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CRIMINAL LAW SYSTEMATIZED

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In this article, the author reviews the second edition of Professor Jerome Hall's book entitled *General Principles of Criminal Law*. Dr. Honig observes that the attempt made by Hall in this work to systematize criminal law represents a trend new to the United States but of long standing in European countries. He further observes that Hall endeavors to base his "principles" upon "many of the ultimate ideas of Western civilization," thereby inviting comparisons between the basic ideas of his system and those of the German theory of criminal law. Accordingly, Dr. Honig analyzes and appraises the principal elements of Hall's system, weighing them critically with the corresponding German theories.—EDITOR.

For many decades European criminal law has been dominated by theoreticians who, in cooperation with the administration of justice, have endeavored to build up systems of the criminal law of their countries. Most recently a similar trend is observable in American criminal law. Latest evidence thereof is Professor Jerome Hall's book *General Principles of Criminal Law*.¹

I. PROFESSOR HALL'S ENDEAVOR

As the title indicates, Professor Hall's book is meant to present a theory and system of criminal law based on generally valid and generally applicable principles. Hall has made this perfectly clear by informing the reader that "the most important functions of a theory of criminal law are to elucidate certain basic ideas and organize the criminal laws. . . ."²

A. His Continental Referents

This starting point must be borne in mind to avoid misinterpreting Hall's statement "that the major shortcoming of the nineteenth century professional literature on criminal law, both Anglo-American and Continental, was the lack of system."³ To be sure, in the numerous German systems on criminal law written in the nineteenth

century, by Feuerbach,⁴ Abegg,⁵ Köstlin,⁶ Hälschner,⁷ Berner,⁸ and Hugo Meyer,⁹ to mention only the most influential criminalists, the leading "set of ideas" is not predominant or clearly enunciated. But the late nineteenth century systems of criminal law, such as those of von Liszt¹⁰ and Binding,¹¹ are unmistakably composed of basic ideas. The same holds true of the systems constructed in the twentieth century by Beling,¹² Max Ernst Mayer,¹³ Mezger,¹⁴ von Hippel,¹⁵ Sauer,¹⁶ and Welzel.¹⁷ That

⁴ ANSELM VON FEUERBACH, *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS* (14 editions, from the beginning of the 19th century until 1847).

⁵ I. FR. H. ABEGG, *SYSTEM DER CRIMINAL-RECHTS-WISSENSCHAFT* (1826).

⁶ C. REINHOLD KÖSTLIN, *SYSTEM DES DEUTSCHEN STRAFRECHTS* (1855).

⁷ HUGO HÄLSCHNER, *SYSTEM DES PREUSSISCHEN STRAFRECHTS*, Teil I (1858); *DAS GEMEINE DEUTSCHE STRAFRECHT*, Bd. I (1881).

⁸ ALBERT FRIEDRICH BERNER, *LEHRBUCH DES DEUTSCHEN STRAFRECHTS* (18th ed. 1898).

⁹ HUGO MEYER, *LEHRBUCH DES DEUTSCHEN STRAFRECHTS* (5th ed. 1895).

¹⁰ FRANZ VON LISZT, *LEHRBUCH DES DEUTSCHEN STRAFRECHTS* (25 editions from 1882 until 1927).

¹¹ KARL BINDING, *DIE NORMEN UND IHRE UEBERTRETUNG* (1st ed. 1872, 3d ed. 1918).

¹² ERNST BELING, *DIE LEHRE VOM VERBRECHEN* (1906).

¹³ MAX ERNST MAYER, *DER ALLGEMEINE TEIL DES DEUTSCHEN STRAFRECHTS* (1915).

¹⁴ EDMUND MEZGER, *STRAFRECHT, EIN LEHRBUCH* (3d ed. 1949).

¹⁵ ROBERT VON HIPPEL, *DEUTSCHES STRAFRECHT* (Bd. I. 1925, Bd. II 1930).

¹⁶ WILHELM SAUER, *ALLGEMEINE STRAFRECHTSLEHRE* (3d ed. 1955).

¹⁷ HANS WELZEL, *DAS NEUE BILD DES STRAFRECHTS-SYSTEMS* (4th ed. 1961).

¹ Indianapolis: The Bobbs-Merrill Co.; 1960. Pp. xii, 642. \$9.00.

Hereinafter, where page numbers, only, appear in the footnotes, the reference is to this work.

² P. 2.

³ Pp. 11-12.

Hall does not mention them may be because these criminalists built their systems on basic ideas and principles as integrated in the German criminal law, whereas Hall strives to construct his system "of a set of ideas by reference to which every penal law can be . . . explained."¹⁸

Hall encourages the reader to compare the basic ideas of his system with the categories presented in the German theory of criminal law, when in the preface to the first edition, reprinted in the second edition, he points out that his principles "include many of the ultimate ideas of Western civilization."¹⁹

B. *His Interdisciplinary Referents*

Hall derives his principles from the union of rules and doctrines. The significance of the principles consists in their being "the ultimate norms of the penal law."²⁰ Each of the three notions—principles, doctrines, and rules—"serves important distinctive functions."²¹ The rules "define particular crimes and fix the respective punishments and treatment."²² Doctrines are not to be understood as theories in the usual meaning of this term,²³ but are mostly concerned with "unusual or abnormal states of mind or situations,"²⁴ to wit insanity, infancy, intoxication, mistake, coercion, necessity, attempt, conspiracy, solicitation, and complicity.²⁵ Metaphorically speaking, the doctrines are to be placed intermediately between the "rules" as the "narrowest and most numerous" propositions and the "principles"; being of "the widest generalizations" the latter are at the other extreme of the line. Their subjects are seven ultimate notions: *mens rea*, act (effort), the concurrence (fusion) of *mens rea* and act, harm, causation, punishment, and legality.²⁶ To clarify the difference between principles and doctrines, I may add that principles relate to elements of the rules that are part of the definition of the crime in question, whereas doctrines are concerned with circumstances that are to be taken into consideration in the application of the rules to concrete cases.

However, not all principles are equally important in relation to the definition of crime, and not all

doctrines are based on juridical logic only. Among the principles, it is the principles of punishment and legality which, according to Hall, do not refer "to essential elements of 'crime'."²⁷ The supporting points of the doctrine of insanity must be sought in psychiatry and in philosophical perspectives.²⁸ The perpetrator's responsibility may be more or less influenced by voluntary and involuntary intoxication, intoxication psychoses, chronic alcoholism, and physical injuries.²⁹ To what extent the judge should accept the opinions of medical experts is left to his own determination. As to kind, degree, and extent of punishment, criminal-political considerations are of great importance. Where free determination and considerations of this kind are involved, the criminalist's opinion rests on his personal convictions. Therefore, I shall only briefly refer to Professor Hall's opinions as far as the above problems are concerned.

Hall's ideas on punishment (chapter 9), mental disease (chapter 13), intoxication (chapter 14), and criminology and penal theory (chapter 16) are instructive and far-seeing. In chapter 9, for instance, he stresses that the administration of penal law has to take into consideration retributive and utilitarian ethics. Hall thus supports the inclusive theory,³⁰ noting with approval that this theory "has been gaining ground in recent years."³¹ He observes that the courts "are attending to the gravity of the harm, the personality of the offender, the public interest, the available peno-correctional facilities, and so on."³² However, as Hall stresses, to strengthen this sound trend the inter-dependence of penal theory and criminology has to be recognized,³³ "the various disciplines concerned with criminal conduct, law and punishment should be viewed as a single inquiry . . ."³⁴

Likewise, psychiatry, law, and legal science should find a common basis.³⁵ The leading example of this need is to be found in the problem of responsibility. According to Hall it is the M'Naghten Rule which provides guidance to the jury, although its reform seems to him absolutely necessary. The wording of the Rule, as used today, does not take into account "the integration of all the

¹⁸ P. 1.

¹⁹ P. vi.

²⁰ P. 19.

²¹ P. 17.

²² P. 17.

²³ P. 17 n. 32.

²⁴ P. 19.

²⁵ P. 17.

²⁶ P. 18.

²⁷ P. 18.

²⁸ Pp. 454-55.

²⁹ Pp. 533, 554.

³⁰ Pp. 302, 304.

³¹ P. 308.

³² P. 306.

³³ P. 601.

³⁴ P. 621.

³⁵ P. 454.

principal functions of personality."³⁶ The rational function, to which alone the Rule refers, must be joined by the volitional function.³⁷ Thus, the jury should be asked "(1) whether, because of mental disease, the defendant lacked the capacity to understand the nature and consequences of his conduct; and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question."³⁸ If instead of the restrictive word "know" the wider terms "understand" and "realize" are used, the Rule takes "full account of the volitional function of personality."³⁹

In the chapter on "Intoxication," Hall severely censures the courts' hostility toward the drunken offender, as seen particularly in their readiness to imply voluntary drunkenness.⁴⁰ Hall finds further fault with the courts for their frequent failure to take seriously the defense of fraud and coercion in becoming drunk,⁴¹ and for their tendency not to recognize temporary insanity produced by drunkenness as destroying responsibility.⁴² Especially noteworthy is Hall's suggestion that different legal consequences should apply as between drunken offenders without prior experience with the influence of alcohol upon them, and those whose previous experience should have forewarned them.⁴³

II. THE PRINCIPLES

Turning now to Hall's principles as based solely on juridical logic, I must regretfully confess that I differ from Hall's interpretation of all the main problems essential to any system of criminal law.

A. *Legality and the Essential Elements of Crime*

As mentioned above, the principles of punishment and legality are, according to Hall, unrelated to the essential elements of the crime.⁴⁴ That punishment is not related to such elements is evident. As a reaction against a violation of prohibitory or imperious legal norms, punishment should correspond to the gravity of the violation;⁴⁵ but there is, indeed, no direct and specific relation

of punishment to the essential elements of the crime. The situation, however, is different with regard to the principle of legality. Hall notes aptly that one meaning of this principle is "that no conduct may be held criminal unless it is precisely described in a penal law."⁴⁶ In other words, this principle demands that in order to be punishable, conduct must correspond to the elements of the definition of the crime in question. Hall expresses this idea by saying: "[W]hen a legal writer speaks only of harm, conduct, punishment and so on, . . . what he probably means to say is legally proscribed conduct, legally proscribed harm, legally proscribed punishment, and so on."⁴⁷ Thus, it is precisely the conformity of the elements of the conduct to the elements of the crime as defined by law that underlies the significance of the principle of legality. Consequently, it is not conceivable to me why, despite the demand of such conformity, which in the German doctrine is called "*Tatbestandsmässigkeit*," the principle of legality has no relation to the essential elements of crime.

B. *Concurrence*

Hall puts the relation between *mens rea* and conduct under the principle of concurrence, i.e., the fusion or integration of *mens rea* and act.⁴⁸ That *mens rea* has to coalesce with conduct has, as Hall notices, contributed to the development of criminal law. For instance, larceny by bailee and embezzlement became recognized as special crimes against property because the perpetrator made up his mind to appropriate property of another person only when he was already in possession of it.

But there are border cases, particularly *Jackson v. Commonwealth*, 100 Ky. 239, 38 S.W. 422 (1896), on which Hall's discussion leaves me dissatisfied. In the *Jackson* case, the defendant, a medical student, had given his pregnant girl friend a large dose of cocaine with the intent to kill her, and then, under the mistaken belief that she was dead, he had severed her head from her body. This decapitation, only, caused her death. Hall views the defendant's conviction of murder as a miscarriage of justice; he regards the decision as a violation of the principle of concurrence. "[T]he *mens rea*," he states, "did not concur with the actual killing." "[T]here was no intention to kill or injure a human

³⁶ P. 521.

³⁷ P. 522.

³⁸ P. 521.

³⁹ Pp. 521-22.

⁴⁰ P. 533.

⁴¹ P. 540.

⁴² P. 542.

⁴³ Pp. 556-57.

⁴⁴ P. 18.

⁴⁵ P. 315.

⁴⁶ P. 28

⁴⁷ P. 25.

⁴⁸ P. 18.

being at the time of the decapitation."⁴⁹ This certainly is true. But is "concurrency" only measurable by the clock? Should not the "fusion" or "integration" of *mens rea* and act be regarded under the viewpoint that the act was done with the intention to produce the harm in question? German jurisprudence attains satisfactory results by making use of the concept "*dolus generalis*," taking primarily into consideration the essential and immoral quality of the conduct. This, indeed, is, if I understand Hall correctly, the requirement implied in the principle of concurrence.⁵⁰ Then, however, not the question of time but the *substance* of the perpetrator's guilt, his intention concomitant with his conduct or his indifference to the risk involved, is decisive.

It seems to me that Hall interprets the principle of concurrence in this way in cases of culpable forbearance. *United States v. Van Schaick*, 134 Fed. 592 (S.D.N.Y. 1904), involved a shipwreck in which many passengers were drowned due to the defectiveness of the lifebelts. The captain and the owners of the boat were found guilty of manslaughter. "The nature of the offense," said the court, "precluded a single act." The duty of the captain and the owners to take care for the safety of the passengers "was continuing." Thus the court found the forbearance of the culprits to be a continuing crime. Hall, however, is of the opinion that "there is no need to resort to a fiction of 'continuing' forbearance in order to satisfy the principle of concurrence. . . . If an offender intentionally or recklessly creates a dangerous situation which later causes a proscribed harm, liability attaches to his conduct, i.e., to the 'concurrency' of the *mens rea* and the manifested effort ('act'), not to that of the *mens rea* and the harm."⁵¹ I don't see why this should hold true only where a dangerous situation is created. When the perpetrator aims at injuring or killing another person and obtains his purpose by a turn of the causality he had not foreseen, as in the *Jackson* case, he likewise should be fully responsible for the harm. Besides, I do not think the court took "resort to a fiction of 'continuing' forbearance in order to satisfy the principle of concurrence." Rather, the case in question involved a continuing crime. Since those responsible for the welfare of the passengers acted recklessly, they knew, according to the meaning of this term, that they took a chance. The

court was entitled even to impute this knowledge if, as Hall points out, "a reasonable man in the given situation would have been aware of it."⁵² A reasonable man, however, would have been aware of it not merely before or at the embarkation, but also during the voyage. The *mens rea* of the people responsible extended over the duration of their *duty* to care for their passengers. This does in fact correspond to the opinion of the English and American as well as the German criminalists. Hall's stigmatization of the court's view as "fiction" seems to me consistent with his refusal to recognize the dogma that an omission is punishable only in case there was a legal duty to take action. We shall return to this problem under heading D.

C. Harm

The preceding argument leads to the clarification of the term "harm," one of the seven "ultimate notions."⁵³ If we understand harm to be "a central notion of penal theory,"⁵⁴ it should follow that it consists of endangering or violating one of those ultimate values the protection of which is the aim of criminal law. This obviously is its meaning when Hall defines it as "loss of a value," and when it is "stated in terms of intangibles such as 'harm' to institutions, public safety, the autonomy of women, and so on."⁵⁵ However, Hall does not restrict the notion "harm" to intangibles, but applies it to physical injuries as well. When he speaks of "harm" as "the end sought" or "the focal point between criminal conduct . . . and the punitive sanction"⁵⁶ he seems to have the physical object of the perpetrator's action in view. The importance of harm in this sense is underscored by the statement that "harm . . . is the fulcrum between criminal conduct and the punitive sanction" and that the elucidation of this relation "is a principal task of penal theory."⁵⁷

This ambiguity, which has existed in American criminal law for a long time, is disadvantageous to the systematization of the criminal law. It results from a general neglect to recognize a difference between crimes resulting in factual injuries to other persons and crimes consisting merely of the perpetrator's act. In German criminal law this

⁴⁹ P. 121.

⁵⁰ P. 18.

⁵¹ P. 213.

⁵² P. 217

⁵³ P. 213.

⁵⁴ P. 213.

⁴⁹ P. 189.

⁵⁰ P. 186.

⁵¹ P. 188.

difference leads to the distinction between *Erfolgsdelikte*, crimes causing factual effects, and *schlichte Tätigkeitsdelikte*, crimes committed and consummated without such effects. If Hall had recognized that these two groups of crimes are of equal significance for the goal of any criminal law, he would have seen that American criminalists do not "list exceptions" and add "confusion" when they state "that in some crimes there are harms, but in other crimes there is only conduct."⁵⁸

D. Act (*Effort*)

Punishment is justified only when harm, understood either as "end sought" or as "loss of value," is caused by criminal conduct. Professor Hall starts his chapter on "Criminal Conduct" by reporting briefly on Austin's definition of conduct: "Act is a voluntary movement. It consists of muscular motions which immediately follow the wish for that movement."⁵⁹ Hall contrasts this strict concept with the very wide definition of Salmond: "[A]ct" includes (1) the offender's bodily movements or omissions *and* (2) the accompanying circumstances *and* (3) the consequences."⁶⁰ If we ask which of these contrasting concepts is to be preferred, we must take into consideration that intention and volition are, according to Austin, "inseparably connected," whereas, according to Salmond, "intention is not a necessary condition of legal liability . . ."⁶¹ To agree with Salmond means, as Hall stresses, "to include negligent, i.e., inadvertent, behavior" in the notion "act."⁶² This, however, is, as I will show later, contrary to Hall's concept of criminal conduct. Furthermore, since the term "act" is ambiguous, as it covers not only overt bodily movements, but also doing nothing, Hall prefers the term "effort," which refers to "both voluntary movement and [voluntary] forbearance."⁶³ "[I]n criminal forbearance the offender 'uses' active external forces by not interfering with certain effects of their operation."⁶⁴ In relation to the realization of the effort, Hall distinguishes between the "internal effort of intention" and the "*manifested effort* which actualizes the *mens rea* in the external world."⁶⁵ This "manifested effort, which includes

voluntary overt movement and . . . voluntary forbearance, may be termed an 'act'.⁶⁶

Since the manifested (or further) effort is the materialization of *mens rea*, which comprehends both "relevant cognition, i.e. knowledge of the material facts, and an internal effort, 'movement of the will,'"⁶⁷ and since every effort is "positive and operative,"⁶⁸ any omission, "in a sense other than voluntary forbearance," is, according to Hall, "fictitious."⁶⁹ Consequently, Hall concludes, negligence, in the sense of inadvertence, is not included in the notion "conduct." There remains, however, I submit, the question whether this is sound penal theory. To be sure, in cases of negligence the perpetrator does not aim at something unlawful. His intention is not directed to the injury caused by his negligence. However, his failure to consider the possibility that he might injure someone indicates that he is wanting in that degree of attention which the law expects and demands of everyone. His conduct does not correspond to that carefulness and consideration which everyone owes to his fellow-citizens.⁷⁰ This fact justifies punishment in case negligence causes harm.

As to the punishment of omissions, Hall refers to English decisions of the early nineteenth century. Under these decisions, an omission was punished if, according to the circumstances, "a legal duty to act was definitely recognized."⁷¹ For the second half of the nineteenth century, Hall mentions Macaulay and Stephen who pointed out the rules regarding punishable omissions. Both stressed that the omission of "benevolent morality" is not sufficient to justify punishment. They felt there must be a relationship between the omission and the positive law in order to stigmatize the omission as a violation of a legal duty to act.⁷²

This train of thought corresponds to the definition of punishable omissions to be found in the *Comments of the German Draft of a Criminal Code of 1960*. The *Comments* clearly state that the moral duty to prevent a danger or injury does not create a legal duty to act. Rather, such duty must be established by the law itself before the inactive person may be held responsible for not preventing the consequences of his inactivity.⁷³ The thought

⁵⁸ P. 220.

⁵⁹ P. 171.

⁶⁰ P. 172.

⁶¹ P. 173.

⁶² P. 174.

⁶³ P. 177.

⁶⁴ P. 254.

⁶⁵ P. 179.

⁶⁶ P. 184.

⁶⁷ P. 183.

⁶⁸ P. 180.

⁶⁹ P. 180.

⁷⁰ Cf. WELZEL, *op. cit. supra* note 17, at 35 *et seq.*

⁷¹ P. 192.

⁷² P. 193.

⁷³ Cf. BEGRÜNDUNG ZUM ENTWURF EINES STRAFGESETZBUCHES 116-17 (1960).

expressed in the *Comments* represents 100 years of learned deliberations on the problem of crimes causing harms and committed by omissions (*Unechte Unterlassungsdelikte*). In codified form it is contained in §13 of the authorized German Draft mentioned above.

Hall, however, is of the opinion that "it requires only brief scrutiny . . . to disclose the superficiality of that theory." "The assertion that an omission is criminal if there is a legal duty to act . . . is a mere tautology if 'legal duty' means a duty imposed by criminal law."⁷⁴ This is certainly true, since if omissions are prohibited by criminal law it is implied that the criminal law itself demands certain actions. But the English decisions cited by Hall⁷⁵ dealt with harms occasioned by violation of duties to act imposed not by the criminal law, but by private law—such as the duty to provide sufficient food to children, to an apprentice, or to a servant. Harms of this kind would not have occurred if the persons who had a legal duty to act had fulfilled their duties. This is the reason why a person who, by remaining inactive, violates such duty is responsible for the harm caused by his inactivity.

In response to arguments like this one, Hall maintains that the above theory proves to be fallacious, no matter whether "it is intended to mean that whenever a civil law requires the doing of an overt act, failure to do it is criminal," or "to mean that an omission is not criminal unless a legal duty is also imposed by civil law."⁷⁶ He notes that "failure to file a tax return, to keep a road in repair, and to perform official duties are common instances of the lack of any relevant private legal duty."⁷⁷

Nobody should question this, since these examples, like others added to them, concern plain omissions (*echte Unterlassungsdelikte*), appertaining to the realm of public law. Thus, Hall may correctly assert that these cases are "unrelated to private law." But as plain omissions these cases do not cause tangible harms proscribed by criminal law. They do not prove anything against the dogma that inactivity is punishable when a person by private or public law was obliged to prevent the harm.

I agree without reservation with Hall's statement that "the relationship of certain rules of

private law to the criminal law is sometimes one of reference by the latter to the former, in the sense that it is forbidden to omit doing certain acts which are defined in the private law."⁷⁸ I cannot see, however, why Hall states: "This does not imply that the penal law is enforcing private law, but only that the latter proscriptions are also penal laws."⁷⁹ Hall substitutes here proscriptions of the private law for its precepts. Only the latter are in question. The omission of precepts prompts criminal prosecution if a person by not acting according to them causes tangible harm that is punishable.

In sum, I don't think that Hall has succeeded in shaking the doctrine that punishment of an omission that caused tangible harm is conditioned by the violation of a legal duty to act. For this reason, I consider Hall's statement untenable "that, so far as the principle of legality is concerned, there is nothing distinctive about criminal omissions."⁸⁰

Having come to this conclusion, Hall asks: "Can criminal omissions be distinguished from overt criminal conduct by reference to some other significant criterion, e.g., as regards causation?"⁸¹ If a father stands by while his child drowns, he is liable, "whereas the stranger is not liable although the physical facts and the chain of physical causation are identical in both cases. This indicates that physical causation, alone, does not determine liability. There must also be something else; and in criminal omissions that element is illegal inaction, one might say, wrongly allowing the forces of physical causation to operate when one, bound by law, could have altered certain of their consequences, i.e. precisely the human factor."⁸²

It seems to me that the problem of causation finally opened the door for the admission of the legal duty to act. For, what else could be implied by "bound by law" to alter the consequences? Or do the words: "precisely the human factor" contain a reservation or restriction?

In the section "Policy of Criminal Omissions" Hall speaks of the "particular duty" of parents to their children, of the "special obligation" of a railroad employee, of a "particular obligation" of one who agrees to look after an aged person. It is not the moral obligation, says Hall, which creates

⁷⁴ P. 194.

⁷⁵ P. 194.

⁸⁰ P. 194.

⁸¹ P. 195.

⁸² P. 196.

⁷⁴ P. 193.

⁷⁵ P. 192.

⁷⁶ P. 193.

⁷⁷ P. 194.

such duty or obligation, since from the viewpoint of morality the bystander is no less obliged to save the child than the father. "The essential difference, it is suggested, inheres not in moral obligation, but in mores, in the public attitudes regarding the respective parties . . ."⁸³

In opposition to this concept, I am of the opinion that it is not the mores, i.e., the public opinion, but the law in its entirety which creates particular duties or special obligations on the basis either of private or public relationship. If harm, forbidden by criminal law, is the consequence of a failure to perform a duty or obligation, then the failure is punishable as a crime because the law—not the mores—demands action.

E. Causation

In cases of omissions, it is not physical causation as such, as Hall points out, but inaction allowing the forces of physical causation to operate which determines liability. Thus, in law the term causality "has a teleological significance that distinguishes it from mechanical causation."⁸⁴ This necessarily leads to the question of the nature or essence of the "cause-in-law" or "legal cause." After displaying various meanings of the term "cause,"⁸⁵ Hall analyzes in his chapter on "Causation" the three aspects under which a legal cause is to be comprehended: (1) Conduct must be the *conditio sine qua non* the harm in issue would not have occurred; (2) the condition must have "effectively, i.e. substantially" contributed to the harm; (3) finally, to be a legal cause, the necessary and substantial condition must be the expression of "a relevant *mens rea*, i.e., necessary, efficient end-seeking."⁸⁶ "In sum," says Hall, "a cause-in-law means a cause which is not only a necessary, substantial factor, but also one that includes certain conduct which expresses a required *mens rea*."⁸⁷

At the beginning of his book Hall points at the dependence of the notion "legal cause" on the conception of *mens rea*: For the definition of *mens rea* to include inadvertence or negligent behavior "not only clouds the meaning of *mens rea* and penal harm, it also greatly obscures the causal problem in penal law."⁸⁸ Even more distinct is the connection between causation and guilt asserted

in the introduction to the chapter on "Causation": ". . . *mens rea* and the defendant's external movements are required . . . the conduct, thus formed, is the cause of penal harm."⁸⁹

These statements raise the question: Is the characterization of the conduct as "manifestation of the *mens rea*" necessary to explain the *production* of criminal harm or only its punishability?

Hall seems to be well aware that to consider *mens rea* as an element of the legal cause contradicts the generally demanded separation of causation from guilt: "The temptation to exclude *mens rea* from problems of causation arises from over-concentration on mechanical causation, resulting from a failure to appreciate the distinctive meaning of the principle of causation in penal law."⁹⁰ As the fundamental of penal law the principle of *mens rea* is, according to Hall, influential "in determining the meaning of 'cause' in the teleological sense."⁹¹

The stress Hall lays upon the term "cause in the teleological sense" and its relation to *mens rea* induces me to find behind Hall's conception a fundamental thought I tried to develop some time ago.⁹² I believe that in order to comprehend the legal relationship between conduct and harm it is not enough to recognize human conduct as a *conditio sine qua non* relative to the harm in issue. This fact is recognized by the so-called selective theories, the best known of which is the Adequance Theory. According to it, conduct is a cause-in-law if it *usually* creates the harm in issue. However, Sauer has pointed out⁹³ that by judging the conduct according to its fitness to create the harm in issue we are no longer occupied with causality as such, but with a totally different, teleological and normative problem. For, while the subject of causality is the ontological relationship of the conduct to harm, any selection among the conditions that come into question as causes of the harm is based on a judgment as to their general fitness to produce such harm. By entering this axiological question we leave behind the realm of ontological contemplations.

Needless to say that nothing else but human conduct is the condition whose general fitness to

⁸³ P. 247.

⁸⁴ P. 282.

⁸⁵ P. 295.

⁹² Honig, *Kausalität und objektive Zurechnung*, in *FESTGABE für REINHARD VON FRANK*, Bd. I, p. 174 *et seq.* (1930).

⁹³ WILHELM SAUER, *GRUNDLAGEN DES STRAFRECHTS* 443 (1921).

⁸³ P. 210.

⁸⁴ P. 196.

⁸⁵ P. 248.

⁸⁶ Pp. 282-83.

⁸⁷ P. 284.

⁸⁸ P. 3.

produce harm is in question, and that conduct must be a manifestation of the human will in order to create legal consequences. The question whether the conduct was generally qualified to create the harm in issue leads to the alternative whether a certain conduct in relation to its result, to wit the harm in issue, can or cannot, from an objective point of view, be considered as "end-directed," i.e., as "*zweckhaft gesetzt*." In sum, only if an independent axiological judgment follows the ontological *sine-qua-non*-judgment are we able to judge whether the defendant's conduct was the cause-in-law of the harm in question and, if the answer is in the affirmative, to proceed to the question of his *mens rea*.

With regard to my refusal to connect the question of causality with the defendant's *mens rea*, I feel considerably supported by Professor G. O. W. Mueller's criticism of Hall's theory as discussed in Mueller's "An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory."⁹⁴ In these Studies, published in 1958, Hall introduced the defendant's *mens rea* as a third element of the cause-in-law. Mueller objected by pointing out that "*mens rea* . . . is too far removed from causation to be part thereof by construction." Rather, it is the "foreseeability" which "is properly subsumable under the primary principle of conduct." "Therefore, prediction or foreseeability becomes properly the third limitation on the causation inquiry. But causation, even in this sense . . . , does not suffice for the imposition of guilt or blame."

Professor Mueller's and my conceptions of the cause-in-law differ in the final analysis only in so far as Mueller stresses the foreseeability of the consequences, whereas I suggest that the objective suitability of the conduct to produce the harm in issue is the ultimate criterion of the relevancy of the conduct, if other conditions beside the conduct as such contributed to produce the harm. I should presume that Hall would not have taken pains to prove *mens rea* to be the third element of the cause-in-law if he had not taken as self-explanatory but had scrutinized the conditions under which the predicate "substantial cause"⁹⁵ can be attributed to one of several causes or the predicate "efficiency or adequacy" to a necessary cause.⁹⁶ Predicates as these are objective standards based on common opinion and experience, just as foreseeability of the consequences or the objective suitability of the

conduct. By these standards the legal significance of the conduct as such is determined. Whether the *defendant* could be expected to act in conformity with them is a different question. This is the question of guilt.

F. *Mens Rea, Negligence and Recklessness*

Criminal guilt is established when man's conduct is the actualization of his *mens rea*, i.e., of that state of mind which includes "knowing or believing, with reference to the material facts and, also, the internal effort of intention." The immediate and inevitable logical consequence of this definition offered by Hall⁹⁷ is the exclusion of negligence from guilt. For "negligence implies inadvertence, i.e., that the defendant was completely unaware of the dangerousness of his behavior."⁹⁸ "Between the extremes of intentionality and negligence lies recklessness."⁹⁹ Thus, intentionality, recklessness, and negligence are the three basic mental positions relative to the defendant's criminal liability for his conduct.

In the case of intentionality, the perpetrator intentionally commits a morally wrong act;¹⁰⁰ he has chosen to cause a proscribed harm by his conduct.¹⁰¹ The reckless person, on the other hand, does not intend to cause harm. However, he does not mind increasing "the existing chances that a proscribed harm will occur."¹⁰² In this sense, "recklessness connotes awareness."¹⁰³ Professor Hall realizes perfectly well that the limitation of the notion "recklessness" is not in line with the definition of recklessness as given in §500 A.L.I. *Restatement, Torts*. He is of the opinion that it "is plainly opposed to the meaning of recklessness" that someone who "was not aware of the fact that he was unduly increasing the risk of harm, . . . was nonetheless reckless if the 'reasonable man' would have known the risk." By the definition of the above §500, persons are held reckless, even though they were only negligent.¹⁰⁴ It is true, says Hall, that "recklessness resembles negligence in that both include an unreasonable increase in the risk of harm; both fall below the standard of 'due care'."¹⁰⁵ On the other hand, it is a "distinctive

⁹⁷ P. 179.

⁹⁸ P. 114.

⁹⁹ P. 115.

¹⁰⁰ P. 83.

¹⁰¹ P. 113.

¹⁰² P. 112.

¹⁰³ P. 116.

¹⁰⁴ P. 121.

¹⁰⁵ P. 115.

⁹⁴ 34 *IND. L.J.* 206 (1959).

⁹⁵ P. 283.

⁹⁶ P. 292.

state of awareness" which intention and recklessness have in common, and which is missing in the case of negligence. "[U]nless it is determined that the defendant knew he was increasing the risk of harm, it cannot be defensibly held that he acted recklessly."¹⁰⁶

This determination, however, apparently can be compensated by the *supposition* that the defendant knew he was increasing the risk of harm: "[T]o find a defendant reckless," Hall maintains, "the jury needs to be informed that . . . they must find that his conduct fell below the standard of 'due care' and that the defendant knew he was increasing the risk of harm; and that they are warranted in so finding if they find that a reasonable man in the given situation would have been aware of it."¹⁰⁷

The bearing of this rule of procedure on the substantive law was clearly expressed in *Commonwealth v. Welansky*: "Knowledge of facts on account of which a reasonable man would have seen the risk, is equivalent to the knowledge of the risk itself."¹⁰⁸ In other words, the awareness, the indispensable element of the recklessness, need be related only to the material facts. If this awareness is established, the rule of procedure, as displayed by Hall, permits the supposition that the defendant knew he was endangering other people by his conduct. This supposition depends, to be sure, on the further assumption that a reasonable man would have seen the risk in the given circumstances.

However, if this does satisfy the requisite of the "awareness of increasing the danger," then the question arises as to what the liability of the defendant is based upon if he did in fact not know that he by his conduct endangered other people. If the defendant knew he endangered other people, his liability rests on the fact that he acted nevertheless. If, however, he was conscious only of the *facts* increasing the risk, *not* of the *risk* itself, he is liable because he should have been conscious of increasing the risk if a reasonable man would have been aware of it.

The contrast between a person who disregards the risk he has taken and a person who was capable of thinking of the risk, but was in fact not aware of it, corresponds to the distinction made in German criminal law between perpetrators who acted with conscious negligence and those who were not

conscious of their negligence: *bewusste und unbewusste Fahrlässigkeit*. This distinction underlies the definitions of "recklessly" and "negligently" in §2.02 (2) (c) and (d) respectively of the *Model Penal Code*. As we remember, Hall excludes negligence from the *mens rea*, since *mens rea* requires awareness, and it is "awareness of increasing the danger" which separates recklessness "completely from the genus of negligence."¹⁰⁹ Such awareness is, as Hall admits, presumable and imputable in cases of reckless conduct. I submit that awareness becomes fictitious if it can be presumed and imputed to the defendant, subject to the application of the reasonable-man standard. I don't see any reason why the same imputation should not be available in cases of negligence if a reasonable man under the given circumstances would not have acted as did the negligent defendant. For "a person acts negligently . . . when he should be aware of a substantial and unjustifiable risk."¹¹⁰ Thus, Hall's standpoint that recklessness creates criminal liability, even if awareness of increasing the danger was not determinable, while negligence, on the other hand, does not, is in my opinion untenable from the viewpoint of juridico-logical deduction.

To support his position, Professor Hall endeavors to prove that even the "traditional ethical ground—the insensitivity of these harm-doers to the rights of other persons"¹¹¹—is not strong enough to justify punishment of negligent harm-doers. We may restrict ourselves to the discussion of only the most important arguments.

Hall does not believe that punishment "will sensitize thoughtless individuals to the rights of other persons." "[T]he legal apparatus cannot assure such a close association between negligence and pain as to provide any support for the use of punishment on this ground."¹¹² But it is obvious that this argument could also be used against punishing crimes intentionally committed.

Furthermore, Hall points out that there is no evidence that punishment or the threat of it may deter negligent harm-doers.¹¹³ However, it is not so much deterrence but correction that is aimed at in the punishment of negligent persons. Moreover, punishment for negligent harm-doers should, according to Hall, be greater than usually provided, since "the cause of negligence may be so deeply

¹⁰⁹ P. 128.

¹¹⁰ MODEL PENAL CODE §2.02(2)(d) (1962).

¹¹¹ P. 138.

¹¹² Pp. 138-39.

¹¹³ P. 139.

¹⁰⁶ P. 120.

¹⁰⁷ P. 121.

¹⁰⁸ 316 Mass. 383, 55 N.E.2d 902, 910 (1944).

rooted in the personality structure of the inadvertent harm-doer as to require a great deal of punishment to alter his habits."¹¹⁴ Since in this connection Hall reproaches the legislators of Continental criminal codes for employing an "incongruous makeshift" it must be remembered that a crime committed by negligence is generally considered to be deserving of milder punishment than a crime done intentionally, because a man causing harm intentionally to other people *a priori* appears more guilty than a man acting negligently.

Finally, if inadvertence is rooted in the personality structure, the attitudes of a person insensitive with regard to creating danger are, according to Hall, not matters of his choice; "hence there is no warrant for punishing him on . . . traditional moral ground."¹¹⁵ I should reply that everyone responsible for his conduct is obliged to watch and educate himself and, for this reason, he is liable for his *laissez faire, laissez aller*.

G. *Mens Rea* and Strict Liability

In chapter 10 Hall deals with the problem of strict liability, i.e., "liability to punitive sanctions despite the lack of *mens rea*."¹¹⁶ Since criminal law is based on moral culpability "strict liability cannot be brought within the scope of penal law."¹¹⁷ Thus, a "careful analysis of the established law of strict penal liability" appears justified.¹¹⁸

Since there are numerous public welfare offenses proscribed without any allusion to *mens rea, mens rea*, it is concluded, is not made a necessary basis of punishing them. Hall especially calls our attention to those proscriptions against "knowingly" or "wilfully" doing certain acts, where then "follows a provision omitting the above terms, and usually fixing a lesser penalty."¹¹⁹ "It is this sort of provision," Hall adds, "that usually comprises strict liability." Does this form of provision necessarily lead to the conclusion that the legislators established strict liability, or did they perhaps think of negligent behavior?

Hall himself calls forth this question by quoting the decision *Reg. v. Woodrow* (1846), in which the court said: The defendant (a tobacco dealer) was "bound to take care . . . In reality, a prudent man who conducts this business, will take care

to guard against the injury he complains of . . ."¹²⁰ Thus, one is permitted to conclude, Woodrow was punished because he did not take that care a prudent man would have taken in conducting his business.

Similar deliberations hold true for early American decisions. Hall refers especially to *Commonwealth v. Farren* (1864), in which the court emphasized among other viewpoints the importance of protecting the community against the common adulteration of food and the reasonableness of imposing the risk upon the dealer and thus holding him "absolutely liable."¹²¹ Later on, Hall remarks very pertinently that many of the public welfare regulations "suppose a continuous activity, such as carrying on a business. This implies that general standards regarding such conduct are important rather than isolated acts."¹²² Nevertheless, these public welfare regulations "do not," according to Hall, "provide any justification of penal liability at the present time."¹²³

In opposition to this conclusion, I would submit the question: Is it not just these general standards upon which the decision depends as to whether the defendant is liable? To reproach someone with negligent conduct means that he is blamed for not having observed that care which a prudent man is expected to observe. It is the difference between the defendant's conduct and the conduct of a prudent man upon which the reproach is based. More specifically: With regard to negligent conduct—the usual form of public welfare offenses—the defendant is blamed because he did not realize that by his conduct he violated certain regulations. Hall himself admits "that, despite the avowals of strict liability, intent and negligence actually play some essential part in such offenses."¹²⁴ "[T]herefore," he continues, "it may be urged . . . that they are designed to catch the willful and the negligent; they are not intended to penalize those who are faultless. But the statutes are so phrased as to include the innocent, and these are caught occasionally as a result of incompetent administration."¹²⁵

It seems to me most regrettable that Hall deems these arguments untenable, although, later on, he concedes "that, from the very beginning of

¹¹⁴ P. 139.

¹¹⁵ P. 138.

¹¹⁶ P. 325.

¹¹⁷ P. 336.

¹¹⁸ P. 326.

¹¹⁹ P. 326.

¹²⁰ P. 327.

¹²¹ P. 328.

¹²² P. 331.

¹²³ P. 331.

¹²⁴ P. 342-43.

¹²⁵ P. 343.

the modern law of strict liability, many judges have suggested that the defendants were negligent and that, had they used due care, the violation would not have occurred."¹²⁶

Deliberations like these lead, in my opinion, to the assumption that the judges would not have found the defendants guilty if their conduct had not evidenced their negligence. Consequently, decisions in which defendants were sentenced without any evidence of their negligence should be frankly acknowledged as erroneous.

Perkins has remarked that "the so-called 'strict liability' means much more strict than usual, but it does not mean that the doing of the prohibited act requires conviction under any and all circumstances."¹²⁷ Obviously, much stricter than usual is a defendant's liability when with regard to his profession or special licenses he is expected to observe special care in his dealings with other people or in possibly endangering them by his conduct. The standard of *his* negligence is not the conduct of a prudent man in general, but the conduct of a conscientious man of his profession or licensed activities.

III. THE DOCTRINES

Passing on to Hall's doctrines, we must remember that they are not to be understood as theories in the usual meaning of this term, but as "propositions more general than the rules but lacking the extensiveness of the principles."¹²⁸ Their function is to complete the specific crimes. "[O]nly after the doctrines have been added to the rules has the penal law, i.e., the definitions of all the specific crimes, been fully stated."¹²⁹ Thus, "a complete definition of specific crimes must always include the doctrines."¹³⁰ However, "the rules provide definitions of the 'normal' criminal conduct of 'normal' persons committing specified harms in 'normal' situations."¹³¹ The doctrines, on the other hand, are mostly concerned with "unusual or abnormal states of mind or situations."¹³² Therefore, "the terms of the rules are to be given the meaning required by the doctrines in their affirmative significance."¹³³ In other words, since "the rules do not completely define

the specific crimes," their meaning "must be determined by incorporation of the relevant doctrines in their affirmative significance."¹³⁴

The starting point of Hall's train of thought, to wit: most of the doctrines concern unusual or abnormal situations, has its parallel in the German doctrine of the "negative Tatumstände," i.e., negative material circumstances, such as self-defense, legitimate commands, consent, and so on. The legal effect of these circumstances is that the action is not illegal, and therefore no crime is committed. The effects of Hall's doctrines, in contrast, are most heterogeneous: Insanity and infancy absolutely exclude criminal capacity; intoxication and mistake may exclude responsibility; coercion and necessity exclude free will, a basic element of *mens rea*; attempt and complicity are modalities of committing crimes; solicitation and conspiracy are *delicta sui generis*. These structural and functional differences of the subjects of the doctrines, on the one hand, and Hall's proposition, on the other hand, repeated time and again, though phrased differently, "that law is fully stated when the doctrines are added to the rules," provokes the following question: How is the unexceptive requirement of the "incorporation of the relevant doctrines in their affirmative significance" to the rules to be carried out when their effects on the *mens rea* are not as obvious as in the cases of insanity or infancy?

A. Complicity, Solicitation and Conspiracy

Complicity is by reason of its nature of affirmative significance. Added to a specific crime it marks this crime as an exception from the rules which by imputing the act to one person only "provide definitions of the 'normal' criminal conduct . . . in 'normal' situations." Thus, by incorporation of complicity, not "normality" of the situation is determined, but just contrariwise an abnormality.

In the administration of justice as well as in textbooks solicitation and conspiracy are justly conceived to be *delicta sui generis*. Nevertheless, a negative significance of these terms may be recognized in relation to the crimes solicited or conspired before these crimes are committed. It is in their commissions in which the affirmative significance of solicitation or conspiracy may be found. However, when the solicited or conspired crime is committed, the conspiracy is no longer

¹²⁶ P. 357.

¹²⁷ PERKINS, CRIMINAL LAW 695 n. 12 (1957).

¹²⁸ P. 17.

¹²⁹ P. 19.

¹³⁰ P. 21.

¹³¹ P. 21.

¹³² P. 19.

¹³³ P. 22.

¹³⁴ P. 21.

(as in former days) considered to be merged in it but is punished independently of it, while solicitation takes on the meaning of aiding and abetting, and the solicitor is punished as principal. Thus, there is no incorporation of solicitation or conspiracy in the crime committed. They only may be useful as evidence. Hall does not explain how the doctrines of complicity and solicitation and conspiracy are to be incorporated "in order that complete definitions of crimes be provided."

B. *Criminal Attempt*

Likewise I could not find any indication for completing the definitions of specific crimes with regard to the doctrine of *criminal attempt*. Hall defines the aim of this doctrine in the section on "Rules and Doctrine" in chapter 15. It "emphasizes the common features of all the harms described in the rules defining specific criminal attempts."¹³⁵ These specific attempts are, if I understand Hall correctly, consummated crimes. Consequently, there is no reason for making use of the doctrine of criminal attempt so that the definitions of these crimes be "fully stated." But "these descriptions are particular instances of the doctrine."¹³⁶ This presumably means that the doctrine is to be applied to all attempts adjudicated in accordance with a general definition of attempt, as for instance that given in article 1, section 2 of the Penal Law of the State of New York. If in these cases the doctrine of criminal attempt is applied in its "affirmative significance," i.e., not indicating an abnormal situation, the consummated crime would be put in the place of the crime attempted. But it is the consummated crimes which, save the exceptions of the "specific attempts" mentioned above, are described by the rules. Therefore I cannot conceive what the doctrine of criminal attempt in its affirmative significance might contribute to the complete description of the crimes in question.

In the section on "Preparation and Attempt" in chapter 15, Hall reviews the difference between preparation and attempt. He reminds the reader of the efforts to define the attempt by descriptive terms such as "moving directly toward the commission of the offense," "the commencement of consummation," "direct movement, tending immediately," "proximately," and so on.¹³⁷ Hall seems to be inclined to dismiss these criteria

as "a mere formality."¹³⁸ This is understandable in view of their variety. However, the criterion "commencement of consummation" means the same as the formulae "*commencement d'exécution*" in the French penal code and "*Anfang der Ausführung*" in the German penal code, both terms implying the beginning of the punishable action. This criterion serves as a very usable yardstick, since it covers any action which due to its natural coherence with the specific crime appears to be part of it. Hall prefers the criterion of the "proximateness" of the harm done to the intended ultimate harm.¹³⁹ Hereby he shifts the center of gravity of the problem from the act as such to its effect. However, not only the attempt but also the preparation of the crime endangers social interests and is in so far harmful. Since under this viewpoint there is, as Hall admits, "no essential difference between states of preparation and criminal attempts,"¹⁴⁰ the boundary between preparation and attempt would depend solely upon the question of the degree of danger brought about by the preparation. For determining this degree there is no other gauge but the free estimate of the judge.

With regard to the so-called impossibility of an attempt, Hall dismisses the distinction between factual and legal impossibility, as to which different legal consequences were generally recognized in American adjudication until *Faustina v. State of California*, 345 P.2d 543 (1959). Hall rejects this distinction as untenable, since the "view of 'legal impossibility' has no greater validity than the earlier theory of 'absolute impossibility'."¹⁴¹ He prefers as the criterion the "apparent objective risk of harm."¹⁴² But the probability of success must have appeared high.¹⁴³ "This suggests that the reasonableness of the effort provides a limitation."¹⁴⁴ In other words: The principle of legality is observed and punishment is justified if the perpetrator reasonably deems those external facts existent which would lead to the desired effect if they were in fact existent. Decisive is therefore the *mens rea* of the perpetrator manifested by his conduct which would have caused the effect if the circumstances had been congruous to those he believed to be existent.

¹³⁸ P. 579.

¹³⁹ P. 583.

¹⁴⁰ P. 583.

¹⁴¹ P. 590.

¹⁴² P. 591.

¹⁴³ P. 592.

¹⁴⁴ P. 592.

¹³⁵ P. 575.

¹³⁶ P. 575.

¹³⁷ P. 578.

This standpoint corresponds to the so-called "*subjektive Theorie*" of the former German *Reichsgericht*, not recognized, however, but vigorously opposed by almost all German writers on criminal law. In limiting responsibility by demanding "reasonableness of the effort," however, Hall makes allowance for an objective criterion relative to danger. Hereby he recognizes the distinction between dangerous and non-dangerous conduct within the realm of impossibility. I wonder how far Hall's criterion of the "reasonableness of the effort" is compatible with his statement: "There are no degrees of impossibility and no sound basis for distinguishing among the conditions necessary for the commission of the intended harm."¹⁴⁵

C. Mistake

Hall's arguments concerning the doctrine of *mistake* are oriented on the contrasting legal proverbs "*ignorantia facti excusat*" and "*ignorantia juris neminem excusat*." The rationale of the first proverb is explained by the insight that "the morality of an act is determined by reference to the actor's opinion of the facts, including his erroneous beliefs."¹⁴⁶ Thus, mistake of fact is a defense provided that the actor's *mens rea* was lacking due to the fact that he did not doubt the morality of his act. This should be conceded if his perception of the facts, "as they reasonably appeared to him,"¹⁴⁷ would exclude criminal liability. By the requirement: "as they reasonably appeared to him," the behavior of a "reasonably cautious and prudent person" is introduced as a criterion. If the actor's behavior does not correspond to this standard, i.e., if he acts unreasonably, he is "criminally liable despite the complete lack of criminal intent."¹⁴⁸ This means, in my opinion, that his responsibility for an act done intentionally, but without the care of a reasonably cautious and prudent man would have shown with regard to its consequences, is, in the last result, based on the blame of negligence. Hall's qualification: "mistake of fact is a defense if, because of the mistake, *mens rea* is lacking"¹⁴⁹ should be accepted under the proviso that the mistake was not caused by negligence.

In his contribution to the discussion on *error*

juris, Hall's starting point is the demand of reliance upon legal authority.¹⁵⁰ Individual opinions and non-authoritative declarations are of no validity. This is, according to Hall, "the rationale of *ignorantia juris neminem excusat*."¹⁵¹ According to this rationale ignorance means lack of coincidence of the defendant's opinion "with the subsequent interpretation of the authorized law-declaring official."¹⁵² The recognition of the formal principle of legality implied in this statement appears justified if we admit that the criminal law expresses the moral ethics of the community which are meant to serve as everyone's guidance. For "the simple morality that is relevant to criminal law" can be understood by any normal adult.¹⁵³ It is this understanding, not "knowledge of formal penal law" that is at the bottom of the axiom "*ignorantia juris neminem excusat*."¹⁵⁴

If the perpetrator's conduct is blameworthy because it is contrary to the simple morality of the criminal law, the blame must be limited to errors relative to proscriptions of the criminal law. Ignorance of private law is not inconsistent with the ethical principles expressed by the rules of criminal law and is to be "treated as a mistake of fact."¹⁵⁵

Two objections may be permitted: First, cases of fraud and of bigamy often give rise to ardent discussions as to whether the mistake in issue was avoidable or not. In borderline cases the simple morality of criminal law is often clouded. Secondly, if a mistake of private law is treated as mistake of fact, a proviso should be made that the mistake is not excusable if it was avoidable by greater care on the part of the defendant.

Incidentally, Professor Hall's standpoint reminds us, as in the case of the impossibility of an attempt, of the position taken by the former German *Reichsgericht*, which distinguished between mistakes concerning criminal and non-criminal (*ausserstrafrechtlichem*) law. Only the latter mistake was declared excusable. However, the distinction did not prove satisfactory and therefore has been considered untenable by almost all German scholars. After 1945 it was relinquished by the *Bundesgerichtshof*, the successor to the *Reichsgericht*.

¹⁴⁵ P. 589.

¹⁴⁶ P. 363.

¹⁴⁷ P. 366.

¹⁴⁸ P. 367.

¹⁴⁹ Pp. 365-66.

¹⁵⁰ P. 382.

¹⁵¹ P. 383.

¹⁵² P. 383.

¹⁵³ P. 413.

¹⁵⁴ P. 413.

¹⁵⁵ Pp. 394, 399.

D. *Necessity and Coercion*

The last subjects that remain to be mentioned among the doctrines are *necessity* and *coercion*. There is no difference of opinion relative to the meaning of these terms: People acting under necessity or coercion harm persons innocent of any wrongdoing. Furthermore, there is no doubt that a cause for arguing about such actions exists only if the physical force (in the case of necessity) or compulsion (in the case of coercion) was not irresistible, so that the free will of the person under pressure was not excluded. Questionable remain the legal consequences: Do necessity and coercion *justify* the acts that harm innocent people, or only *excuse* them? Since this question is commonly placed in the foreground of discussion, I am surprised by Hall's preliminary statements that "[E]xcuse and justification are pertinent and useful in procedure But they are fallacious and misleading when they are applied as notions of substantive penal theory."¹⁵⁵

Justification and excuse are terms indicating the consequences of acting under pressure, as they do for instance in cases of self-defense and command or order. In all such cases there is no punishment, provided the act was in fact justified. I would not know of any reason more stringent than the exclusion of punishment which would lead to the conclusion that necessity and coercion are parts of the system of substantive criminal law. Incidentally, it seems strange to me to find the essential arguments concerning justification and excuse not in chapter 12, "Necessity and Coercion," but in chapter 7, "Harm." If it is the pressure exacted by necessity or coercion on account of which a person is not held responsible, then it is his acting, not the harm caused by it, which is justified or excused. This becomes evident when for instance A, who wants B to be killed, instigates him to attack C, and C kills B in legitimate self-defense. By using C as his instrument, A is responsible for the death of B because A's conduct is not justified, but punishable as a purposely committed crime.

As to the question under which conditions actions under pressure are justified or only excused, Hall seems to reject this distinction *a limine*. He refers approvingly, if I am not mistaken, to the doctrine "that a very high probability of complete destruction by physical forces is a justification for sacrifice of some to save some, provided the method

of selection is fair."¹⁵⁷ If this would be so, the person chosen to be sacrificed would not have the right to defend himself! As to coercion, the distinction, he says, breaks "down completely."¹⁵⁸ Nevertheless, Hall admits "that the coerced person is justified in certain situations and that the coercer is nonetheless liable."¹⁵⁹ On the other hand, Hall realizes that "if coercion is a form of justification, then, in the usual mode of analysis, the coercer should not be liable"¹⁶⁰

There can be no doubt that he is liable, because in the first place he uses another person as his instrument, and in the second place the act of the coerced one is not justifiable, but only excusable. This conclusion, however, appears to Hall untenable since the coerced person remains according to American law responsible for murder, in Canada even also for kidnapping, assisting in rape, mayhem, arson, and other offenses.¹⁶¹ These exceptions, in which the coerced person is under the obligation to disregard the danger imminent to himself if he is asked to inflict grievous harm onto innocent people, necessarily leads, in my opinion, to the conclusion that the doctrine of coercion includes the requirement of evaluation; in other words, the coerced person may cause some small harm to an innocent person in order to prevent grievous harm to himself, but he is not permitted to cause equal or more grievous harm to an innocent person. To Hall, on the contrary, those exceptions prove that coercion does not create an excuse; for "excuse implies complete exculpation, as in insanity or infancy, no matter what harm was committed."¹⁶² Against this argument I may submit that the effect of coercion in modifying criminal responsibility depends on the foresight of the legislators or on the opinion of the court, whereas insanity and infancy are circumstances which absolutely exclude responsibility by reason of the lack of criminal capacity. Thus, any inference from the latter circumstances to the former relative to their effectiveness is not persuasive.

CONCLUSION

The reader will agree that in reviewing Hall's *General Principles of Criminal Law* I have remained within the limits of immanent criticism.

¹⁵⁷ P. 434.

¹⁵⁸ P. 235.

¹⁵⁹ P. 236.

¹⁶⁰ P. 235.

¹⁶¹ P. 235.

¹⁶² P. 235.

¹⁵⁶ P. 233.

I deemed such criticism necessary since juridical logic led me to results different from the author's statements relative to the scope of his principles, and contrary to the thesis concerning his doctrines, summarized on page 21, that "A *complete* definition of specific crimes must *always* include the doctrines."

Questioning the cornerstones of Hall's system means, of course, questioning the concinnity of his system as such. Nevertheless, the author's endeavor to build up a system of criminal law undoubtedly is meritorious. It will prove to be a steppingstone and an incentive for further development of the system of criminal law.