Toward a Rational System of Criminal Law

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by Paul K. Ryu and Helen Silving
Jurisprudential Background

The history of legal development from primitive law to mature, civilized law and from the latter to skeptical law is marked by a progress from ritualistic or sense-perceived law to conceptualized law and by a subsequent breakdown of the thus evolved concepts. The present stage may be best characterized as one of a new conceptualization—namely, formulation of new systems of concepts, perhaps best represented by the system of Kelsenian jurisprudence, on the one hand, and that of American legal "neo-realism" of the Lasswell-McDougal school, on the other hand.

In primitive law the process of law administration possesses an independent existential status. There is no legal reality behind legal processes: the ritual of law is law itself. Law may be thus perceived by the senses. This primitive stage is overcome once men begin to ponder over the "why" of the ritual, asking themselves questions such as, "Why do we execute the person?" Whatever reason is advanced in answer to such question, that reason must bear this significant characteristic: It must be formulated or susceptible to being formulated in terms of a certain minimum degree of abstraction. Once a beginning is made in the direction of abstraction, conceptualization progresses steadily, and there occurs a peculiar phenomenon: concepts move into the limelight of interest, acquiring a certain independence from the actual fact situations which gave rise to their formulation. Those who apply law begin to act as though these concepts rather than the concrete issues were at stake in law. Incident to this phenomenon is a growing rigidity of the law. From a need to give effect to actual social needs and to relax the rigidity of law there in turn arises a trend toward de-conceptualization of law. Lawyers begin to realize that legal concepts were meant to be servants and not masters of the law and have been unwittingly made its masters.

The struggle against the dominance of legal concepts was decisively launched by the juristic theories of Jhering and Eugen Ehrlich. Jhering ridiculed the overemphasis of concepts in German jurisprudential doctrine, demanding recognition for the significance of "purpose in law" and treatment of concepts as incidental to such purpose. Ehrlich contended that not only is law not exhausted in concepts but that there is a legal reality of social life and custom to which artificial conceptual law must ultimately yield, "living law" being by its very nature more powerful than book law or statutory law. In turn, Hans Kelsen in Europe, on the one hand, and the American legal realists, Walter Wheeler Cook, Karl Llewellyn and Jerome Frank, on the other hand, applied to legal concepts a devastating critical analysis proceeding from an operational notion of law. Both Kelsen and the American realists posed the question of what given concepts, such "law" and "fact," "procedure" and "substance," "public" and "private law," "subjective" and "objective law," (right) actually mean in practical operation, that is, whenever one attempts to interpret them in term of legal process or legal activity. They showed that when thus analyzed, many legal concepts have no operational meaning whatever, while
other legal concepts have a meaning that is different from that attributed to them by traditional jurisprudence. As regards the latter meaning, these scholars pointed out that it is not a social meaning but rather one resembling the meaning of theological concepts and that the method whereby such meaning is applied in law is comparable to the method of theological hermeneutics. They said that what traditional legal scholars mostly do when engaged in conceptual jurisprudence is deducing from legal terms a meaning which these scholars previously placed into these terms under the guise of a finding of preexisting meaning. Kelsen, as is well known, was not contented with such critical analysis alone. He thence proceeded to construct a systematic jurisprudential conception of the legal order, geared to possible law, a conception of law as it may be rationally interpreted in "pure," that is, in specifically juristic, formal terms. On the other hand, the so-called "Law, Science and Policy" school of Lasswell and McDougal has been engaged in formulating a new legal axiology in terms of a new idea of rationality of law in a substantive sense, geared to a scientifically rationalized purpose.

The described jurisprudential development is reflected in all fields of law. It is also observable in the field of criminal law. However, in this field conceptualism in the traditional sense plays a distinctive role, fulfilling a more significant social purpose than in other fields, for "legality" or the "rule of law," which is of paramount importance in criminal law, demands conceptualization. But in the interest of legal rationality it is desirable to guard against misdirection of the conceptualization necessary to maintenance of the rule of law by permitting the concepts introduced to serve this purpose to turn into autonomous values, applicable apart from the requirements of legality. Such misdirection is characteristic of the trend known in the legal literature of civil law countries as "science of criminal law," Strafrechtswissenschaft or Strafrechtsdogmatik, Sciencia or dogmatica penal, a trend dominated by German legal thought. If we are to formulate a system of law consciously directed toward fulfillment of the chosen social purposes for which law is created, we must first disencumber our thinking of the barrage of misconceptions introduced into it by this German "legal science." Only then can we proceed to clarify in our minds what it is that we expect to achieve by means of criminal law and how our expectations can be best fulfilled. A critical analysis of prevailing jurisprudential conceptions must prepare the ground for a new rational methodology and a new conscious axiology.

The Origin and Function of the
"Science of Criminal Law"

The so-called "science of criminal law" is not a science at all unless we understand by "science" any systematic structurization of anything. Of course, whatever it is that we systematize, we always proceed from some particular principle of systematization. We may thus systematically conceive of a poem in a variety of ways: in terms of its grammatical structure,
its aesthetic composition or its logical meaning. We systematize for a purpose and while at
times the structurization undertaken for one purpose may also bear on another purpose—for
example, the grammatical structure of a poem may have a bearing on its aesthetic composition—
this need not always be the case. Often a poem may be grammatically incorrect but
quite poetic in an aesthetic sense. It is hence important that we bear in mind at all times why
and under what principle we systematize our object of interest. What is the principle under
which the so-called "Strafrechtswissenschaft" systematizes criminal law? We may answer this
question best by proceeding from historical developments.

When men began to rationalize their legal conduct, they did not at once perceive a total
image of a system of overall justice, governing all aspects of life. They rather had but a dim
notion of right and wrong as applicable to concrete situations. This notion then developed,
growing in degree of abstraction and comprehensiveness. We assume that in time there emerged
an idea of "right and wrong," "good and evil," to which substance was gradually given as
concrete situations were presented for decision. People knew that a conduct could be righteous
or wicked, but under what specific conditions it was the one or the other was not generally
formulated. This was rather a matter to be determined on a case to case basis, although of course
the belief prevailed that such determination was not in the nature of "decision-making" but
rather in the nature of a "finding" of a pre-existing Divine Law or Revelation, Justice or
Reason. In the course of events, the idea of "right and wrong" became paramount to any
concrete right or wrong. From such abstract idea of "wrong"—Unrecht—there then developed
the notion of "illegality," Rechtswidrigkeit, antijuricidad.

While the idea prevailed that "right and wrong" can be found by judges as a preexisting
reality, in practical operation such process of alleged "law-finding" was mostly a process of
arbitrary decision and of exercise of absolute judicial power of law-making. To put an end to
this system of arbitrary justice, there were invented the ideas of rule of law and of separation
of powers. What exactly is "rule of law"? It is a system in which concrete judgments, judgments
rendered in individual cases, are required to conform to a general idea of justice, concep-
tualized in advance of judgment and indeed in advance of the conduct charged as criminal.
Nulla poena sine lege means that to be punishable a conduct must conform to a general type
of conduct described and proscribed by law, and nulla poena sine lege praevia means that
such law must be in force in advance of the concrete criminal conduct.

The idea of "rule of law" or "legality" is not necessarily positivistic. For "law" which,
within a system of such rule, must govern human conduct is not by definition a formally
pronounced command of a sovereign power. It may be any type of law thought to be valid.
Thus, it might be a law derived from a notion of Divine Will or Revelation or Reason,
provided that the contents of such Will or Revelation or Reason be deemed cognizable. How-
ever, at a decisive stage in the history of ideas "lex" in nulla poena sine lege came to mean
statutory law to the exclusion of any other law. For formal legislative statement of proscription
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was taken to afford the only sufficient guarantee of precision in limitation of the area of prohibited conduct, that might bar judicial arbitrariness, and the only satisfactory method of giving the potential offender advance notice of that which he must not do to avoid punishment. Attention became focussed on the description of criminal conduct in a statute or a code. Thus there emerged the notion of Tatbestand, meaning (1) the abstract description of criminal conduct in a statute and (2) an actual conduct or life event conforming to such description. To be punishable, a conduct must qualify as "tatbestandsmässig" in the sense of fitting an abstract statutory description of proscribed conduct.

What is the relationship of such a notion of Tatbestand to the old notion of "wrong"? "Legality" or "law" demands that a notion of "wrong," to be applicable as a standard of judgment, must have been incorporated in a Tatbestand of law. It would thus seem that with the emergence of the Tatbestand no room has been left for the idea of pre-legal or supra-legal "wrong." This, in fact, is the contention of positivistic jurists. By contrast, those legal writers who adhere to an idea of natural law maintain that the Tatbestand does not exhaust all that is legally "wrong," but that there is still present in law a general notion of the "wrong" or the "right" antecedent and paramount to specific legal enactments. The controversy is particularly acute as regards the area of exemptions. Positivists contend that the positive law itself in separate provisions modifies the Tatbestände that give rise to responsibility, introducing exceptions or justification grounds, which are also formulated in Tatbestände, except that these Tatbestände are "negative," in that they exclude otherwise obtaining responsibility. These writers claim that, indeed, the area of "illegality" is reducible to "negative Tatbestände." On the other hand, there are those who assert the autonomy of exemption grounds, pointing out that there is a difference between killing a man in self-defense and killing a mosquito, even though in neither situation is the actor held responsible. (1) These authors stress, beyond the Tatbestände of exemptions, the moral "atmosphere" surrounding these exemptions, often interpreting it as but a particular reflection of the general natural law "climate" of all law.

In the course of the struggle over the demarcation line, if any, between "Tatbestand" and "wrong," the latter has been formalized into a more definite concept, called "illegality," Rechtswidrigkeit. While a vigorous controversy over its positivistic or natural law basis is being waged in doctrinal writings, the German Bundesgerichtshof, perhaps inconsistently with otherwise manifested trends, adopted the positivistic position that "Rechtswidrigkeit" is but "negative Tatbestände." (2)


(2) See Decision of the Bundesgerichtshof in Strafsachen of June 6, 1952 (1. Strafsenat), in Entschei-
dungen des Bundesgerichtshofes in Strafsachen, vol. 3, p. 105 (1953), at 106, 107 (decisions of the Bundesgerichtshof are hereinafter cited in this form: BGHSt. 3, 106, 107 (1953)). On the controversy regarding classification of error as regards presence of circumstances of justification as an "error regarding the Tatbestand" (Tatbestandsirrtum) or an "error regarding a prohibition"
A third factor lifted out of the general description of crime is “guilt,” Schuld, culpability. This most elusive concept was defined in classic criminal law simply as the mental element of crime, intent or negligence. Under the impact of the doctrine of Rheinhard Frank, Dohna and others, there was added to the mental element another component of “guilt,” namely, the normative factor of “blameworthiness.” Finally, Hans Welzel, claiming that the mental element is so closely connected with the criminal “act” that their separation is not even theoretically thinkable, concluded that the Tatbestand comprises the mental element, leaving as “guilt” factor exclusively “blameworthiness.” (3) Accordingly, Welzel and, following him, the Bundesgerichtshof define “guilt” as “blameworthiness.” (4) At present classification of the mental element within the Tatbestand or within “guilt” is the subject of vigorous doctrinaire disputes.

One might query why a demarcation line is being drawn between “guilt” as blameworthiness and “illegality,” if, as Welzel and other adherents of the “normative theory of guilt” contend, “illegality” is a comprehensive natural law concept, also implying “blameworthiness.” But we need not dwell upon this point, since we have more fundamental doubts regarding the scope of the significance attributed by civil law scholars to the total tri-partite division of crime into Tatbestand, illegality and guilt.

We are now ready to answer the question regarding the principle under which the so-called “Strafrechtsdogmatik” originally systematized crime by dividing it into three constituent elements, “Tatbestand,” “illegality,” and “guilt.” This division was devised to secure establishment and maintenance of the “rule of law.” Modern democratic criminal law philosophy demands that to be punishable a human conduct must satisfy these three essential requirements: [1] it must fit into a statutory Tatbestand, that is, conform to a description of factual circumstances of conduct and attending conditions, as described by a given statute (Tatbestandsmaessigkeit); [2] there must be no circumstances present which, notwithstanding the givenness of a Tatbestand, exclude the illegality of the conduct (“illegality” — Rechtswidrigkeit); and [3] there must be “guilt,” particularly an intent or negligence as required by law (Schuld).

Division of crime into the three constituents is most heuristic as a tool of democratic law. No criminal responsibility should ever be imposed unless all these constituents are present and properly proven. Separate consideration of each of the three crime constituents functions as a most important safeguard permitting one element to be taken as a substitute for another or as a supplement of another where the latter is only partially realized. Separation of crime into the

(1) (Verbotsirtum), see Eduard Dreher and Hermann Maassen, Strafgesetzbuch (Third rev. and enlarged edition, C. H. Beck’sche Verlagsbuchhandlung, Muenchen und Berlin 1959), comment to § 59 StGB, at 113, 114.
(4) BGHSt. 2, 194 (1952); for quotations from and discussion of this leading case on error of law see Ryu & Silving, supra, at pages 449—452.
three constituents makes formulation of essential democratic postulates as regards the type of relationship that ought to exist between these constituents. Justice Jackson notices with praise that jurists of civil-law countries have never accepted the "conspiracy" principle, as obtaining in countries of the common law. (4a) The reason for rejection of this dubious principle has been insistence upon a proper relationship between "guilt" and "Tatbestand," meaning, a clear direction of intent to a specific statutory type of criminal conduct. The division also makes possible establishment of an order of analysis, that serves as an economy device, sparing adjudicators the cumbersome task of engaging in queries which eventually prove to have been pointless. Adjudicators must first find whether a Tatbestand has been fulfilled. If no Tatbestand is present, there is no point to look for the other constituents, for however illegal or guilty a conduct might be, in any of the several senses that might be attributed to these terms, it is not punishable. If a Tatbestand is found to be present, then the adjudicators may proceed to inquire into the question of whether the conduct is also illegal, and only if illegality is also found to be present is there any point in looking into the issue of guilt.

Misapplication of Classificatory Categories to Issues Alien to the Purpose of Classification

While thus the tri-partite division of crime serve as a significant "Illegality" tool, there is a tendency noticeable in civil law countries to invoke it beyond the scope of its usefulness to the purpose for which it was devised. Trapped in the common pitfall of conceptualism, many civil law scholars assume that the concepts of Tatbestand, illegality and guilt represent ontological, existentially fixed, entities, so that it is possible to discover by means of "scientific" method upon mere observation of a factor, and without regard to the established specific methods of statutory interpretation, whether that factor is classifiable as part of the Tatbestand or of illegality or of guilt. By the same token, these scholars believe that once a factor has been thus "scientifically" classified as part of one of the crime constituents, its situs is fixed for all purposes, so that it must necessarily be "scientifically" thus classified within any context other than that for which it was originally classified. From the place thus attributed to a factor within the three-partite division, they in turn infer what legal rules must --- by way of logical or "scientific" necessity --- govern that factor, regardless of statutory interpretation or any countervailing policy consideration. They claim that any rule other than that thus inferred would be "unscientific."

The "science" invoked in these arguments is the "Strafrechtswissenschaft" which has been instrumental in devising the three-partite division. As may be seen from the description of the origins and function of that discipline, it is not a "science" in a proper sense but rather a

systematization of a specific policy purpose based upon a particular criminal law philosophy. While it serves this purpose well, it does not afford an appropriate standard of judgment on issues to which that purpose does not apply. The division of crime into the Tatbestand, illegality and guilt is a functional devise serving the purposes described in the preceding section. When deriving from the situus of a factor within such classificatory categories legal inferences not related to those purposes, civil law scholars and decision makers reach conclusions on sham issues and hence arrive at misguided policy results.

To avoid misunderstanding of the scope of our criticism, it is necessary to emphasize that this criticism is addressed to a particular methodology employed in resolving issues de lege ferenda as though they were de lege lata, as well as issues arising within the border area of lex lata and lex ferenda. In interpreting the law in force, it may often be impossible to avoid drawing inferences from classificatory categories in resolving issues not related in policy to the issues with regard to which the classification was originally made; for but for such device the requirements of the rule of law could not be met as regards the issues to be thus resolved. For example, often a crime could not be legally conceived within existing law unless its Tatbestand were borrowed from another crime, for the Tatbestand of the former was originally conceived as a Tatbestand of reference. The original conception may have been irrational from the standpoint of policy; but to construe a new different Tatbestand for the crime in issue would amount to creating a new crime by judicial interpretation. Adoption of the borrowed Tatbestand is thus the only method of abiding by the rule of law. However, civil law scholars do more than that. They often resolve issues de lege ferenda by such method of “borrowing” elements of one crime from another or argue such issues as if they had a foundation in positive law.

Perhaps a description of the methodology used by these scholars may be best introduced by reminding the reader of well-known examples of so-called “borrowed criminality,” a notion whereby the criminality of an accomplice is not an autonomous phenomenon but it is “borrowed” from the criminality of the principal.

In French and German law complicity in suicide is not punishable simply because suicide itself is not a crime. Since the principal’s act is not criminal, it is argued that neither can the accomplice’s act be criminal. De lege lata, of course, this argument is sound, because unless a special Tatbestand of instigating, aiding and abetting suicide is created, as has been done in Swiss, Italian, Polish and other laws, one charged with such complicity should not be convicted within a system of rule of law for want of a Tatbestand, the normal Tatbestand of complicity resulting from a combination of the general provisions on complicity and the provisions proscribing the pertinent act of a principal. But when the same argument is used in


(6) For citation and discussion of special laws to this effect see Silving, supra, pages 376—378 and notes 105—113.
opposition to introduction of a special Tatbestand of complicity in suicide, it is misleading, for the policy considerations which support immunity of suicide do not apply to complicity in the suicide of another.

French law affords another instructive example of "borrowed criminality." According to this law, if A instigates B to kill B's father, A is punishable for parricide (notice that his accomplice is punishable under French law as severely as the principal), although the victim is not his father; but if A instigates B to kill A's father, who is not also the father of B, neither A nor B is punishable for parricide, but both are punishable for simple murder. (7)

It may be pertinent to note that the result reached in the first mentioned situation is not required by the rule of law, since the latter is intended to protect the accused but should not be used to his disadvantage. In the light of policy considerations certainly no elaboration is necessary on the absurdity of both rules. Other instances of "borrowed criminality" may be less striking but are similarly irrational.

A vigorous controversy is being waged in Germany on the question of whether certain factors are "justification grounds" or "excuses;" for we are told that if they are the former, they are negative "illegality," whereas if they are the latter, they merely exclude "guilt." Nor is this but a theoretical dispute; on such classification are deemed to depend most significant legal consequences. We are informed that one cannot be an accomplice to the act of another unless the latter's act is "illegal,"(7a) whereas mere absence of "guilt" on the part of the principal does not preclude complicity. (8) It may be interesting to observe the practical results of this type of legal inference from a classificatory category where the classification was made without regard to the issue that is involved.

Self-defense is generally considered a "justification ground" and an act of self-defense is deemed to be "not illegal." Let us assume that D, unaware of the fact that N defends himself against P's assault and believing N to be the assailant but wishing nevertheless to help him, rushes to his rescue and kills P. Notice that, according to German law, if N had himself killed P without knowing that P was attacking him, in a situation of objective but not of subjective self-defense, N would be punishable on the theory that the exemption ground of self-defense requires the aggressor's "intent to defend himself" (Verteidigungswwille). (8a) In our

(7) Vouin et Leautre, Droit penal et criminologie (1956), page 282.
(7a) See Reinhart Maurach, Deutsches Strafrecht, Allgemeiner Teil (Second enlarged and revised edition, Verlag C. F. Müller Karsruhe 1958), 564.
(8) This is the dominant view (herrschende Lehre). Ibid. But see on less rigid doctrines of "accessority of complicity" id. 564–570. Accessority in the sense of dependence of complicity on the presence of intention on the part of the principal is now asserted in BGHSt. 9, 370, 375 (11. Strafsenat), 1957 (decided July 6, 1956): "Der erkennende Senat ist der Ansicht, dass eine 'Anstiftung zu einer unvorsätzlichen Tat' nach dem geltenden Strafrecht und nach der vom Bundesgerichtshof vertretenen Schuldlehre nicht möglich ist. Er folgt hierbei im wesentlichen den überzeugenden Gründen von Bockelmann und Welzel." On this problem see the critique of Horst Fransheim, Die Teilnahme an unvorsätzlicher Hafttat (Walter de Gruyter & Co., Berlin 1961).
(8a) Maurach, op. cit., supra, 249, and decisions cited there. The rule seems to be similar in American law. Rollin M. Perkins, Criminal Law (Foundation Press, Inc., Brooklyn 1957), 884, and
example, however, there is present a perfect situation of self-defense, and one might say that D acts with "animus socii," in the sense of desiring to "associate" himself with N, though in an act erroneously qualified by D as aggression rather than defense. Could D be punished? Notice that in D's case there are present a Tatbestand as well as guilt and that an absence of "illegality" could be read into the situation only by means of a purely doctrinaire construction, not derived from any statutory source. Yet, if "illegality" or its absence is taken to be an ontological quality, necessarily uniform with respect to the principal and the accomplice, in fact, once fixed as regards the former, imparted to the latter, D's impunity is unavoidably inferred. But this type of legal analysis bars consideration of valid policy aspects that may be totally different in relation to D from those relating to N. Such methods of reasoning tend to obscure the realities of the psychological and social situation which should be considered in determining questions such as, what ought to be the basis and scope of an "accomplice's" responsibility, what is the proper philosophy of self-defense and of the defense of others and under what circumstances a pertinent "defense" quality should be affirmed. We must not forget that "complicity" is a sui generis social and psychological phenomenon, which has not been as yet "scientifically" fully evaluated. Whether a person participating in the act of another should be held criminally responsible, ought to be decided not on assumption of a notion of "illegality" per se but on the basis of an "illegality" concept construed for the purpose of the distinctive complicity situation. But this requires recognition of "illegality" as a relative and not an absolute category.

As it denies the "possibility" of criminal complicity in self-defense on the ground of absence of "illegality" in the latter, so German doctrine also, on the same ground, denies the "possibility" of self-defense against self-defense,(9) as though this were a matter of "logical" argument rather than of policy wisdom. Whether self-defense against self-defense should be admissible, ought to depend not on formal classification of self-defense as "not illegal" or as "excused," but on the ultimate ethical, psychological and social problem that is involved. Perhaps the answer to this question should be made to depend on whether, judging by the totality of the relationship, the person acting in self-defense is or is not psychologically the true aggressor.

The adherence of German doctrine to an absolute concept of "illegality" contrasts with an opposing trend to found each person's responsibility exclusively upon his own "guilt," without regard to the guilt of another. But it is often difficult to conceive of "guilt" as a relative concept while interpreting "illegality" as an absolute one. Thus, in an interesting decision the Bundesgerichtshof held that aiding and abetting principals engaged in "blackmail" could qualify

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n. 10. The total theory of "animus socii" (or auctoris) is absurd in its simplicity. It assumes that human conduct is guided by a single motive, which is in flagrant contradiction to psychological reality.

(9) On this (Gegenontwohr) see Maurach, op. cit., supra, 247.
as "fraud," if the accused did not know that the principals were threatening the victim with action they were going to take against him but thought that they were merely extracting money from him by misrepresentation that a third party was about to take such action. The court thought that it was possible for an accomplice to be "guilty" of a crime different from that of the principal so long as the two crime types had the same basic root—in the case at hand, fraud, also implied in the blackmail. Actually, the two crime types differed not only in "guilt" but also in "illegality," since blackmail implies motivation of the victim by a threat whereas fraud implies motivation by misrepresentation.

Another most pertinent example of the awkward effects of legal ontology is to be found in the law of legal error. Under the impact of a most commendable reform movement, "error of law" has been admitted in Germany as a defense to a charge of crime. As regards the scope of such defense, the doctrine is widely split. Some writers, foremost among them Mezger, assert that knowledge of law is part of "intent," whereas, under the leadership of Welzel, contend that such knowledge is not part of "intent" but is part of "guilt," defined as "blameworthiness." On whether it is the one of the other depends the legal treatment of persons engaged in legal error. From classification of knowledge of law within "intent" or within "blameworthiness" there are alleged to follow significant practical consequences in terms of applicable legal rules. If knowledge of illegality is part of "intent," it must be proven by the prosecution as part of the proof of intent. But if it is part of blameworthiness, there is no objection in principle against reversing the burden of proof. If knowledge of law is part of intent, there can be no conviction for intentional crime in the absence of such knowledge, however negligent the accused may have been in not securing it. But if it is but part of blameworthiness, the accused may be convicted for intentional crime, though his guilt is reduced depending on the degree of his negligence. Since eminently practical results are thus inferable from the position one takes on whether knowledge of law is part of "intent" or part of "blameworthiness," it would seem proper to inquire whence legal doctrine derives its notion of the exact situs of legal knowledge.

The inquirer might be puzzled to learn that the defense of legal error has been introduced into positive German law by judicial legislation influenced by a doctrinal movement of long standing. This judicial legislation, however, is purported to interpret existing German law, in which there is alleged to be imbedded the principle of nulla poena sine culpa. But while all agree that "guilt" (culpa Schuld) is a basic condition of responsibility in German law, the question is wide open as to what is "guilt." Since German legal scholars equally uniformly assert that the definition of "guilt" is a matter of "science" rather than one of law, they


(11) On the described controversy and the legal rules allegedly flowing from the divergent positions see Ryu & Silving, supra, at pages 442–449.
firmly oppose inclusion of such definition in a Penal Code. (12) How does “science” define “guilt?” One school of thought, which might be called the “psychological” one, asserts that “guilt” is or includes “intent” (or negligence, as the case may be) (this doctrine is technically called “Vorsatztheorie”), whereas another school of thought, the “normative” one, contends with equal vigor that “guilt” is but “blameworthiness” (Vorwerfbarkeit) (this doctrine is technically called “Schuldttheorie”). Since knowledge of law pertains to “culpa” in the quoted principle, it is taken to be incorporated in “intent” or in “blameworthiness,” depending on the view one holds as regards the meaning of “culpa.”

When the query is extended to the problem of how “science” determines whether “guilt” is intent or blameworthiness, the answer comes closest to a semblance of “scientific” quality. As will be seen, this semblance is misleading. Welzel claims that his identification of “guilt” with “blameworthiness” to the exclusion of “intent” is derived from a “scientific” observation of the reality of life, in which act and intent are always united. Since the two are thus inseparable, they must be united in the Tatbestand, so that the only factor remaining as constituent of “guilt” is “blameworthiness.” This doctrine, indeed, thus seems to reflect a realistic view of psychological and social phenomena rather than a doctrinaire splitting of life reality into conceptual ingredients. But upon closer analysis, this doctrine also may be shown to proceed from an ontological view of the Tatbestand and of guilt, as though they were entities fixed in life events rather than classificatory categories, artificially created for a definite policy purpose.

To say that since act and intent are inseparable in the reality of life they cannot be conceptually separated for any purpose, is comparable to saying that since the various parts of a human body are united, it is improper to discuss the heart, since it does not exist apart from a body. The fact is that scientific classifications are always artificial and oriented to purpose. Classification is not a true dissection as takes place in an anatomical laboratory but merely a conceptual dissection. The fact that act and intent are united in the reality of life does not constitute a valid ground for not separating them conceptually, provided that we bear in mind in appropriate cases how these two concept may bear on each other. Indeed, a conceptual separation of act and intent makes it at all possible for us to gain insight into the type of relationship that exists between them in the reality of life. Such separation makes it possible in law to formulate certain demands of the rule of law regarding the proper relationship of act and intent, such as that the intent should be directed to a specific Tatbestand. As may be seen, the mere fact that a doctrine’s point of departure is a “scientific” observation does not render the manner of its use “scientific.”

The science that would seem qualified to answer the question of whether knowledge of

(12) After an elaborate discussion the definition of guilt was eliminated from the Draft of a New German Penal Code 1960, See Entwurf eines Strafgesetzbuches (StGB) E 1960 mit Begrundung, Bundesrat Drucksache 270/60 (Bonn 1960), at page 92.
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law is part of "intent" is psychology. But this science cannot afford a general abstract response to such question. Obviously, the issue is not whether knowledge of law is part of "intent" but whether the law does or should require such knowledge as part of legal intent. Formerly German courts in constant adjudication had held error of law not to afford a defense to a charge of crime, thus implying that knowledge of law was not a requirement of criminality, meaning that such knowledge was neither a part of "intent" nor a part of "guilt," indeed, not an ingredient of any of the constituent elements of crime, Tatbestand, illegality or "guilt" (in a broad sense of the term). The assertion implicit in the decision of the Great Senate of the Bundesgerichtshof of 1952, adopting the defense of legal error, that legal knowledge has always been part of the criminality concept of German law, such interpretation being required by the principle nulla poena sine culpa, is entirely gratuitous. Reading an idea of preexisting justice into the law in force is an ancient devise of "natural law." Operationally, such reading could be meaningful only if it were taken to import retroactivity of the ruling. But the possibility of reopening adjudicated cases in which the defense of legal error could have been raised was never considered by German jurists. In the United States, whenever a settled rule is overruled, the problem of reopening cases decided under it becomes acute. In realistic terms, knowledge of law was not part of either "intent" or "blameworthiness" until 1952 (except in special legislation); it is part of "blameworthiness" since that time. But neither of these propositions conveys a "scientific" finding in any sense other than of a reflection of a rule of positive law carrying certain operational results.

It may be interesting to note that the German Bundesgerichtshof, when giving preference to Welzel's "normative" (Schuldtheorie) over Mezger's "psychological theory of guilt" (Vorsatztheorie), relied heavily on the fact that the former theory leads to preferable policy results. Indeed, how a person engaged in legal error ought to be treated in law, should be determined on grounds of policy wisdom in the light of psychological and sociological insight rather than on dissection and manipulation of legal concepts. Whether there is a sound basis for treating error of law in analogy to error of fact or distinctively, is an eminently practical question, to be resolved on grounds of "practical reason."

Desirability of drawing a clear demarcation line between interpretation of existing law and policy disposition may be perhaps best demonstrated by use of an example from a particular areas of the law of error. There has been much controversy among German scholars concerning the question whether in crimes of "commission by omission" ("pseudo-omission") error regarding the duty to act is an "error regarding the Tatbestand" or an "error of law." (13)

(13) For discussion see Ryu & Silving, supra, at page 452 and notes 173, 174.

(14) Welzel now regards the duty to act both in crimes of genuine omission and in those of pseudo-omission as pertaining to "illegality." Welzel, op. cit., supra, 192. On the other hand, the Bundesgerichtshof, following the doctrinal majority view, regards it as part of the Tatbestand. BGHSt. 3, 82, 89 (1952), citing Welzel's former view. Maurach, op. cit., supra, 482, also changed his view on the proper classification of the duty to act, and in the second edition of his work (cited above) asserts knowledge of such duty to be part of illegality rather than of the Tatbestand.
On this allegedly depends the question of whether a person who fails to comply with such duty in ignorance or error regarding it may be convicted for intentional crime. German scholars apparently assume that this question is soluble in general abstract term, whereas rationally it ought to be resolved de lege lata by the established methods of interpreting particular legal provisions and de lege ferenda on policy grounds, taking into account the moral issue that is always involved in cases of this type. Consideration of a concrete situation may help to elucidate the point.

Let us assume that a mother fails to feed a new-born baby and that the baby dies; that she actually intended to kill the baby in this manner and that she now alleges that she did not know that she had a duty to feed her child. She could have asked people whether she had such duty and, indeed, it dimly occurred to her that she ought to do so. Her ignorance of her duty has thus been negligent. Should she be punished for murder or for negligent homicide? As mentioned before, according to German doctrine, the answer to this question depends on whether the “duty to act” in omissions is “fact” or “law.” Welzel now regards such duty both in genuine omissions crimes and in crimes of “commission by omission” as belonging to “illegality,” whereas courts, following the doctrinal majority view, regard it as part of the Tatbestand. It would seem, however, that the answer to the question of whether the mother in the above example should be held responsible for the graver crime of murder ought not to be reached by juggling the symbols “fact” or “law”—ultimately, but abbreviated forms of expressing certain legal rules—but directly by reading the facts of the case in the light of the pertinent rule of law. Does a mother who fails to feed her infant child as a result of which the child dies “kill” it within the meaning of the provisions on homicide, assuming that the latter define homicide as “killing another”? This is the crucial question, which must be answered in accordance with the established rules of statutory interpretation. Such rules may, of course, proceed from prevailing ideas of the normative elements of the Tatbestand. (15) If such duty to feed is thus read into the Tatbestand, it would seem imperative to interpret the mother’s error as one regarding the Tatbestand. This is so by virtue of the legality principle, which requires as a condition of punishment knowledge of all circumstances of the Tatbestand, at least so far as intentional crime is concerned. It would exceed the scope of this paper were we to engage in disputes regarding the scope of knowledge or knowability required in cases

(15) The duty to act in genuine omissions crimes is a constituent element of the Tatbestand in exactly the same way as is the duty not to act in crimes of commission. Both may be determined by certain "normative elements of the Tatbestand." For example, the duty to disperse upon an appropriate order in cases of riot, as defined by a penal code, is a condition of responsibility as is the complex of civil law rules of property a condition of responsibility in larceny, defined as the taking of a "thing belonging to another." In crimes of "commission by omission" the situation is basically the same, except that the Tatbestände in cases of these crimes involve two kinds of normative elements. In the example in the text there are two duties: [1] not to kill a human being, and [2] to rescue the child from death by starvation. The second Note continued: duty derived from a source outside of the Tatbestand, but is incorporated in the latter, in a comparable manner as property rules are incorporated in the Tatbestand of larceny.
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of negligence. As may be readily seen, introduction of the "illegality" notion into the situation as described may easily lead to enlargement of responsibility beyond the scope of the "meaning" of a Tähestand, as interpreted by conventional rules of statutory construction. Such enlargement would constitute a violation of the legality principle.

De lege ferenda the issue of a mother's ignorance or mistake regarding her duty to feed her infant child raises profound problems of ethics, to be evaluated in the light of the psychological and sociological situation rather than on the basis of a doctrinaire determination of whether such duty is "fact" or "law." Here the legislator must decide how such mother ought to be treated in the event that the child dies as a result of neglect, and the draftsman must thereafter formulate the chosen rule in such a manner as to convey to the courts the legislative choice. Of course, the draftsman must in so doing take into consideration the prevailing rules of interpretation.

In thus distinguishing the issue de lege lata and de lege ferenda, however, we must not lose sight of the fact that the distinction between these two points of departure is by no means a rigid or absolute one. Rather, law creation and law interpretation shade into one another imperceptibly, even within a basic positivistic approach to law. But to the utmost extent possible law interpreters should be careful not to permit the realization of law creation and law interpretation to be used as a medium of indirect evasion of the legality principle. Doubts regarding interpretation of positive law must be resolved by adoption of that construction which favors defendants.

A caveat is called for. Rejection of doctrinal conceptual hairsplitting as a basis of resolving legal issues should not be taken to imply elimination of theoretical considerations from the process of policy making. Such rejection is limited to the area of policy disposition on grounds of purely classificatory categorization not geared to the purpose of disposition. Apart from the justifiable demands of "rule of law," decision makers ought to be free to decide profound ethical and social issues on their merits rather than be bound by sham ontological preconceived notions of the "inherent nature" of legal concepts.

The place of Science in Criminal Law

We hope to have shown that the traditional civil law "science of criminal law," Strafrechtswissenschaft or Strafrechtsdogmatik, sciencia or dogmatica penal, is not a "science" unless we understand by science any type of systematicatization. If this so-called "criminal law science" is not a "science" in the sense in which we normally use this term, is there any "science" pertinent to criminal law? There are, of course, several "sciences" the potential object of which may be criminal law, as a type of expression of human life and as a pattern of conduct. Such sciences are, for example, anthropology, psychology, sociology. However, as always we
are interested in such "sciences of man" only indirectly, that is, to the extent that their observations may be used in law itself, critically and constructively. "Sciences," in the broadest sense of this term, may be tools of legal decision making. Their findings may afford pertinent considerations in policy determination and in the pursuit of the goals fixed by policy. When used in this manner, they function as disciplines dealing with criminal law as well as integral parts of criminal law structure. Legislators in enacting legislation, judges in rendering decisions, and lawyers when arguing cases, may rely on scientific findings. They may allege that a given rule is rational or irrational in the light of certain scientifically established facts and scientific laws. In what sense can a statute, a judgment or any other legal command be scientifically rational or irrational? How can science be used in law? A few examples may demonstrate what is meant by scientifically rational or irrational law.

We may first mention an elementary example. Let us assume that a law is enacted requiring bridges to be constructed in a certain way but that most engineers are of the opinion that if bridges are built in such way they will soon collapse, this being highly probable in the light of the laws of physics. A law of this type would be scientifically irrational or "unscientific," since not based upon a proper understanding of the laws of physics.

Similarly, a law may be rational or irrational in the light of various other sciences, such as medicine, sociology, economics. When Louis D. Brandeis, the later Justice Brandeis of the United States Supreme Court, was a lawyer, he wrote a famous brief, in which he relied not only on legal rules laid down in statutes and precedents but also on general facts of physiological, social and economic life and on the scientific laws governing such facts. In arguing for the constitutionality of an Oregon statute which provided that no female should work in certain establishments more than ten hours a day, Mr. Brandeis submitted to the Court over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in the United States and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization, and detrimental to the education of children and to family welfare. (15a) This approach was unusual at that time, since—as is well known—members of the legal profession are often charged with looking up in an ancient treaties on jurisprudence how scientific terms, e.g., such medical terms as "appendicitis" or "schizophrenia," are defined. Brandeis’s example was imitated by other lawyers, and the type of brief which argues general life conditions and scientific laws has since become known in American jurisprudence as a "Brandeis Brief."

Today it is fashionable in the United States to argue before courts various types of general scientific data. Judge Jerome Frank persuasively advocated utilization of modern psychological and sociological knowledge in decision making. In the well-known "de-segregation cases" the Supreme Court of the United States relied heavily on psychological and sociological data,

(15a) Müller v. Oregon, 280 U.S. 412 (1908). Notice the way the court used these materials in sustaining the constitutionality of the statute.
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submitted by counsel. (16) In previous decisions the Court had held that the "equal protection" clause of the United States Constitution was satisfied if Negro citizens were afforded equal facilities with those accorded to White citizens. The Court now overruled this holding and ruled that the "same" rather than merely "equal" facilities had to be offered to all alike, since, as has been scientifically, that is, psychologically and sociologically, ascertained, the emotional needs of the Negro population could be satisfied only by full integration.

While a large variety of "sciences" may be involved in legal situations, there is one science that is involved in all such situations. That science is psychology. Law is addressed to men in more than one sense. It orders people to obey its prohibitions and commands; it instructs judges to judge violators; and calls upon other enforcement officers to carry out the judges' sentences. Obviously, to rational, law must be based on a number of psychological considerations. Such considerations are: How will people react to the proposed law? Will they obey it or will it be honored in the breach rather than in observance? Will judges properly enforce it or are they rather likely not to do so? The problem of the "deterrent effect" of laws generally or of particular laws has been the subject of juristic attention for a long time. There were those who believed that psychological deterrence is the very essence of law. Hobbes and Feuerbach were the chief exponents of this view. Today there is a great deal of controversy over the question of the deterrent effect of the death penalty. An important consideration in deciding whether this institution should be preserved is whether or not people are psychologically deterred from violating laws by the example of a lawbreaker's execution.

Again we believe that we might best state our argument in favor of rational law, in the sense of a law that is responsive to scientific psychological insight, by use of an elementary example. Ahasuerus, the famed Biblical Persian king who wooed Queen Esther, is said to have ordered the ocean flogged when a bridge over the Hellespont was broken by an ocean storm, resulting in a defeat of the Persian army. That this ruling was irrational is immediately obvious. But why was it irrational? Because it proceeded from an unscientific view that the ocean possesses physical and psychological qualities such as are possessed by men and that it reacts and suffers as they do. Punishment, the very crux of criminal law, is predicated upon the assumption that people react to it psychologically in a certain way, namely, that they dislike it and will seek to avoid it by future law-abidance. Every modern law is based some view of psychology, although the particular view of psychology adopted in law is not always a scientific one, but may rather be a popular view or popular reflection of scientific psychology, often of an obsolete psychology.

However, while scientific considerations are actually assuming an ever increasing signifi-

(16) Brown v. Board of Education, 347 U.S. 483 (1954), holding segregation in public schools unconstitutional, since violative of the "equal protection" clause of the Fourteenth Amendment to the United States Constitution. This case overruled Plessy v. Ferguson, 136 U.S. 537 (1896), which had held that the clause required supplying Negro citizens with "equal" but not necessarily with the "same" facilities.
cance in law, it is essential to keep in mind that precisely what scope ought to be accorded
to such considerations in law is itself a matter of legal policy rather than a scientific question.
Laws are enacted and decisions are rendered for a purpose that is not itself primarily scientific.
The so-called "ends of criminal law" are ethical, political and social ideals, that is, they are
normative and not scientific conceptions. For example, most criminal laws aim at avoiding
the causing of harm by one person to another. Avoidance of harm is a social ideal, not a
scientific datum, although as a social ideal it might conceivably be supported by scientific,
e.g., psychological, considerations. Given such social ideal, the questions arise whether it can be
at all achieved by law and, if so, how it can be best achieved. Sciences must supply an-
erswes to these questions. Their function is hence one of teleology, that is, of means-to-end
relationship. In analyzing the latter type of relationship, however, one must be careful to view
each situation in proper perspective. For the means-to-end relationship is not anything absolute
or static, but may vary or change depending on assumed value ranks under given circum-
stances. What may appear to be a value or goal within a given frame of reference may be a
means within another frame of reference. The most significant problem raised by the legal
use of science is how to reconcile the values pursued by such use with conflicting values.
Resolution of such conflicts may and may not depend on scientific considerations. Again an
example may illustrate the nature of the issues thus posed.

An important goal of law is meting out justice and justice in a criminal trial is undoubt-
edly predicated upon finding whether the accused in fact committed the act with which he is
charged. Men of science recently invented new methods of truth-finding, which are allegedly
"objective" and thus more effective than the wholly subjective methods of questioning. Such
methods are narcoanalysis and lie-detector tests. But notwithstanding the fact that such meth-
ods may enhance the probability of truth-finding, courts in the United States, in France and
in Germany have in general refused to admit results of examinations with the aid of such
methods as evidence in criminal proceedings.(17) The German Bundesgerichtshof held that
use of the lie-detector violates the provision of the Bonn Constitution that "Man's dignity is
inviolable." In the conflict between the goal of truth-finding and that of human dignity the
Court gave preference to the latter.(18)

When courts are confronted with such conflicting values, they must establish what is the
relative rank of each within the total system of social and constitutional values; they must
weigh these values against each other. Nor is this process of weighing values a simple task of
comparing two abstract goals. The comparison must rather be made against the background
of the particular circumstances that are involved, and these circumstances may include scienti-
fic data. Thus, when barring admission in evidence of statements made under the impact of
objective devices of truth-finding, courts have taken into consideration the fact that these

(17) For a discussion of the pertinent cases see Helen Silting, Testing of the Unconscious in Criminal
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devices have not been shown to be perfectly reliable as means of securing the truth. Had they been found to be perfectly reliable, perhaps a new issue might arise, namely, whether evidence that may lead to a virtual certainty of facts in a criminal trial may or should be excluded on the ground that it has been secured by a method violating human dignity. In such event, it might be also important to know the exact degree to which dignity may be thus affected. However, it is certainly arguable that however reliable, such evidence ought not to be admissible, since in a free society preservation of man's dignity is under any circumstances paramount to all other goals.

The Function of Psychology in Law

As mentioned in the preceding section, every modern law is based upon some view of psychology, however inarticulate. The rationality of law is in large measure predicated upon the soundness of its psychological assumptions. While the standards of psychological soundness vary and change in time, it is reasonable to expect modern law to be based upon modern psychology. In the light of the latter, many assumptions of conventional law appear to be fallacious. A familiar example is afforded by the prevailing legal and popular belief that the deterrent effect of law increases with its severity. Modern psychology has shed considerable doubt upon the soundness of this belief. In support of the fact that the deterrent effect of punishment is not in direct relation to its severity scholars have often cited the observation that when in England small thefts were punished by death pickpockets conducted their trade under the shadow of the gallows, taking advantage of the crowds gathered to watch the executions.

The fact is that our contemporary law of the Western World civilization is based on a view of psychology which dates back in large part to Biblical concepts of the operations of the human mind, and in part to ancient and medieval psychological conceptions of the Roman canon law. Being derived from theological sources, our legal psychological notions are mingled with normative ethical concepts in a manner which impedes clear realization of the factual mental situation to which the evaluative process is being applied. We are not first taking account of a psychological phenomenon and then evaluating it in the light of a normative standard. We are rather from the very beginning of our inquiry dealing with an indeterminate mixture of descriptive and normative factors. That this approach is not apt to enhance the rationality of evaluation, needs no elaboration. Indeed, the ancient roots of our legal concepts pervade our law, imperceptibly piercing through apparently advanced notions and impeding true progress. It may be instructive to consider several significant examples of the described phenomenon.

Our modern distinction between premeditated and merely intentional crime is traceable to the Biblical notion of crime committed by lying in wait or pursuant to prior hatred of long
standing. This distinction is most precarious. Courts in the United States have rendered highly questionable decisions on this matter. In second degree murder, which is not a capital crime, there must be intention to kill. First degree murder, which is often punishable by death, is distinguished from second degree murder by the fact that it must be "premeditated." Life or death thus hinges on whether the accused did or did not "premeditate." Since even in second degree murder the accused must have "intended" to kill the victim, the question has been posed as to what additional state of mind is required to constitute "premeditation." Courts have held that the accused must have given the matter a "second thought."(19) But efforts at defining a "second thought" have not gone beyond vague notions of the time that is necessary to form it. In a famous District of Columbia case, a man of below average intelligence, under the impact of admittedly powerful provocation by the victim, attacked and beat her severely. Had he killed her then and there, concede solely, only second degree murder would have been committed. But between the time of the attack and the final killing the accused had walked up and immediately down a flight of stairs. The time spent in thus walking up and down the stairs sufficed in the court's view for giving the matter a "second thought", turning second into first degree murder and justifying capital punishment.(20) The case was vigorously criticized in legal literature.

The "premeditation" test having been found inadequate in Germany, the German law was amended and there were introduced instead other tests of the most serious type of homicide.(21) The most important of these tests is that which qualifies the actor as "murder" rather than a "manslayer" when he kills "treacherously"(heintueckische). In accordance with this test, the Bundesgerichtshof held that whenever a person attacks another from the back rather than while facing him, however incidental this method of attack may be, the ensuing killing is "treacherous." In one case a man killed his wife following a long argument in which physical violence was used by both sides. The final act of killing, however, occurred after a pause of very short duration when the victim got up and tried to wash the blood off her face. The decisive factor which the court thought turned the actor from a manslayer into a murderer was that at that point, standing behind her, he grasped her by the neck and choked her to death. The court refused to give any consideration to the fact that the killing was part of continuous res gestae of mutual violence, in which passions ran to the highest peak.(22) The

(19) Jones v. United States, 175 F. 2d 544, 552 (9th Cir. 1949).
(21) Section 211 (2) of the German Penal Code: "A person is a murderer if he kills a human being out of lust for killing; for the satisfaction of sexual desire; out of greed, or any other base motives; in a treacherous or cruel manner or by means causing common danger; or in order to make possible or to conceal another crime."
(22) Decision rendered December 2, 1957, BGHSt. 11, 139 (Grosser Senat fur Strafsachen); also reported in Neue Juristische Wochenschrift, vol. 11, at p. 308 (1958). For criticism see Kohlrausch-Lange, Strafgesetzbuch (42. edition, Walter de Gruyter & Co., Berlin 1959), comment to § 211, § 212, at 477.
notion that an attack from the back is *ipso facto* more blameworthy than a front attack is undoubtedly traceable to the ideals of chivalry of feudal knighthood. There is also implicit in it an assumption that such attack requires a particular cunning that is reminiscent of the old idea of "premeditation."

Our notion of "negligence" is derived from the Roman-canon law. Here normative and psychological factors are peculiarly combined in such a manner as to make a discriminatory evaluation of highly divergent fact situations practically impossible. German scholars pointed out already in the nineteenth century that a distinction ought to be drawn between advertent negligence, that is, taking an unjustifiable risk in spite of knowledge of such risk, and inadvertent negligence, that is, taking a risk without any awareness of danger. In a system of law allegedly based upon the principle of *nulla poena sine culpa* it would seem pertinent to ask whether it is not quite as unjust, in the sense of punishing a person to whom guilt cannot be ascribed, to punish a man to whom it has never occurred that he may be taking an unjustifiable risk as it is to punish one acting in ignorance or error of fact or of law. Yet, German scholars soon discarded the distinction between advertant and inadvertent negligence, proclaiming that in both situations an accused's conduct is blameworthy, since whether or not he knows the risk, he ought to know it. The feature of a "duty to know" is not a psychological phenomenon but a normative standard, and it is this normative factor that affords a basis for assimilation of advertent and inadvertent negligence, permitting their being treated under a common heading. Whence precisely does this concept of undifferentiated negligence stem? It seems to be derived from the Roman private law notion of "culpa" rather than from any concept of criminal law. In private law the ultimate issue is one of liability for a damage caused to another or of distribution of a loss rather than of personal responsibility, so that in this branch of law the state of mind of the defendant plays but a secondary role. But in modern criminal law "guilt" is said to be of the essence of answerability and German scholars have indeed asserted that knowledge of the illegality of one's conduct is the crux of "guilt". It is obviously inconsistent with this position to dispense with such knowledge in the case of negligence. The same inconsistency may be found in the very law of legal error, where even inadvertent negligence in ascertaining the law is held to constitute "guilt" (defined as knowledge). This incoherence of German doctrine may be explained by its inability to disentangle itself from the ancient confusion of normative and psychological factors. And perhaps one of the roots of this inability lies in the fact that legal psychology itself is not a clearly defined separate discipline but is rather treated as part of an outmoded "moral science." Clearly, to reach rational legal judgments on issues involving psychological understanding, we must have a precise notion of the exact situs of psychology in law and proceed from a sound modern psychology as a basis of rational legal concepts.
Toward a Modern Concept of Forensic Psychology

The shortcomings of prevailing legal psychological notions have been felt for a long time. But the full scope of their inadequacy has not become apparent until lawyers became acquainted with the newest trends in psychology. The teachings of this discipline have been completely reexamined in the course of this century by the growing science of psychoanalysis. It would be impossible, of course, within the scope of a lecture to present even summarily all the legally relevant aspects of the findings of this science. We may but briefly note several of these aspects: the discovery of the Unconscious and the substitution of a dynamic for a static, and of an unitary for a compartmental, concept of mental phenomena.

The Unconscious is a construct denoting phenomena of mental life of which the bearer is not aware and of which he cannot become aware by a simple conscious effort at bringing them to his conscious attention; yet, they tend to disturb and often to direct the processes and expressions of his conscious life. In the light of psychoanalytic insight, every human act or life expression appears to be product of his total life experiences, both conscious and unconscious, rather than the direct result of a particular, consciously formed and historically fixed intent. Similarly, no human act or expression can be attributed exclusively to one of the three conventional faculties of the mind, knowledge, will or emotion; rather, the cognitive, conative and emotional facts always appear in unison, and not, as was formerly believed (faculty psychology), situated in separate compartments of the mind.

Many of the inadequacies of conventional law, examples of which were sketched in the previous section, such as artificiality of the concept of "intent" and of its differentiation from "premeditation," may be traced to the failure of that law to comprehend and rationally evaluate the complexity of mental life, the combination within it of conscious and unconscious forces and its unitary and dynamic nature. Conventional law is structured on a number of psychologically unrealistic assumptions: that mental phenomena are exclusively conscious or preconscious; that each conduct is referable exclusively to one particular simple phenomenon of "intent."(23)

(23) There is noticeable in law a beginning realization that human action is always the result of multiple motivations (Motivenbuendel) and that man tends to rationalize his actions so that the socially acceptable or least unacceptable motivation rather than a highly censured one might appear as the "intent" to be relevant in law. The German Bundesgerichtshof expressed the view that whether in such cases the law ought to recognize as decisive solely the "dominant motive" or that motive which was "in the foreground of [the actor's] consciousness" or rather assume the mental state as required by statute to be given if it played any part, however small, in the performance of the act, depends on the nature of the interest protected by the statute in issue. Thus, a defendant who, while bodily punishing a girl under his care, also experiences sexual satisfaction is guilty within the meaning of § 174, number 1, German Penal Code (towards conduct with dependant persons under the age of 21 entrusted to defendant's care), whatever may be the proportion of the sex motive to the educational intent. Decision of Jan. 16, 1959 (N. Strafensant), reported in Neue Juristische Wochenschrift, vol. 12, at p. 822 (1959).
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and that in fact it may be ascribed to a particular compartment within the human mind, reason, will, or emotion. But while these assumptions are maintained, certain aspects of law seem to indicate that law is not entirely blind to the impact of unconscious forces upon human action. Thus, for example, punishment of inadvertent negligence implies recognition of the relevance for legal purposes of the unconscious forces that determine inadvertently negligent conduct. Yet, such recognition is itself unconscious, in fact, disguised by awkward rationalizations for punishing inadvertent conduct within a system of law built on "guilt." "The defendant did not know that he was taking a risk, but he should have known it." Justice, of course, is not served by this type of "unconscious" consideration by the law of unconsciously produced social harm. Rational justice is rather predicated upon the decision makers' conscious understanding of the social and psychological situation for which they purpose to enact a legal rule. Only a thorough scientific understanding will prepare them for formulation of rules appropriate to distinctive situations and for assignment of soundly discriminating, functional sanctions to diverse situations.

Conventional doctrine has never adequately explained why causation is required in law, why in some laws attempt is punishable less severely than consummation, why unintended aggravated consequences of conduct lead to aggravation of punishment in praeterintentional crime, etc. Such and similar rules of conventional law are rooted in an unavowed recognition of the role of unconscious intention in causation, (24) of unconscious withdrawal in attempt, of the impact of praeterintentional unconscious "intention" upon actual consequences, etc. But since in law recognition of the role of the Unconscious is itself unconscious, it often operates irrationally. There is no clear, verbalized and conceptualized policy guiding such recognition. A conscious policy reached against the background of scientific knowledge rather than an unconscious groping for an intuitively "right" decision is of the essence of statesmanship in the criminal law of a free society.

The subjects of law may not always be guided by conscious judgment. But certainly law makers should at all times know exactly what they are doing and why they are doing it.