Criminal Theory as an International Discipline," 4 *Crim. Just. Ethics* 60, 77 (1985).

Codes; to Professor Darby for devoting years of hard labor to translating, with scrupulous care, both the introduction and the Code itself; and, again, to Barbara F. Blum for skillfully piloting this volume through the press.

EDWARD M. WISE
Wayne State University

TRANSLATOR'S PREFACE

Why would an American lawyer want to translate a foreign penal code? I was often asked this question by colleagues astonished to learn that I was spending my energies translating from German rather than doing something obviously useful and practical. Translating, after all, is tedious and mechanical drudgery, unworthy of a mind trained to deal with higher matters. And translation work is certainly not worth much academically, since the art of translating is basically a methodical schoolboy type of exercise devoid of any creative scholarly content. The translator, viewed as a bilingual copier of manuscripts, provides a product that may or may not be useful to others doing serious scholarly research. Since so many otherwise reasonable people share these views and hold translation work in such low esteem, it is perhaps appropriate to explain why I devoted so much time and attention to detail in completing this translation of the German Penal Code.

Law, as Savigny taught, is a product of the common consciousness of the people. Of all sources of law, a penal code especially reflects a country's values and the opinion of its people in matters of right and justice. The German people, now as in the past, occupy a strategic Central European land mass and represent an important economic, social and political force in the global strategies of the world's two great superpowers. What Germans think, how they behave, and the depth of their commitment to a value system are important to those who would formulate and execute international public policy. Since 1945, the peoples of West Germany have rejected totalitarianism and turned to the West for ideological and legal policy inspiration. The arbitrary and ruthless way in which the Nazis used the criminal law to eliminate political opponents and racially undesirable elements has been irrevocably renounced. The present Federal German Penal Code represents a solemn national commitment to the rule of law. Substantively and procedurally, its provisions clearly satisfy those minimum

standards of fairness and respect for human dignity which constitute the hallmark of Western Civilization.

Contemporary German criminal law is not only a measured, civilized response to the excesses of National Socialism, it is also a product of generations of highly respected legal philosophical scholarship. The conceptual framework which supports the General Part of the Penal Code is an imposing edifice of intellectual abstractions which continues to exercise great influence on the criminal law systems of code countries in the Romano-Germanic legal tradition.

Even in the Common Law area, where judges writing opinions rather than professors writing treatises have traditionally shaped the contours of criminal law theory, scholars such as Jerome Hall and George Fletcher have drawn inspiration from German philosophers in developing new ways of thinking about crime and punishment. The Federal German Penal Code thus represents an important source for jurists working in the field of comparative law. Its provisions include not only innovative methods of penal treatment (§§ 40-43 on daily rated fines), but also Special Part substantive offenses of interest to foreigners engaged in a wide range of commercial, diplomatic or military activities (§§ 102-104a, for example, protect foreign officials, representatives and sovereignty symbols).

For over three decades now the United States and several of our Western European Allies have stationed troops or engaged in military exercises on Federal German territory. Pursuant to the provisions of the 1951 NATO Status of Forces Agreement (4 UST 1792; TIAS 2846), as well as those of subsequent multilateral and bilateral agreements (14 UST; TIAS 5351; 14 UST; TIAS 5352), NATO military personnel may under certain circumstances be tried in German courts for offenses committed in violation of the German Penal Code. An up-to-date and reliable English translation of the Code may prove to be useful, not only to the defendant and his attorney, but also to the United States military trial observer complying with the provisions of the Senate Resolution accompanying United States consent to ratification of the NATO SOFA.

A knowledge of substantive criminal law is also relevant to extradition. Article 2 of the Federal Republic of Germany's

Extradition Treaty with the United States (32 UST 1485; TIAS 9785) defines an extraditable offense as one which is "punishable under the laws of both Contracting Parties." An Appendix to the Treaty contains a list, not intended to be exhaustive, of extraditable offenses. The Treaty requires, however, that whether or not the offense for which extradition is sought is listed in the Appendix, it must be punishable by a maximum period of more than one year's deprivation of liberty under *both* United States and Federal German law. Officials charged with the duty of implementing this double criminality requirement in extradition proceedings may desire to consult my translation to assist them in analyzing the constitutent elements of the respective offenses. A reliable translation of the German Penal Code may also be useful for purposes of resolving other issues that sometimes arise in extradition proceedings, such as the rule of speciality; prior jeopardy for the same offense; the political, military or fiscal offense exceptions, etc.

These considerations are relevant not only for the person whose native language is English, but they also pertain to those outside the English-speaking world who possess a working knowledge of English but not of German. Using caution and prudence, such persons may profitably consult my translation of the German Penal Code, realizing that their ultimate comprehension of it in their own native language lies two steps removed from the original. Although I have taken great care to capture the meaning of the Code provisions in light of the intent of the legislator and the relationship which they bear to other aspects of German law and life, in the last analysis my translation is only an aid in attempting to understand the original text, to which the puzzled reader must ultimately refer for guidance.

The art of translating, as everyone should know, involves much more than a computerized scanning of a lexicographical data bank for *le mot juste*. Dictionaries frequently do not provide satisfactory answers to inquiries for meaning in context. The language of German law (*Juristendeutsch*) is a language quite different from that used in educated circles in other walks of German life. It employs a vocabulary containing words,

phrases and expressions of art possessing a special meaning for lawyers. Although the drafters of the German Penal Code doubtlessly strove for clarity of expression, there are several places (§§ 239a, 239b) where their preference for intricate sentence structure (*verschachtelte Sätze*) has succeeded in puzzling even university trained citizens of the Federal Republic.

Mindful of the requirements for exactitude that flow from the maxim *nullum crimen, nulla poena, sine lege,* I endeavored to carry over into understandable English every phrase and word as it appeared in the Code. Literal translations which captured the legislative purpose were used in preference to formulations which possibly might have been more euphonious to the ear of a person trained in the Common Law, but which also might mislead him into a false sense of security. Thus *Körperverletzung* (§ 223) was translated literally as "bodily harm" rather than as "assault" or "battery." The literal translation may seem strange to the Common Lawyer, but at the same time it warns him that this is an offense the constituent elements of which may well be different from assault or battery. On the other hand, care was taken to avoid the pitfalls of *faux amis* (cognates that suggest a meaning belied by the fact). Thus, *Bankrott* (§ 283) was descriptively translated as "conduct endangering the rights of creditors" rather than "bankruptcy." Under United States law, a Chapter 7 or Chapter 11 bankruptcy is not a crime but a statutorily prescribed method enabling honest debtors to satisfy their creditors and to begin life anew.

In other parts of the Code, I encountered words and phrases which posed formidable challenges to translation. Just as a French judge, bound by the admonitions of Article 4 of the Civil Code, may not refuse to decide a case on grounds that he cannot find a law governing the issues, so also is the translator bound by an unwritten custom of the craft that obliges him to translate the untranslatable. Having done my duty, I would here like to explain how and why I arrived at translations of several particularly difficult concepts.

One of the most troublesome words in the Code is *Schuld.* The problem with translating *Schuld* as "guilt" (which I reluctantly did in some places in the Code) is that it seems awkward to an Anglo-American Common Lawyer to use it in

constructing a theoretical model of a criminal offense. We tend to think of guilt in a procedural sense as something which the prosecution must prove beyond a reasonable doubt in a trial. As is well known, the vast majority of individuals accused of crime in the United States are morally guilty even before the trial starts. But morally guilty or not, the law presumes that they are innocent of the crimes charged until proven guilty. To an American lawyer it would be answering the most important criminal procedural issue ahead of time to say that "guilt" must be present before a person can be formally charged with a criminal offense. The moral blameworthiness or culpability of the accused finds expression in Anglo-American criminal law theory in the *mens rea* requirement for *malum in se* offenses.

In Germany, however, *Schuld* forms an integral part of a tripartite conceptual structure of crime. Worked out after generations of disputation among German criminal law scholars, the tripartite system (*Dreistufentheorie*), the implications of which are reflected throughout the Code, may be outlined in levels as follows:

I. *Tatbestandsmässigkeit,* or fulfillment of the statutorily defined constituent elements of the offense. Analysis here focusses on the act itself, which must not only be voluntary but also committed intentionally or negligently to cause the social harm proscribed. Inclusion of a subjective as well as an objective element in the *Tatbestand* necessarily injects a *mens rea* requirement into this first level of the tripartite system.
II. *Rechtswidrigkeit,* or unlawfulness in the sense that the wrongfulness of the act committed is not negated by a legally recognized ground of justification (e.g., self-defense).
III. *Schuld,* or guilt in the sense that the subjective imputability of the act to the perpetrator is not negated by a legally recognized ground of excuse (e.g., insanity). At this level *mens rea* must also again be present in order to establish the personal blameworthiness of the offender.

This, in an admittedly oversimplified fashion, is the widely respected and, at least in civil law countries in the Romano-Germanic legal tradition, greatly admired and often borrowed German contribution to criminal law theory. Partly due to

linguistic and legal-cultural reasons, it has made little headway in English-speaking countries of the Common Law tradition. We tend to approach the law in a more pragmatic way, balancing pain and pleasure in a utilitarian search for a criminal justice system that most effectively achieves community perceived penal-correctional goals. Not "does it fit harmoniously into a carefully conceived conceptual structure?" but "will it work to produce desired criminal correctional results?" is the question that typically characterizes the thinking of a jurist trained in the Common Law.

This is not to say that no one is interested in criminal law theory. Jerome Hall's *General Principles of Criminal Law* (2nd ed. 1960) and George Fletcher's *Rethinking Criminal Law* (1978) will continue to influence Americans who appreciate an erudite and philosophical approach to the intellectual underpinnings of a subject dealing with the more sordid aspects of human behavior. But most Americans working in the criminal justice area, whether law teachers, prosecutors, defense counsel, judges, probation officers or prison administrators, have little affinity for conceptual abstractions. Most of us are destined to remain on the outside looking in at von Jhering's "paradise of legal concepts."

As already noted, the highly refined tripartite structure of crime is reflected throughout the current Geman Penal Code. Articles 34 and 35 clearly differentiate justification and excuse. *Schuld* appears in several places, sometimes with primary reference to level III *mens rea* and attribution (§§ 17, 19, 20, 35), elsewhere (§§ 46, 57a(1) number 2, 84(4), 86(4), 129(5), 129a(4)) as an element to be taken into consideration in the post-conviction imposition of punishment, and in one place (§ 213) as an integral part of the German "adequate provocation rule" in manslaughter. In dealing with these paragraphs I did not always translate *Schuld* as "guilt." My purpose was to find a word or phrase that conveyed the meaning intended by the legislator and at the same time to express this meaning by use of a symbol that would be readily understandable by an Anglo-Saxon lawyer unschooled in German criminal law theory. Thus, in § 19 *Schuldunfähigkeit des Kindes* is translated "criminal incapacity of the child" rather than "guilt incapacity of the child." At common law, immaturity (infancy) precluded