General Principles of Criminal Law

SECOND EDITION

Jerome Hall

GENERAL PRINCIPLES

OF

CRIMINAL LAW

SECOND EDITION

BY

JEROME HALL

DISTINGUISHED SERVICE PROFESSOR OF LAW
INDIANA UNIVERSITY

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To My Wife

PREFACE

This book, first published in 1947, was written to elucidate the basic ideas of criminal law in the light of current knowledge and to organize that law in terms of a definite theory. In the preparation of this edition, I have tried to realize more fully the original intention.

The first edition has been almost completely revised and reorganized, and several new chapters have been added. A large part of the history of criminal attempt and shorter discussions not directly pertinent to the principal subject of the book have been omitted. I have used the earlier publication of certain of my articles to further the analysis of some of the more difficult problems. Chapter 13 includes parts of the article published in 65 Yale Law Journal, chapter 11 appeared in 33 Indiana Law Journal, some passages were published in 100 University of Pennsylvania Law Review, and chapter 8 is a revision of the essay in *Studies in Jurisprudence and Criminal Theory* (1958). I thank the publishers for permission to reprint these excerpts and I greatly appreciate the secretarial and research assistance generously provided by Indiana University.

JEROME HALL

Bloomington, Indiana

PREFACE TO THE FIRST EDITION

Serious thinking in any field of knowledge culminates in a search for and analysis of basic principles that comprise the foundations upon which the entire discipline rests. This book is devoted to an analysis of such principles of criminal law and of the major doctrines of that law. Because the principles of criminal law include many of the ultimate ideas of Western civilization, one might well devote a lifetime to the study of those principles and still regard the results with diffidence. The prospective reader is entitled to know the relevant facts of the present work.

Not long after the publication of *Theft, Law and Society* in 1935, I turned my attention increasingly to the more general problems of criminal law. In 1937, I wrote an article on the principle of legality, which elaborated my report on that subject at the Hague meeting of the International Society of Comparative Law. Next, I engaged in the study of criminal attempt, strict liability, and the interrelations of criminal law and torts. By 1940, I had become persuaded of the great importance of and need for a book dealing with the fundamental principles and doctrines of criminal law and of the possibility that a continuation of my efforts might produce such a work. During the succeeding years, the greater part of my time available for research, subject to the discharge of various other duties, has been devoted to that objective. I have taken advantage of the publication of several of my articles on the above and other problems for use in this book; the prior publication permitted further thought and improvement of the analysis. Thus the parts of the articles included in this book have been revised and in some very important regards they have been greatly modified.

The reader will, of course, form an opinion concerning the kind of analysis that is presented and the methods employed. But it may not be superfluous to note that various problems are discussed in different contexts in the book. This does not involve repetition; it implies that a reading of the writer's entire analysis of those problems requires reference to the Index and to the relevant discussions noted there as well as in the cross-references cited in the footnotes.

I am obliged to my former student, Ruth Smalley, for considerable assistance during the past two years. Not only did she relieve me of the major burden of the routine aspects of the research as well as of the compilation of the index and the checking of proof; she also contributed much valuable criticism and made many helpful suggestions.

I am also obliged to Dean Bernard Gavit for facilitating the research in many ways. Finally, I wish to thank the publishers for permission to reprint from my articles which appeared in the Columbia, Harvard, Pennsylvania, and Yale law reviews, and in *Twentieth Century Sociology* (1945, Philosophical Library).

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CHAPTER I

CRIMINAL LAW THEORY

IN an inclusive sense, "theory" signifies the knowledge of a subject, acquired without any practical objectives in view; and it is especially concerned with the ultimate ideas which comprise the foundation of a science or social discipline. "A theory" has a much narrower reference, for example, the kinetic-molecular theory of matter. In this sense, a theory is a definite conceptual scheme which correlates many otherwise disconnected bits of knowledge.[1] While a scientific theory is directly valid in relation to the empirical laws it explains, these, in turn, are verified by their correspondence with fact. Significance, simplicity, and suggestivity in research determine preference among competing theories.

The above observations also apply in a general way to descriptive theories of criminal law, although their verification and significance depend upon additional, normative factors. A theory of criminal law is constructed of a set of ideas by reference to which every penal law can be significantly "placed," and thus explained.[2] This, indeed, is the gist of explanation in any field — the location of data in the

[1] " . . . by 'theory' one understands an explicit formulation of determinate relations between a set of variables, in terms of which a fairly extensive class of empirically ascertainable regularities (or laws) can be explained (always provided that suitable boundary conditions for the application of the theory are supplied). . . ." Nagel, *Symposium: Problems of Concept and Theory Formation in the Social Sciences*, pub. in Science, Language, and Human Rights 46 (1952).

[2] The rules of penal law are elucidated by being related to more general propositions, which are organized in terms of a theory of penal law.

context of a theory.[3] In sum, the most important functions of a theory of criminal law are to elucidate certain basic ideas and organize the criminal laws, thereby greatly increasing the significance of criminal law.

A theory of penal law (briefly, penal theory or criminal theory) should be tested by the significance of its explanation of existing penal law, and the scholar's primary vocation is to increase that knowledge. If he foregoes the rigors of that task because of his desire to reform the law, the results are bound to be problematical. Both theory and reform are obviously important, but the two should not be confused nor should theory be depreciated in the name of humanitarianism. 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? It also happens, however, as the writer has elsewhere shown,[4] that a rigorous adherence to theoretical inquiry inevitably uncovers areas where reforms are needed. When these discoveries are thus made, as by-products of research, the proposed reforms are apt to be defensible. In any case, the subject matter of the theory presented in this book is the existing criminal law — the existing penal codes, statutes and decisions.

It ought to be more widely recognized how extremely difficult it is to exclude one's values from the construction of his theory of penal law; indeed, much of the diversity of existing theories, unsuspected when only their far-ranging superstructures are considered, results from conflicting valuations, *e.g.* those regarding negligence and punishment. Perhaps, the most that should be expected is that such

[3] "A fact or law is explained only when a sufficient knowledge of the system to which it belongs is reached to enable one to interpret the fact or law in terms of that system, and as one of the actual members of that coherent and orderly whole." Robinson, The Principles of Reasoning 291 (1947). "We are said to *explain*, when a conjunction of elements or features in the real, whose connexion is not intelligible from a consideration of themselves, is made clear through connexions shown between them and others." Joseph, An Introduction to Logic 502 (2nd ed. 1916).

[4] Theft, Law and Society (2nd ed. 1952).

"preferences" and their implications be articulated. Accordingly, the writer believes it will be helpful if some of the postulates of the present work are noted at the outset.

In the theory presented in this book, *mens rea* is defined to exclude negligence and, of course, the quite innocent conduct that is subjected to strict liability. It seems evident that this narrow definition of *mens rea* has many advantages. For example, it makes possible the precise definition of the relevant, probably most important, principle of penal law, with similar far-ranging consequences for the definition of many crimes. For the reference of that definition is to definite states of awareness — intentionality and recklessness — and the corresponding conduct is clearly voluntary in the sense of being end-directed or end-hazarded, *i.e.* as to certain proscribed harms.

In contrast to this, current "penal law" holds that negligent behavior may give rise to penal liability. The consequences for theories built upon that preference are considerable and unfortunate. In the first place, it is necessary, on that premise, to define *mens rea* and the corresponding "fault" or "guilt" in wide terms which include the inadvertence of negligent behavior. This not only clouds the meaning of *mens rea* and penal harm, it also greatly obscures the causal problem in penal law; and other complications result from using "*mens rea*" to denote very diverse states of mind. For example, if dubious findings that certain persons "could" have acted carefully are also admitted within the scope of *mens rea*, is it not likely that both "*mens rea*" and "guilt" denote such different states of mind, conduct and behavior as to be very imprecise tools of analysis, perhaps in some cases, a mere formality? We shall discuss this question in later chapters.

The writer's preference in the above regard, expressed in a narrowly defined concept of *mens rea*, also implies positively that normal adults who voluntarily commit certain harms ought to be punished. What needs to be stressed, however, is the even stronger negative implication of this definition. Since the punishment of a human being is a very

serious matter, any doubt regarding the appropriateness of penal liability should be resolved by narrowing its scope. Accordingly, if one is uncertain whether negligent persons should be subjected to punishment, that doubt ought to be resolved in the indicated way. Non-punitive sanctions which modern law abundantly provides may also be more effective.

Another major preference, reflected in the writer's theory, is firm adherence to a rigorous principle of legality. The protection of the individual from the heavy punitive hand of public officials, the equality of treatment which must also be included in any cogent view of justice, the certainty of legal processes, which is the condition of any knowledge of law — these and other precious values depend on precise legality — the "rule of law." Where the conditions of penal liability are vague, the principle of legality is proportionately weakened. Since it can have no greater vitality and precision than its contents allow, the inclusion of widely diverse states of mind, conduct, behavior and harm takes an inevitable toll. So, too, while even verbal insistence upon guilt may be laudatory, the inclusion, in the definition of crimes, of motives and other uncertainties regarding the competence of inadvertent or ignorant harm-doers greatly weakens legality. To weaken that basic principle seriously and, at the same time, to insist that a higher ethics requires that or, what comes to the same thing, to insist that such an ethics requires certain decisions regarding guilt, the effect of which dilutes legality because of the vagueness of the decisions, is hardly a satisfactory solution of difficult problems.

It must, of course, be granted that some aspects of any theory of criminal law require that difficult decisions be made. How to maintain rigorous legality and at the same time deal justly with extreme cases which barely oppose the central purpose of the relevant laws, how to preserve that legality and also individualize punishment by taking many subtle, personal factors into account raise perennial problems for judges and administrators as well as for theorists. Again, some persons who intentionally or recklessly commit forbidden harms, and are thus within the