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Book Review

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previously thought to be desirable. It was said, for instance, in *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 A. 97, 14 L. R. A. (N. S.) 304 (1907) that "If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded . . . , we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity"

Although equity jurisdiction in the present case seems to be justified, it is most important to pay heed to the fears of those who prefer to limit such authority. The deprivation of jury trial to the defendant, the substitution of judicial penalties for contempt in place of definite legislative penalties, the possibility of arbitrary exercise of power in equity, and the likelihood that the public will regard extensive equity jurisdiction as an indication that we have government by injunction are factors which should be uppermost in the minds of those charged with fixing the bounds of equitable relief.

Charles T. Dunn.

BOOK REVIEWS

GENERAL PRINCIPLES OF CRIMINAL LAW. By Jerome Hall.¹ Indianapolis: Bobbs-Merrill Company, 1946. 600 pages. \$7.00.—*General Principles of Criminal Law*, by Jerome Hall, is more than a monograph. It is a scholarly comprehensive and discriminating presentation of general principles. It represents a distinct contribution to legal literature by one of the foremost present day students of criminal jurisprudence. The author of *Theft, Law and Society*, and editor of *Readings on Jurisprudence* has produced a work that does not belie its name. *General Principles of Criminal Law*, as conceived by the author, is conditioned by developments in the history of the law and of legal thought and scholarship, as well as present day thought and legislation, not only in America, but also in other countries of the world, whose experience, thought, and scholarship have relevant contributions to make.

Excellent judgment has been used in selecting the fundamental questions to be considered in the fifteen chapters of the book. The writer brings in a sufficient amount of legal history and comparative law to remind one that a title *Comparative Criminal Law* might be almost equally appropriate.

A listing of the principal topics will give an idea of the range of this work which covers about six hundred pages: Criminal Law Theory, The Principle of Legality, Criminal Intent, Mens Rea and Culpability, Objective Liability, Interrelations of Criminal Law and Torts, Criminal Omissions, Ignorance and Mistake, Necessity and Coercion, Intoxication, Mental Disease, and finally Criminology and Criminal Law.

It is possible that the author overemphasizes the importance of general principles when he says (page 15):

Thus, the substantive criminal law is like a mighty tree. The fundamental principles are the deeply grounded roots that support the entire massive structure. The trunk is composed of the general doctrines, firmly interwoven, mediating between roots and branches. These last consist of the profuse array of specific crimes. The tree's vital juices flow unimpeded from roots to branches; so, too, from fundamental principles to specific rules run common notions binding the diverse forms in significant unity. Just as no one can

¹ Professor of Law, Indiana University.

understand branches apart from trunk and roots or either of these apart from the others, so, equally, is it impossible to understand the specific crimes in isolation from the doctrines and the fundamental principles or either of these in separation from the rest.

It might be observed here that in a tree there are no "vital juices," only water in which certain elements are suspended. Also the "flow" is not free but is frequently interrupted by the necessity of lateral action — a sort of a zig-zag movement. Moreover the "flow" is not merely from the roots to the branches, but there is a corresponding "flow" from the branches to the roots. Thus, though admittedly implicit if indeed not express, the "flow" from the specific crime and its relevant rules to doctrines and fundamental principles might properly have received more emphasis.

One of the highly significant contributions of the book is the careful presentation of historical backgrounds which are presented throughout the book where relevant. Another equally significant contribution is the author's evaluation of writings of numerous authors in the various fields of criminal law and criminology. Perhaps it would be unjust to describe this work as iconoclastic but certainly it may be said the author does not hesitate to challenge an idea merely because its author is eminent. For example: the writer does not mince words in taking issue with the Holmes doctrine of objective liability. It might be said too, that in the opinion of this writer the book contains a sound attack upon the Holmes theory. While I agree with the author that it would be undesirable to adopt the objective theory for all criminal offenses, I feel that the author is wrong in contending that penal treatment should be limited to cases where there is moral culpability. This limitation would not be workable. Neither would it be desirable in an enlightened democratic society, unless we redefine moral culpability, *mens rea*.

I can see no sound reason for denying to the state the use of criminal sanctions to accomplish socially desirable ends where, in the reasoned opinion of the social unit involved, such sanctions are necessary, even though the proscribed act does not involve moral culpability in the sense conventionally understood.

On the question of the relations between civil wrongs and criminal wrongs, I agree with Kenney that they "are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being not one of nature but one of relation." The state furnishes the sanction in each field. If the state is dissatisfied with the effect of tort sanctions it may and occasionally does super-add criminal sanctions. Many jurisdictions expressly provide that where a person suffers damage as a result of a breach of criminal law the criminal shall also respond to him in damages. Thus in present day law we have many acts which are wrongs in the tort sense and also are proscribed by criminal law. Thus it is not enough to say that there is a moving line between tort law and criminal law as to the fact situations involved. It must be said as Kenney puts it that tort wrongs are often also criminal. Thus it seems doubtful wisdom to stress the distinctions and slight the common elements except as this is done for the sake of clarity.

Among other arguments for the distinctness of these two branches of the law the author turns to legal cause to reinforce his point. He seems to identify legal cause in tort law with *sine qua non*. For example on page 258, we find "common sense ideas of causation (*sine qua non*)" and on page 259 "causation and the common sense cause of it (*sine qua non*)."

He argues that *sine qua non* is inadequate for criminal law analysis saying, pages 258, 259:

In torts, the tendency is to lay the total damage 'caused in fact' at the door of the harm-doer, especially if he intended to commit any tort, with little

concern for the foreseeability of what actually happened. But in penal law, with distinctive objectives and sanctions, defensible on moral grounds, there usually is and should always be a sharp differentiation of causation from intentional or reckless harm-doing. *Sine qua non* is too crude a notion to be employed here.

No one conversant with the problem would argue that *sine qua non* is adequate for the objectives of criminal law. But likewise no one in the tort field is satisfied with *sine qua non* as a guide in torts. This is the view of the American Law Institute² and the view generally held by writers on tort law. Thus on pages 322-323 of Prosser on Torts, we find the following definition of the "but for" rule:

From such cases many courts have derived a rule, commonly known as the 'but for' or '*sine qua non*' rule, which may be stated as follows: The defendant's conduct is not a cause of the event, if the event would have occurred without it. At most this must be a rule of exclusion: if the event would not have occurred 'but for' the defendant's negligence, it still does not follow that there is liability, since considerations other than causation, which remain to be discussed may prevent it.

Thus the differentiae between criminal law and tort law seem to receive over-emphasis if not exaggeration.

The most surprising idea presented in the book is that which favors the legislative fixing of punishment, as against a rather sharp separation by which guilt or innocence is ascertained and subsequent treatment is determined upon.

On the subject of *nulla poena sine lege* the author in part says:

Several common traits characterize these revolutionary authoritarian movements whether they abrogated or retained the principle of legality. Special police are exempt from legal constraint; they arrest, try, execute, and exile without legal restraint. Appeal is limited or non-existent. Special tribunals for the trial of political offenders may be depended upon to effectuate the will of the government. There is sweeping abrogation of constitutional guarantees. All of this is rationalized and sustained by controlled philosophic thought, as interpreted by the leaders to implement their political aims. The salient feature of authoritarian political theory in its attack on *nulla poena* consisted in stressing the paramount importance of the Community. The subordination of the individual was the obvious corollary. Thus, during revolution, law, especially criminal law, is used as a party weapon

If the present specific devices for preserving and developing these values are to be supplanted by unlimited discretion which, if honest, informed and controlled, does without doubt have an important, proper function to perform, what instruments and methods are to be provided in their place which can safeguard what is paramount? In the light of the above discussion, it is necessary to conclude that there should be a strong presumption in favor of the principle of legality within the sphere of criminal law. The burden of proof should be on those who claim superior knowledge and ability to attain better results by extra-legal methods.

The present tendency seems to be contrary to the ideas expressed above. Noteworthy in this respect is the resolution of the round table on Criminal Law of the Association of American Law Schools at the 1946 meeting, which calls upon the American Law Institute for the formulation of a model code of criminal law and emphasizes that special consideration and emphasis should be placed upon the treatment of the criminal. The abuses of authoritarian governments are to be avoided of course. But likewise would it not be almost equally unsound to

² RESTATEMENT, TORTS (1934) § 431, comment a.

authoritatively legislate in advance the exact punishment which would in all cases be allocated to a particular offense?

The author presents a careful classification of types of fact situations relevant to injuries inflicted by intoxicated persons. He favors corresponding differentiations in punishment. It is thought that such a technique however sound in theory would not prove equally sound in application. The loopholes that would be thus presented to resourceful defense counsel would probably do more harm than good.

In cases involving mental disease, law's need for guidance through the progress of medicine, psychiatry and related techniques is undeniable. I would agree we should keep the expert "on tap" but wonder if substantially he should not also be "on top."

The author's proposals for equal penal treatment for omissions with acts is reflected very little in present day law in America. There, as elsewhere throughout the work, the author is consistent with his thesis against making any conduct penal where there is no normal culpability in favoring penal treatment where moral culpability appears, even where such culpability takes the form of failure to act.

** John W. Morland.*

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