"Guilt"  "※"

by

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"※" This article is an enlarged lecture delivered at the Law School of Seoul National University on the occasion of the celebration of the 60th birthday of Professor Chung Kwang Hyun.

The author is greatly indebted to Dean Paul K. Ryu of Seoul National University School of Law and Graduate Law School for valuable suggestions and constructive criticism in the preparation of this article.

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This lecture is devoted to an analysis of the concept of "guilt," that is, to ascertainment of its meaning. An initial, methodological problem with which I must deal is, what I understand by ascertainment of the "meaning" of a term such as "guilt." For "meaning" itself is a term of many meanings.

Section I: The Meaning of Ascertain Meaning

The very formulation of the question, What is meant by ascertainment of the "meaning" of a term such as "guilt," seems to suggest the idea as though that term came first and its meaning came second, while we might expect meaning to be the primary notion and terminology to be but a secondary matter. The fact is, however, that our life and actions are only partially governed by meaning, in the sense of rational meaning. As the Bible suggests, the Word came before Creation. Words, their sound and the unconscious associations attached to them, govern us, often beyond our control. Belief in the magic of words is said to be characteristic of primitive people. Actually, modern civilized men are by no means free of a similar tendency to attribute to words an impact beyond the scope of consciously realized meaning. We thus frequently use a word as though its meaning were obvious; yet, when asked what
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exactly that word means, we are puzzled to find that we are not prepared clearly to formulate that which it stands for. We may have some fuzzy notion of that which it is supposed to symbolize, but that notion is not consciously conceptualized in our minds and is so laden with emotions that purging it, in the sense in which Whitehead recommends the "purging of symbols,"(1) presents a major task. For this reason we often feel when searching for the meaning of a term such as "guilt" as though we were engaged in an exploratory expedition into a reality beyond the "word."

For scientific purposes such search would seem superfluous. Men of science—one might argue—would do best if they proceeded from "meaning" and assigned to each meaning a term chosen by arbitrary fiat to serve the purpose of convenient scientific communication, preferably a number or an otherwise formal symbol, such as a letter of the alphabet. Confusion of meanings could be thus avoided. But this method, that may be appropriate in mathematics and the mathematical sciences, is not appropriate in the social sciences. Actually, it is not even used in the former; e.g., notions of mechanics, such as "force" and "mass," have been derived from the common language and then endowed by physicists with a specific meaning, distinct from that attributed to them in everyday life.(2) Certainly, in the social sciences such arbitrary assignment of a term to a meaning would miss an essential purpose of these sciences, namely, that of clarification of meaning of social usage. In the social sciences the symbol assigned to a meaning itself constitutes a meaningful issue. Thus, for example, the very fact that in social usage a term has a particular dual meaning, referring to two apparently distinct realities, may point to a connection assumed in the given society to exist between these two realities. Terminology is a social factor having a significance beyond that of a mere designation of specific meanings. In law the ascertainment of the meaning of terms performs not only a scientific but also a specifically legal social function. Although legal interpretation is now known to be a highly creative task of law-making, it undoubtedly also includes a "finding" of social meaning.

While the meaning of a social term may not be at all settled, such term may be deemed to carry extremely significant social consequences, which it may be practically impossible to dissociate from that term and associate with another, new, term. For such consequences are taken to attach to that term regardless of changes in the scope of its meaning. Perhaps no better example of this phenomenon can be found than is afforded by the very term "guilt." In cases where the defense of insanity was abolished by statute, courts in the United States have reversed convictions on the ground that withdrawing the issue of "guilt" from the jury in a criminal case is unconstitutional.(3) Peculiarly enough, no constitutional objections have


(3) State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910). Compare also State v. Lange, 168 La. 958, 123 So 639 (1929); Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931). Sanity is considered a requisite of "guilt."
been raised to changes in the contents of the "guilt" concept, such as changes in definitions of insanity or in the structure of intent, although where such changes occur, that which the jury is passing upon is not identical with that it was passing on before.(4) Thus, seeking to establish what people — in the case of law particularly legislators and judges — mean when using a term such as "guilt" serves not only the purpose of satisfying an intellectual curiosity but also the purpose of practical law administration.

A social function such as that of determining the meaning of "guilt" should be geared to the aim which it pursues. If the determination of such meaning is to serve the purposes of scientific communication, of bringing to the consciousness of law makers what is actually at stake in terms of practical solutions when the issue of "guilt" is raised, and of facilitating legislative drafting, it cannot be limited to a mere "finding" of social usage. An additional creative activity is necessary.

Social meanings are not always rational. Unless it is precisely our purpose to inquire into the phenomena of men's thinking and believing, we must try to make sense of what people attempt to say. We must apply to words of current usage a critical philosophical analysis, seeking to derive from them a core of rationally understandable thought. We must aim at finding that which can be "meaningfully said" among those matters which people attempt to convey by means of common or legal language,(5) and, if necessary, reformulate versions of such language, so as to express the thought behind it in a logically correct form.

However, it should be noted that meaning in law is always sui generis. Much that cannot be otherwise "meaningfully said" in social life can very well be meaningfully said in legal life. Language in law purports to convey commands rather than merely descriptive propositions.(6) Legal sentences are ultimately always imperatives.(7) Often a meaningful imperative may be conveyed by a sentence the terminology of which would be meaningless were it contained in a descriptive sentence. When the addressee of a command understands what action he is

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(4) Strictly speaking, every new crime type introduced into the law and every extension of an old crime concept enlarge the concept of "guilt." Notice in this connection the enormous extension of the notion of attempt; significantly, this extension is a product of judicial interpretation, following doctrinal changes. There is room for doubt whether even the principle of nulla poena has been adequately considered in such situations.

(5) On this see the writings of Wittgenstein and Stevenson. In a letter to Cynthia Schuster, dated May 5, 1952, Charles Stevenson said (See Schuster, Peter Glassen on the Cognition of Moral Judgments, in Mind, vol. LXX, No. 277, at pages 95~96 (1961)): "So what I was really attempting to do.....was not to give just what people have meant, but only to 'salvage' from their meaning all that I, viewing the situation from an empirical viewpoint, could find intelligible'....."

(6) Apparently descriptive propositions actually import commands or constituent parts of commands. For this reason a descriptive proposition in law, for example, a definition, may be valid even if it is scientifically questionable.

(7) True, according to Wittgenstein, the meaningfulness of descriptive language may be tested by expressing it in terms of command and response to such command. Yet, this does not eliminate the meaningfulness of a distinction between imperative and assertive sentences.
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to take in response to such command, the latter has meaning even if apparently significant component parts of the commanding sentence are otherwise meaningless. For example, though there are no dragons or witches in actual existence, a law may define qualities allegedly constituting dragonhood or witchcraft and delegate to certain persons authority to find from the presence of such qualities the givenness of such creatures. If then such person makes a finding to that effect, the dragon or witch has a legal operational reality, meaning that it gives rise to legal consequences, anything science may say to the contrary notwithstanding.

Since terms in law are always ultimately commands, any ontological meaning assigned to them is in the course of law application translated into operational terms. Phenomenologically that term then stands for that which it "does" in legal life, that is, the observable conditions and consequences which are attached to it. The translating process often follows the pattern of social usage. In a sense, all men are philosophers. When they use a term, they implicitly attribute to it a place in the totality of their image of the universe (Weltbild); thereby they ascribe to its meaning certain operational qualities, in the sense of expected responses in emotion and in action on their own part and on the part of their fellowmen. Thus, for example, when "guilt" is understood to convey the idea of "sin," there obtains a social expectation that certain conditions must be met and certain sanctions must or ought to follow, whereas when "guilt" is taken to represent social harm, certain other conditions and consequences are contemplated. When an ontological conception of "guilt" appears in a legal context, it conveys these expectations, which are in turn translatable into legal rules. It is significant to note that though the ontological meaning of a term used in a command may be irrational, the command operationally expressed through its medium may be rational, judged in the light of a chosen policy objective.

The common philosophy of a concept is not necessarily uniform or static. It may very well vary or change in the course of time. In the light of the dynamic nature of social meaning, a problem of crucial significance is that of the identity or continuity of the topic of discussion. What is it we may ask that has changed? What is the justification for applying to a variety of meanings a single term? Why, in the instant case, do we speak of "guilt," although this term may mean different things to different people? Why, above all, is it necessary or desirable to find a common denominator for such variety of meanings? Of course, unless we find such common denominator, the controversy over the meaning of "guilt" will turn out to be but a semantic dispute. Mainly, however, is our concern with finding such


(9) But judges are not justified in simply substituting a new rational meaning for an old outdated one intended by the legislator. For in attributing the latter meaning to the term in issue, the legislator has actually conveyed a legal rule, which may be quite rational. See Helen Silving, Analogies Extending and Restricting Federal Jurisdiction, Erie R. Co. v. Tompkins and the Law of Conflict, 31 Iowa Law Review 330 (1946).

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common denominator due to our expectation that it will help us to clarify and to formulate in proper operational terms the meaning which we decide to attribute to guilt. Only if we can formulate a "general theory of guilt" will we be able to express in meaningful terms a particular concept of "guilt."

There are two potential sources of assuming an identity or continuity of meaning of a term to which various meanings have been socially attributed. One consists in the fact that there may be found a minimum meaning common to such varying meanings. The other lies in a community belief in the identity or kinship of the several meanings.

While any ontological doctrine of "guilt" may be fitted into the general theory of guilt, provided that operational terms can be substituted for ontological ones, this form of expression, implying a basic critical philosophical approach, may not be acceptable to those who postulate the essential uniqueness and irreducibility of their particular metaphysics of "guilt." Except within such extreme metaphysical approach, there is no incompatibility between formulation of a general theory of guilt and choice of a particular guilt doctrine. The former is a scientific task, the latter is a political choice, which may, of course, as any political choice, be determined by a preferred general philosophy.

In social usage often several terms may designate an identical or practically identical meaning. This is confusing and should be avoided in scientific discourse and in legal life. For scientific and legal purposes it is desirable to select one among the several terms, to be henceforth used in denoting such meaning. Such selection is, of course, arbitrary except that it may be dictated by considerations of convenience. Preference should be given to a term the meaning of which is least overlapping with that of other terms.

Section II: The Meaning of Guilt

Fixing a rational meaning of "guilt" for scientific and legal purposes is a complex task. I shall begin by differentiating various terms which have a potentially overlapping meaning: "responsibility," "imputation," "culpability" and "guilt." In so doing, I shall, somewhat arbitrarily, assign to "guilt" a most limited, purely formal meaning. Then I hope to show that it is this formal meaning which may be taken to account for application of the single term "guilt" to a variety of social meanings. There will follow a brief discussion of certain historical and contemporary conceptions of guilt. Then there will be submitted a general theory of "guilt," followed by specification of the import of one particular theory of guilt, the democratic one.

1. Differentiation of "Guilt" from Related Notions

In social, particularly legal, usage several terms are often assumed to have a meaning similar to that of "guilt." The standard of differentiating these terms adopted in this lecture
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is partly that of convenience and partly that of preferred usage.

"Responsibility" (Verantwortung), which in English and in American law and legal literature is often confused with imputability or with mental capacity (Zurechenbarkeit, Zurechnungsfähigkeit) in the civil law sense, is functionally better used as a broader concept, denoting the connection adopted in ethics or in law between certain conditions, such as certain mental and external factual data (e.g., intent or negligence and death causation), and certain consequences, such as social censure, imprisonment, fine, compensation. (10) "Guilt" is a more limited concept, denoting only one set of conditions within the comprehensive relationship of "responsibility," namely, a set of conditions relating to the defendant.

"Imputation" is the establishment of the above described connection, specifically, ascription of responsibility to the defendant. Usually such imputation is predicated by law upon "imputability," that is, fulfillment of the conditions under which the law admits imputation. When these conditions bear on the psychological factors of maturity or sanity, one speaks of "mental capacity" (Zurechnungsfähigkeit). "Mental capacity" is but a historically developed and not a necessary ingredient of either responsibility or guilt, though in Anglo-American law it is often misleadingly said that an insane person "cannot" be "guilty." Nor has "guilt" itself, in the sense of personal conditions of responsibility, always been a requirement of imputation. Even in modern law there are instances of imputation without guilt, in the modern sense of this term, implying certain mental states.

"Culpability" is a term which is closest to that of "guilt," and has the advantage of being less laden with moralistic implications. However, since culpa has the dual meaning of both general "guilt" and "negligence," it is desirable to avoid it. We use the term "guilt," because it is not also used to denote specifically "negligence."

2. Minimum Notion of "Guilty": Formal Unity of All Guilt Notions

The unity of the term "guilt" despite variations and changes in its meaning may be found in the status of this concept within the notion of responsibility, as defined above. As mentioned, not always is "guilt" required by law to constitute responsibility. But whenever it is required, it functions as a particular type of condition of responsibility, namely, as a condition of imputation of an act or of answerability for an act to a person; it is said that he is answerable (or that responsibility applies to him or that he is responsible) because he is "guilty." In Kelsenian jurisprudence this relationship is reversed: one is guilty because he has been declared to be answerable. In fact, in the light of Kelsen's view of guilt, it is legitimate to say that "guilt" is personal answerability. The definition of "guilt" as personal conditions of imputability or as outright answerability affords a formal, minimum concept of "guilt,"

which is common to all historical concepts of guilt. (11) Our present task is to find the general principle of variation in substantive notions of personal answerability. The object of our search is to determine wherein the several concepts of guilt vary from each other. The resulting definition of guilt will be a substantive one, in the sense of indicating the nature of the substantive discrepancies between these concepts.

It may be instructive, before presenting a general theory of guilt, to discuss briefly specific guilt doctrines, as they evolved historically. Each of these doctrines lays a claim to exclusive validity. Yet, it is often difficult to comprehend the exact meaning of such claims or the bases for their assertion.

3. Historical and Contemporary Notions of "Guilt"

Tracing the origins of the "guilt" concept would require engagement in anthropological studies, exceeding the scope of this lecture. Psychological roots of the recently much discussed, often irrational, "sense of guilt" have been elaborately treated by psychoanalytical writers. We are not at this stage concerned with them. Our concern is rather with the historical idea of guilt that is directly reflected in certain modern legal guilt doctrines. We will not go back further than to the Bible, which via the Roman-canonical law has decisively influenced both the common and the civil law. Nor can we engage in elaborate study of the Biblical concept of guilt. We shall confine ourselves to a very brief reference to salient features of that concept. Biblical guilt is predicated upon the presence of psychological factors, which seem to be intricately diversified. The minimum requirement of guilt is knowledge of wrongdoing, (12) and malice, evidenced by such acts as lying in wait or by previous hatred of the victim, is a mark of an especially blameworthy attitude, evoking particular Divine reprehension.

These features of the Biblical concept of guilt have been introduced into law, giving rise to a psychological concept of guilt, on the one hand, and to a normative one, on the other hand. We thus encounter in modern law the "psychological doctrine of guilt," incorporating the Biblical concept of guilt as a comprehensive psychological phenomenon (including consciousness of wrongdoing), and the "normative doctrine of guilt," incorporating the evaluative ingredients of the Biblical concept. The former identifies guilt with intent or negligence, the latter defines it as blameworthiness. Neither of these doctrines affords a satisfactory formulation of "guilt," as that concept is commonly understood or as it actually operates in law.

The "psychological doctrine's" equation of guilt with intent is questionable, if by intent we understand a descriptive category, namely, a state of mind of the actor. Certainly, in social usage the concept of guilt implies some element or qualification other than, or in addition to,

(11) Community beliefs that there is a common denominator in the various concepts of guilt also afford the unity of this concept of varying connotations.

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intent. It has a normative connotation, invoking the idea that that of which one is said to be guilty is bad. In fact, traditional law refers to intent as malice, wicked will or vicious will or evil intent. These epithets suggest a censure of the intent. It is not sufficient if the actor possesses an "intent;" it must be also bad or blameworthy to possess such intent. The combination of factual and normative elements is even more pronounced in the second type of "guilt" of conventional law, "negligence." The latter is often defined as a "disregard of care." In the case of inadvertent negligence, "disregard" seems to convey the notion of a total absence of any psychological element, unless psychoanalytical interpretations are admitted. But in conventional law there has been no conscious, systematic recognition of the Unconscious. The psychological theory of "guilt," as conventionally formulated, is not a theory of guilt in a proper sense, but at best the expression of a particular rule derived from such alleged theory. That rule provides that conduct must not be attributed to a person unless he intended it or its results or was negligent with regard to such results. This rule is one of limitation of responsibility, based upon a particular philosophy of criminal justice. It is a legitimate rule, but cannot be said to exhaust all the demands of the philosophy from which it is derived. Other normative implications must hence be considered. We are thus referred to the second doctrine of guilt, the "normative" one.

The development of the last mentioned doctrine in Germany may be traced to Rheinhard Frank, who pointed out that though two acts may be committed with equal intent and be directed to the same legal interest, there might be a need for a differentiation in the degree of guilt involved in them, because one is committed under circumstances of greater freedom than the other.(13) If, then, variation is called for though the "intent" is constant, it appeared that "guilt" should not be deemed identical with "intent." The differentiation in the degree of guilt, according to Frank, is based on the fact that a criminal act committed while the actor enjoys greater freedom or is under less pressure is more blameworthy than one committed while the actor possesses lesser freedom. This Frankian interpretation gave the clue for elaboration of the concept of "blameworthiness" as an ingredient of guilt and for diversification of guilt depending on the degree of blameworthiness.(14) Dohna finally introduced some methodological order into the confusion of normative and psychological factors in "guilt" by distinguishing sharply between evaluation in terms of blameworthiness and the object of valuation, the conduct and intent to which the judgment of blame attaches,(15)—a methodological order it took a surprisingly long time to reach in the country of Kant. Dohna pointed out that "guilt" is a judgment of value which is passed upon "intent" as an "object" of evaluation. Finally

(13) Frank, Ueber den Aufbau des Schuldgebriifs, in Festgabe fuer die Juristische Fakultael der Universitaet Giessen (1907).

(14) The normative approach was developed by other writers: Beling, Unschuld, Schuld und Schuld-
stufen (1910); Goldschmidt, Der Notstand, ein Schuldproblem (1913); Freudenthal, Schuld und Vorwurf (1922).

(15) Dohna, Der Aufbau der Verbrechenslehre 32 (2nd ed. 1941).
Welzel completely separated the element of blameworthiness from the object of blame, the external conduct and the intent, alleging that the intent that steers the conduct is inseparable from that conduct itself and that only jointly do these factors afford a Tatbestand (conduct as described by statute), so that there remains as "guilt" factor solely the element of "blameworthiness." (16) The resulting definition of "guilt" is simply "blameworthiness." Nor is this definition of the so-called "normative doctrine" a mere jurisprudential nicety. It is rather taken as a basis for advancement of significant legal rules. Prominent among these rules is that on the treatment of legal error. Whereas the "psychological doctrine," assuming knowledge of law to be an essential of "intent," excludes punishment for intentional crime of a person engaged in legal error, the "normative doctrine," contending that such error does not affect "intent," admits such punishment, advocating merely its reduction depending on the degree of negligence in not securing the required legal knowledge.

Welzel's argument is methodologically dubious. The fact that act and intent are inseparable in the reality of life does not import inadmissibility of their conceptual separation. (17) Equally dubious is Welzel's inference from the elimination of intent from guilt and its assignment to the Tatbestand that knowledge of law does not refer to the latter but pertains to illegality—a inference from which Welzel in turn derives the stated legal rules on error of law, as though these rules followed from that inference as a matter of logical necessity. (18) But, however dubious may be the method of Welzel's argumentation, his arguments and conclusions have been adopted by German courts. The Great Senate in Criminal Matters of the German Bundesgerichtshof incorporated into the German law Welzel's definition of guilt: "Guilt is blameworthiness"......"Schuld ist Vorwerfbarkeit." (19) From this proposition it in turn derived a rule on the treatment of error of law, as set forth by Welzel. The rule thus adopted by the Bundesgerichtshof is valid German law, even though the argument whereby it was reached was fallacious. To the extent that the definition of "guilt" as "blameworthiness" is thus translated by German courts into a specific functional rule on legal error that definition is itself functional. Phenomenologically, that definition means that specific rule.

However, should the issue arise, what other legal rules may be derived from this concept of "guilt," a new methodological problem will be posed: Can a direct analogy be drawn from the rule on legal error, on the basis of a similarity in the light of legal policy between the facts underlying that rule and facts present in the new situation to be evaluated? Or should courts rather again proceed from the philosophical definition of "guilt as blameworthiness" as a

(17) Welzel's argument is comparable to an allegation that since a color never exists in reality apart from an object bearing it, it cannot be conceptually separated from objects. Actually, it would be impossible to express the observation that an object bears a certain color unless conceptually object and color were separable.
(18) For further criticism of this method, characteristic of civil law doctrine, see a forthcoming paper by Paul K. Ryu and Helen Silving.

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starting point? The first mentioned method is mostly applied in courts of common law countries. Civil law countries rather apply the second mentioned method. Should German courts again be faced with the problem of the inferences to be drawn from the professed definition of "guilt" in terms of legal rules, it would seem desirable that they reach a more definite notion of what is "blameworthiness." What, according to the Bundesgerichtshof, is blameworthiness?

As understood by Welzel and following him by the Bundesgerichtshof, blameworthiness lies in man's choice to conduct himself contrary to law when he could have conducted himself in accordance with law.\(^{(20)}\) The system of ethics whereby man's failure to conform is judged is an "ethics of responsibility" rather than an "ethics of attitude." This implies that man is bound not only to conduct himself ethically, in accordance with his understanding of ethics, but also to search for a correct decision. In other words, man must not only choose the "right" instead of the "wrong." He must also choose between what is "right" and what is "wrong." He must "search" for justice and not merely abide by it. "Guilt" or "blameworthiness" thus consists not only in doing wrong but also in choosing wrongly.

Welzel contends that his notion of blameworthiness founded upon freedom of choice is rooted in modern "scientific" insight. He points out\(^{(21)}\) that the determinism of Lombroso, Garofalo and Ferri was to a large extent based on their belief in Darwin's conception of man as the most perfect product of evolution from biologically inferior animals. Since man appeared to these scholars as a biologically better adapted specimen than other creatures, his achievements were believed to be simply referable to the fact that he presents a higher stage in the natural phenomenon of development. But recent research conducted by zoologists and animal psychologists has demonstrated that far from being biologically better adapted than animals, man shows a regression in adaptation instincts, as a result of which he is more exposed to danger than they are.\(^{(22)}\) According to these researchers, man compensates for this shortcoming by intellectual achievements. Indeed, this shortcoming is the source of such achievements. Welzel interprets this capacity of man to overcome inherent defects by intellectual resources as his "existential freedom and liberation from organic ties," in the sense of Scheler's philosophy. Since he is oriented to the criteria of truth, meaning and value and can free himself of causal determinism, man is a responsible being. Crime—says Welzel\(^{(23)}\)—is the product of causation; it is thus a proper subject of criminology. But man can liberate himself of causal necessity by an act of will, and this is what makes him the subject of "criminal law," a responsible person. He is "guilty" when acting contrary to law, because he could have acted in accordance with law. This is the source of his blameworthiness.

While the source of man's blameworthiness is his free choice of crime, the justification

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\(^{(20)}\) Ibid., at 200—201; for pertinent passages of the decision see Ryu & Silving, supra, note (12), at 451; see also ibid., at 449, for discussion of the philosophical basis of Welzel's notion of guilt.

\(^{(21)}\) Welzel, op. cit., supra, note (16), at 125—131.

\(^{(22)}\) Welzel cites particularly Storch and Lorenz.

\(^{(23)}\) Ibid., at 131.
of the state's right to punish, according to Welzel's view, lies in "assertion of the statal legal order."(24) Thus, apparently, punishment is linked to guilt in an orderly system of natural law rationality.

Welzel's philosophical foundation of blameworthiness and guilt obviously combines Kantian and Hegelian ideas. The notion of "free will" set up in opposition to "causation" is typically Kantian. This notion is not substantially advanced by the alleged scientific refutation of Darwinian findings, since disproving causation does not if so facto import free will. Nor does the phenomenon of man's "overcoming causation" disprove causation. In any event, freedom of will is not a foundation of responsibility but at best a condition of the latter. From the fact that a man could act otherwise than he acted it does not follow that he may be punished if he acts as he does. The Hegelian view of punishment as assertion of the legal order, on the other hand, may be very well maintained without any reference to free will, except perhaps for the intervening Kantian notion that man must not be used as a mere means for statal ends. Welzel's philosophy does not actually connect the two elements of justification of punishment in statal needs and in individual "guilt."

Whatever may be the merits of referring blameworthiness to free will on a philosophical level, free will certainly cannot afford a practical test of blameworthiness, since it is not provable in a court of law. Significantly, the notion of "free determination of will" ("freie Willensbestimmung") was eliminated from the definition of mental incapacity of the German Penal Code(§51 StGB) upon recommendation of prominent psychiatrists who asserted that they were unable to make scientifically valid assertions on such essentially theological issue.(25)

Even if blameworthiness could be meaningfully defined as derived from freedom of choice, the problem of the source of the moral judgment implicit in a determination that a conduct or intent is blameworthy would still remain open. For surely guilt or blameworthiness does not consist exclusively in free choice. Whatever may be the nature of blameworthiness, the latter is undoubtedly conceived as implying a moral value judgment, and perhaps the most crucial issue in defining guilt is what type of morality it is that gives it substance. Even in a single culture we may find a variety of moral standards, not to speak of the fact that there is often a discrepancy between prevailing verbal moral standards, that is, the standards which people profess to believe in, and the standards by which they actually abide. But even before the issue of conflict of moral conduct and moral judgment is reached the question must be answered whether the proper standard is a popular cultural one or a supra-cultural and supra-individual standard of absolute ethics.

In another famous decision, rejecting relativistic popular ethics as guides to moral legal judgment, the Great Senate of the German Bundesgerichtshof professed the German law's

(24) Ibid., at 208—209.
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adherence to the ethics of Christianity as of the dominant religion, expressed in legal institutions such as that of monogamy. (26) It said that permitting popular standards or mores to prevail over the Christian morality of general law would be tantamount to allowing law to be overridden by factual community conduct, whereas it is the function of the law to guide such conduct. This decision was severely criticized by most German writers who claimed that disregard of popular standards of morality is itself unethical, since it results in imposition of the morality of one individual or group upon other individuals. (27) In England and in the United States the moral standard mostly prevailing in law is that of utilitarian ethics. But there are various versions of utilitarianism, so that diversity of standards is not precluded.

A most controversial issue recently debated in England concerns the proper scope of moral prohibitions that may be enforced by law. One group argues that the state cannot prohibit an individual from engaging in any conduct of his choice unless that conduct is harmful to others. (28) The other group contends that the community, represented by the jury or by any group selected at random, may impose its moral standards upon individuals and enforce their obedience by law. (29) In the United States a vigorous controversy has been waged as to whether judges in rendering moral judgments should rely on their own moral predilections or “hunches” or rather apply community views or community mores. (30) Some writers, indeed, contend that enlightened decision makers should assert their own “overriding goals” in preference even to the “formal code.” (31) Jurisdiction to determine insanity exempting from guilt has been

(26) Entscheidungen des Bundesgerichtshof in Strafsachen 6, 46 (1954), holding sexual intercourse between fiancées to constitute “lewd conduct” (Unzucht) within the meaning of § 181 of the German Penal Code (Pandering), on the ground that by adopting the Christian conception of the institution of marriage, German law took the position that sex intercourse is admissible only in marriage, and that this position of absolute Christian ethics must prevail over community views or community mores.

(27) Beckelmann, Zur Strafbarkeit der Kuppelei, Juristische Rundschau 1954, pp. 361—364, at 363, stating: “...the moral norm which the individual recognizes as valid can be absolutely obligatory only as a standard and guide of his own conduct. However, it must not be simply taken as basis for the evaluation of acts of others. Whoever undertakes to do that raises his personal morality to the status of an objective legal norm. In the course of time the danger would arise of his becoming a witches’ judge.”


(29) See particularly Patrick Devlin (Lord Justice Devlin), The Enforcement of Morals (Macabaeum Lecture in Jurisprudence of the British Academy, Oxford University Press, 1959); also Law, Democracy, and Morality, 110 University of Pennsylvania Law Review 635 (1962).

(30) Edmond Cahn, who in his Sense of Injustice (1949) asserted that there is a minimum sense of “justice,” in the form of reaction to “injustice,” in the heart of everyman everywhere at all times, has elsewhere expressed his choice of standard of adjudication to be the judge’s own moral view and not the so-called “community view” or “community mores.” See Cahn, Authority and Responsibility, in Freedom and Authority in Our Times (Harpers, 1953).

(31) Lasswell and Donnelly, The Continuing Debate Over Responsibility: An Introduction to Isolating the Condemnation Sanction, 68 Yale Law Journal 869, (1959). The principal argument of this paper, that of isolating the condemnation sanction, has been known in Europe at least since 1893, when Carl Stross’s Project of a Swiss Penal Code was published. See Exposé des Motifs de l’Avant Projet de 1893 (Basel-Geneva 1893).
widely debated both in England and in the United States, some stressing the virtue of a lay jury's instinctive evaluation, others advocating reliance on psychiatric expert opinion or indeed delegation of decisive authority to psychiatrists. (32)

While thus the issues of, why certain psychological states should be deemed to constitute guilt, or, what is blameworthiness defining guilt, are widely open, scholars argue each his preferred notion of guilt as if it were a provable scientific proposition. Indeed, that which is common to the psychological and the normative doctrines of guilt is their metaphysical orientation. Adherents of both doctrines assume that "guilt" is inherent in a given factor, either the mental attitude of the accused, according to the psychological doctrine, or the blameworthiness of his conduct, according to the normative doctrine. Each doctrine assumes that "guilt" by its very nature emanates from the respective factor. This metaphysical, "natural law" view of guilt explains the violence of the controversy over the definition of guilt. Scholars of the various schools of thought act as if they were engaged in a theological dispute over Satan's qualities rather than in an argument over a legal issue. Thus, in the famous dispute over the defense of error of law waged by Mezger and Welzel the issue has been formulated in terms of what "guilt" is. (33) Mezger claims that it is the psychological factor of intent, whereas Welzel contends that it is blameworthiness. From such metaphysical positions scholars in turn derive a notion of the immanent logical necessity of certain legal rules. Each of them claims that the rule of his preference is or must be valid, since it is implicit in the only "true" conception of guilt—the conception he advances.

This approach is misleading. In law, in contrast to theology, there is no "true" conception of "guilt," though there may be a "valid" one, in the sense of conveying a legislatively assumed notion of guilt, that is translated or translatable into valid rules of law. If the arguments advanced by scholars merely purport to interpret the German Penal Code, these arguments would be methodologically proper to the extent that they actually attempted to convey the meaning of existing law. But these arguments are couched in ambiguous language, so that it appears as though they were reflecting eternal truths about the inherent nature of "guilt." This impression is strengthened when we read the assertion, which ultimately prevailed in the Draft of a German Penal Code of 1960, that a definition of guilt need not be included in the Penal Code, since this is a matter to be defined by "legal science." (34) Whence is "science" to derive the definition of guilt? As will be shown in a forthcoming paper by Dean Paul K. Ryu and the present writer, that which civil law scholars call the "science of criminal law" is not a "science" and the method of deriving practical legal rules from the situs of certain factors within constructs (Tatbestand, illegality and guilt) in the structure of crime often consists in inferring from these constructs matters which these scholars had previously put into them under the guise of "scientific" finding, without regard to legislative conceptions or sound policy demands.

(32) For some aspects of this issue see Helen Silving, Mental Incapacity in Criminal Law, in Current Law and Social Problems II (University of Toronto Press, 1961).
(33) On this see Ryu & Silving, supra, note 12, at pp. 448–452.
(34) See next page.
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The weakness of such derivation of legal rules from doctrinal propositions on the ontology of guilt, not geared to the ultimate operation of these rules in terms of their practical consequences becomes obvious as soon as we realize that in law that which is ultimately at stake is the legal rule. Only the latter is operationally and functionally expressed in law, for law is not a science but a system of guidance for conduct. Whatever may be the merits of a theoretical notion of "guilt," such notion is meaningless within the framework of law unless it is or can be translated into practical propositions, namely, rules of conduct. The rationality of law is hence predicated upon the rationality of the ends which legal rules purport to serve and the rationality of such rules as means to achieve these ends. Their soundness should be judged in the light of value considerations and teleology and not by quasi-theological arguments regarding the nature of legal concepts. Value considerations may, of course, be based on ontological conceptions of "guilt." But if the legal ontology of "guilt" is to be itself rational, such conceptions ought not to be derived from purely structural constructs adopted for a definite purpose (as is the division of crime into Tatbestand, illegality and guilt) and which the legislator never visualized as potential determinants of "guilt" for any other purpose. Moreover, in considering adoption of a theoretical notion of guilt in law, decision makers should take into account that notion's probable practical operation in the light of social purpose, for no theoretical notion is ever simply translatable into practical rules. The latter always imply either more or less than is conveyed by the theoretical notion. In a sense, rules of law have a meaning of their own that is independent of their theoretical basis, for their practical import can never strictly correspond to the theoretical propositions that support them. Unless the particular "guilt" concept advocated by a scholar is alleged to be that adopted by a positive law in issue, the method of inferring from the "nature" of legal guilt the logical necessity of adopting a particular legal rule, e.g., a given rule on legal error, in large measure leads to making legal decisions on the basis of sham issues. Whether or not a person who engages in criminal conduct in negligent error of law ought to be punishable for intentional crime should depend on the purpose of punishing such crime and the reasons for a grant of immunity in

(34) "Guilt"—said Welzel, op. cit., supra, note (16), at p. 53—"is a self-evident element of crime, not especially mentioned in criminal law provisions." The Draft of a German Penal Code in its first reading (1958) nevertheless contained the following provisions: "Whoever acts without guilt shall not be punished. Punishment must not exceed the measure of guilt." This provision was struck from the 1960 Draft. The elimination has been elaborately justified in the comments to the Draft. See Entwurf eines Strafgesetzbuches (StGB) E 1960 mit Begrundung, Bundesrat Drucksache 270/60 (Bonn, 1960), at p. 92. The draftsmen point out that "there is no need for an express statement in the code of the provision contained in the first sentence. This provision evinces from numerous sections of the Draft..." They further point to "the notion of guilt" being "alive among the people." Since the Draft uses the term "guilt" on various occasions in contexts in which its meaning is by no means clear (e.g., § 60: "The basis for the measure of punishment is the guilt of the actor."), it would seem that the rule of law requires its being defined. For the view that "guilt" must be defined by legal science rather than by legislation see Welzel, Wie wuerde sich die finale Handlungslehre auf das neue Strafgesetzbuch auswirken, in Materialien zur Strafrechtsreform, Band 1, Gutachten der Strafrechtslehrer (1954).
the light of the scope of applicability of such purpose, rather than on the question of whether or not knowledge of law is doctrinally part of intent or part of blameworthiness. Unless it can be honestly said that the German legislators included knowledge of law in the definition of intent as obtaining in positive German law or excluded such knowledge from intent, the issue of such inclusion or exclusion cannot be resolved "scientifically." Whether or not “intent” at law must also comprise knowledge of law, is not a question of “scientific finding” but one of legal determination. If an answer cannot be reached by use of the established means of legal interpretation, then the principle in dubio pro reo requires the judiciary to decide in a sense most favorable to the accused. Of course, one might argue that the so-called "science of criminal law," however dubious per se, has by long usage been incorporated into the civil law system of statutory interpretation. In any event, de lege ferenda an issue such as that of inclusion in, or exclusion from, "intent" of legal knowledge is ultimately one of policy choice, though policy may be influenced by considerations based on the policy maker’s ontological conception of "guilt." But it is essential that decision makers be clearly aware of the ultimate operational meaning of their choice.

Legal concepts are tools making communication of legal rules possible. Viewed phenomenologically, they are but symbols of legal rules that are or may be conveyed by their means. In the last analysis, for legal purposes they are these rules. This is also true of the concept of "guilt" as used in law. This concept is a shorthand expression standing for those legal rules that relate to imputation of answerability to a person. According to the phenomenological theory of guilt, advanced by Felix Kaufmann(35) and developed on the basis of the Kelsenian formal notion of "guilt" as the result rather than the source of imputation, the content of "guilt" is the sum of certain postulates addressed to law, such as, that it ought to be so formulated as to make it possible to distinguish clearly guilt from non-guilt, that it should permit gradation, that it should be possible to differentiate within it intent and negligence as types of guilt, that it should allow for exemption for mental incapacity.(36)

This phenomenological doctrine of guilt is heuristic in drawing attention to the ultimate issue that is posed in law whenever the "nature of guilt" is debated. Doctrinal notions of guilt are immediately translated into the legal rules, whether in force or postulated, which these notions represent. This doctrine helps us realize that in law a descriptive proposition—notice that a statement formulated in terms of what guilt "is" purports to be a descriptive proposition—is meaningful only to the extent that it conveys a legal rule, for the issue in law is not truth or falsehood but validity or invalidity.

This should not be taken to mean that descriptive scientific propositions are not pertinent in law. The sciences, particularly the so-called "sciences of man," afford important items of

(35) Felix Kaufmann, Die philosophischen Grundprobleme der Lehre von der Strafrechtsschuld (1920).
(36) Ibid., at pp. 72—76.
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consideration in formulating legal policies and in shaping rules teleologically well adapted to realization of such policies. But the so-called "science of criminal law" engaged in by civil law scholars under the name of "Strafrechtswissenschaft" or "Strafrechtswissenschaft" is not such rationally pertinent "science"; its description as a "science" is misleading. Nor must any science be ever conceived as a direct constituent of law; sciences as well as ethics can be part of law only in the form of their operational impact. The same is true of metaphysical doctrines to be encountered in law.

4. Quest for a General Theory of Guilt

In formulating his phenomenological theory of guilt, Kaufmann made certain specific ethical and political assumptions. He thus assumed utilitarianism to be the proper philosophy of law and the postulates of liberal democracy as prevailing in Austria at the time when he wrote to be generally valid postulates. But, as is known, "guilt" is an ancient concept antedating the birth of utilitarian philosophy and political liberalism. Kaufmann's view of guilt hence reflects not a general concept of guilt but a specific historical one. However, his theory lends itself to enlargement into a general theory of guilt. Such enlargement requires but the realization that the postulates addressed to law which constitute "guilt" are not permanently fixed but rather vary with changing philosophies of law, its ontologies and epistemologies as well as its political philosophies. How "guilt" is to be defined in specific substantive terms, depends on the type of postulates obtaining in a given legal system, postulates which, of course, may in turn be derived from ontological or ethical or political conceptions of "guilt." The definition of guilt in terms of the legal rules which "guilt" symbolizes affords, if these rules are rules of positive law, "guilt" de lege lata. One may, however, on particular preferred policy grounds, that may be derived from his general or political philosophy, formulate demands for introduction into the law of principles other than those in force, that is, for adoption of a different concept of "guilt," "guilt" de lege ferenda. Finally, a decision maker or policy advocate may favor generally or for special types of situations dispensing with any personal conditions of answerability. In such event one may speak of "crime without guilt."

The specific substantive content of the concept of guilt is always an expression of legal or policy demands, whatever may be the basis of their adoption. At the root of this concept there is always some political postulate, whether express or implied. There are thus various conceptions of guilt, depending on the underlying view of the proper structure of the form of government as relating to criminal law and procedure: a theocratic concept of guilt, an autocratic concept of guilt, a democratic concept of guilt, etc. There obtains between the prevailing form of government, in a broader sense of this term, and the concept of guilt a certain relationship, which may justify the assertion that there is a proper concept of guilt corresponding to a particular form of government. One might thus well say that in a theocracy
or in a state in union with a church the proper concept of guilt is the theocratic one, meaning that the demands predating imputation of "guilt" to a person are theocratic or theological and that the proper jurisprudence of guilt is ontological. Similarly, one might assert that in an autocracy consistency requires that the concept of guilt be autocratic and that in a democracy that concept ought to be democratic. However, the phenomenon of a mixed form of government may be noticed also in this field. Thus we may find in an otherwise autocratic state a democratic notion of guilt expressed in law and vice versa. A particularly frequent phenomenon is adoption of a theological concept of guilt despite prevalence of a system of separation of Church and State. It should be noted that when I use the term "demands" I do not mean to suggest that particular notions of "guilt" or the rules into which such notions are translatable are always or even mostly formulated in terms of demands. I merely submit that notions of "guilt" in law always import such political demands, since in operational terms they realize them.

A most intricate problem is that of relationship between the "law of guilt" and the "jurisprudence of guilt." The former consists of the legal rules relating to guilt, symbolized by a particular concept of guilt. The latter consists in the philosophy of guilt adopted by scholars of a given legal system (metalegal jurisprudence) and or by the law itself (philosophy prevalent in the law). There is interdependence between these two spheres. Thus, an ontological concept of guilt, when adopted by legislators or judges may influence the law, as has been shown to have been the case in Germany, where Welzel’s jurisprudential doctrine of guilt was translated by the Bundesgerichtshof into particular rules on legal error. A critical, phenomenological doctrine of guilt may have a similar impact, although that type of doctrine implies that the concept of guilt reflects the law of guilt and not vice versa (except if reflection is taken to indicate that the law of guilt originates in a concept of guilt). It may be also significant to note that often political philosophies have an impact on ontologies and may thus exercise, in addition to their direct impact, an indirect influence upon the law of guilt.

In summarizing it may be said that taking the minimum definition of guilt, in the sense of personal conditions of imputation, as a basis, the particular legal definitions of guilt vary from each other in that they always stand for certain distinctive political demands regarding such conditions.

5. Some Aspects of a Democratic Concept of Guilt

Discussion of the various particular notions of guilt would exceed the scope of this lecture. I shall deal only with two aspects of one concept of guilt, namely, that which is of particular interest to us, guilt in a free society. One of these aspects concerns the psychological conditions of imputation; the other concerns the standard from which the notion of guilt may be derived.

In a free society any type of state intervention at criminal law into the life, liberty,
property or other personality interest of an individual should be predicated upon a thorough comprehension of the human personality, of the operation of man’s mind, the motivations that prompt his actions, his prospective reactions to projected interventions and their impact upon his future mental and social development. Such comprehension, of course, must be based upon insights of modern psychology and sociology, not upon obsolete scientific assumptions. A realistic psychology as the basis of imputation of guilt is of the essence of justice to the individual, for only such psychology can help decision makers to realize why a man acted as he did and what punishment or other sanctions mean to him. Science in this sense is an indispensable tool of democratic law; law not based upon valid science is but a ritual.

Today, a proper evaluation of human action must proceed from an understanding of both the conscious motivations and intentions that steer human conduct and the profound unconscious motivations that determine every personality expression. True, imputation of “guilt” for punitive purposes should never be based on man’s unconscious motivations,(37) except that such motivations are implied in any conscious action and in the harm caused by such action and that harm causation is a requisite of state intervention in democratic law. But, wherever possible, unconscious factors bearing on evaluation of conscious action (e.g., unconscious inhibitions preventing consummation in cases of attempt) may and should be taken to limit or even to exclude imputation for punitive purposes; when there is a serious need for community protection, non-punitive intervention predicated not upon “guilt” but upon “danger” is warranted.

Yet, modern German scholars, though greatly concerned with the problem of “guilt,” show no interest in the impact of the Unconscious upon legally relevant conduct. They deal exclusively with the psychology of the system Conscious. Their “guilt” concept is thus in many respects based upon a fictional and outmoded notion of man, an inadequate interpretation of his intent, his negligence, advertent and inadvertent. Even in the light of conventional psychology, the German doctrine of “guilt” is flagrantly inconsistent. The defense of error of law was admitted in German law(38) as implicit in the tenet “nulla poena sine culpa,” interpreted to bar punishment unless the defendant “knew” that what he was doing was wrong. At the same time, German law continues to treat punitively persons to whom it never occurs that their conduct might involve a risk, that is, persons engaged in inadvertent negligence.(39) In fact, the described inconsistency exists even within the law of legal error itself;

(37) “For the practical need of adjudging man’s character, the action and the attitude consciously expressed in it are mostly sufficient.” Sigmund Freud, Traumdeutung—Über den Traum, in Gesammelte Werke (Imago Publishing Company, 1940), vol. II, p. 626.
(38) See decision of the Bundesgerichtshof cited supra, note (19).
(39) Negligence always involves error or ignorance. On moral grounds the view has been advanced quite early in the doctrine of civil law countries.....in the beginning of the 19th century..... that “inadvertent conduct” is not morally “imputable” (see Almendingen’s writings cited in Luis Jiménez de Asúa, Tratado de Derecho Penal, 1950, vol. V, at pp. 739, 742), and several writers, foremost among them Kohlrausch (Irrtum und Schuldbegriiff, 1910, at pp. 1 et seq. and 183; and
error based on inadvertent negligence may constitute a punishable failure of exertion, so that a man may be punished for intentional crime even though it never occurred to him that what he was doing is illegal. The inconsistency of this approach appears magnified in the light of the fact that similar unconscious motivations may underlie so-called "honest error" and inadvertent ignorance.

As regards the choice of moral standards of determining guilt and the proper scope of legally enforceable morality, it is fashionable to point to the relativity and unverifiability of moral judgment. However, democracy, as a particular political, and hence moral, philosophy, makes such choice and thus disposes of the allegedly insoluble issues, such as those raised by the controversy between the German Bundesgerichtshof and its critics (40) or by the debate between Lord Justice Devlin and the majority members of the Wolfenden Committee (41).

There is neither need nor occasion within the context of formulating a system of ends of criminal law or a concept of "guilt"---but an incident of such system---for starting with first principles. A penal code is but a part, though a distinctive one, of a comprehensive order of life afforded by the total complex of accepted standards and laws, including the constitution, of a given country. The purposes of that complex are the same for all its parts. In countries governed by constitutions, the aims of all law are fixed by constitutional law. True, constitutional law mostly consists of 1. rules of delegation of authority of law-making and of 2. rules of limitation of such authority. But although these rules do not generally determine the substantive rules of penal law, they fix the scope of the ends which criminal legislators may assume. Criminal law is distinct from other branches of law in that it operates by means that are highly deprivational. The normal sanction of criminal law is liberty deprivation combined with a "defamation," the criminal record. It follows from the principle of individual freedom, which is implied in the very existence of a "constitutions," that, whatever ends may be pursued by legal branches other than criminal, only very strictly limited ends may be pursued by criminal law. To justify inclusion of any values within criminal law for enforcement by the specific means of such law, it must be positively shown that 1. the provisions thus to be enforced are indispensable to the maintenance of most basic needs of society, and not merely to the maintenance of otherwise proper ends of society or community demands or mores; 2. that these provisions can be effectively enforced by criminal law means, so that they be neither a dead letter nor a pretext for enforcement of a policy extraneous to the avowed one; and 3. that the policy pursued cannot be reached by means other than those of

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Reform 1910, vol. 1, at pp. 194 et seq., and 208) advocated that it should not be punishable. But Kohlrausch later abandoned this position. Another prominent supporter of this view was Baumgarren, Aufbau der Verbrechenslehre (1913), at 116. It was suggested that only a fine should be imposed upon inadvertent conduct. But today the normative view is overwhelmingly accepted.

(40) See text at, and notes (26) and (27).
(41) See text at, and notes (28) and (29).
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the criminal law.

What, within such concept of the "ends of criminal law," is "guilt"—"guilt" in the sense of the personal basis for application of punitive sanctions? It is "blameworthiness," of course. But it is not reprehensibleness in any broadly moral sense but rather a judgment of disapproval of non-conformance in a social-political, narrowly legal, sense. A person who breaches the law in a democratic society is "anti-social," not necessarily "immoral." To use Biblical language, he breaches the "covenant," or to use Rousseau's variation upon the same theme, he breaches the "social contract." In this sense, he is "guilty," and in this sense only does political society have any right at all to punish him. Such society is not in any other sense a custodian of his morality.

Nor does such society have any right to expect from a member abidance by any comprehensive duties, not fixed in advance by the terms of law. Codification is thus an essential tenet of democratic criminal law. By the same token, criminal statutes must be interpreted strictly in favor of the accused. Any enlargement of criminal law policy must be accomplished by enactment of new statutes, not by judicial policies or doctrinal views, even when they have the support of scientific insight. But scientific insight may and should be used even contra legem, whenever it favors the accused.

The stated principles dispose of several arguments set forth in the above described controversies. Since criminal law is subject to distinctive limitations, the fact that the institution of monogamous marriage is adopted by the civil law and protected by some criminal law provisions cannot be deemed a sufficient ground for judicial extension of the scope of these or other criminal law provisions. Nor must absolute morality or, indeed, any other morality, except that implicit in the maintenance of basic social needs, be taken as a standard of proscription at criminal law. State intervention by means of such law is predicated upon the presence of social harm, that is, harm to persons other than the individuals concerned, and in fact, not every social harm justifies such intervention. A weighing of community interests against individual interests is of the essence of democratic policy making.

Yet, this limitative view of "social harm" does not fully resolve the issue of what should be deemed to constitute such harm de lege ferenda. Before proceeding with our discussion of the specific instances in which allegedly insoluble disputes are resolved by adoption of democratic tenets, it will be helpful to deal briefly with the problem of such harm.

The positivistic school of criminal law allegedly eliminated the concept of "guilt" from criminal law on the ground that this concept is predicated upon the doctrine of "free will," which—the school claims—has been disproved by science. The positivists rather proceed from a notion of "social necessity" as the standard of criminal law sanctions, aimed at "social protection" or "social defense." Of course, using the phenomenological methodology, one could unite under a common symbol the positivistic postulates as regards personal answerability and this symbol might be called "guilt," "guilt" in the sense of social responsibility without moral
stigma or moral blameworthiness.

The notion of "social necessity" is but a variation of that of "social utility," which is a pre-positivist utilitarian standard. Social utility is, indeed, the crux of "utilitarian ontology." Conventional utilitarians were convinced that they knew very well what is socially useful or harmful. Bentham thought of social utility in terms of the greatest happiness of the greatest number of people. He was not concerned with the "people’s" choice or their own view of what is good for them. Happiness was standardized. There was hardly any question as regards that which makes a man happy. Indeed, happiness could be atomized to a degree of rendering it susceptible to exact quantification; "the greatest happiness of the greatest number" was a mere matter of mathematical computation. The positivists, though professing to proceed from "science," did not go beyond this utilitarian idea of happiness. When Ferri, for instance, speaks of "social necessity," he assumes it to be perfectly well known wherein such necessity consists.

While Bentham disregarded the fact that it may make a man happy to choose his own happiness or even to choose unhappiness, Kant thought choice to be the very essence of man’s being a "person." The "will of man," the "will of the people," as a democratic ideal, often conflicts with that which other persons, including Benthamite philosophers, may consider to be man’s welfare. An essential tenet of democracy is that no one knows better than the individual himself what is good for him or what should make him happy. The positivists have never concerned themselves with this ideal of self-government, self-determination or self-direction, for they have assumed such self-determination to be itself "determined." One might puzzle, indeed, why they have not taken due account of the fact that by the same token their own "science" is also presumably thus "determined."

The most fundamental defect of Benthamite utilitarianism, however, has been disclosed by a theory which has assumed Benthamite hedonism as its point of departure in trying to structure the most gigantic scientific system of psychology, psychoanalysis. While admitting the validity of the Benthamite assertion that a "pleasure-pain" calculus is a basic factor in human motivation, psychoanalysis assumes that such calculus operates not only in the system Conscious but also in the Unconscious. Since the motivating factors in the two processes of calculus are not the same and there is no coordination between them and since unconscious forces seek and find expression in human conduct, the rationality of the latter in terms of conscious evaluation of the "pleasure-pain" balance may be seriously disturbed; man may appear to seek pain rather than pleasure. This realization has destroyed the belief that conscious hedonism functions as exclusive regulator of human action and that the latter is thus a readily understandable simple psychological phenomenon.


(43) It would by far exceed the scope of this lecture were I to undertake discussing the intricate problem of "life" and "death drives," the latter constituting a controversial issue among psychoanalytic experts.
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is the peculiar transformation which the so-called "sense of guilt" has undergone in the light of psychoanalytic insight. That "sense" is no longer a purely rational remorse of moral man—whatever may be the decisive morality notion—, but appears to be a complex psychological phenomenon deeply rooted in the Unconscious and, relating, in part at least, to experiences other than the conduct consciously repented. The aim of psychoanalytic therapy is particularly to clear "guilt feelings" of irrational contents and reduce "guilt" or conscience to a rational regulator of man's social conduct. But this aim is a medical one directed to the well-being, as psychoanalysis conceives it, of the individual patient.

The attempt of psychoanalytic writers to construct a "social theory" on the basis of psychoanalytic scientific assumptions has been largely obstructed by the difficulty of reconciling medical with social ethics—a difficulty magnified by the methodological naïveté of some psychiatrists, their failure to realize that a social theory cannot be but a theory of arithmetical computation or geometric synthesis of individual happinesses. Writers in this field often overlook that they have themselves destroyed the foundation of Benthamite mathematics of happiness.

The revolution produced by psychoanalysis has injected a new series of problems into the old conflict of libertarian democracy oriented to self-determination and utilitarian democracy oriented to group welfare. The former has long ago conceded that each of the individual "sovereigns" must yield some of his self-determination so that others, ultimately also the "group," may survive and realize a similar portion of their self-determination and a modicum of "group" welfare. Old school liberals assumed that such yielding ought to be strictly confined to that which is necessary for equality of treatment and group survival, and this postulate is still valid in criminal law, in which the ultimate stake is man's personal liberty. Yet, the notion of that which is comprised in a modicum of group welfare and survival and in the individual demands that may be included in such welfare has radically changed. We are thus witnessing an enormous expansion of personality rights which have developed against the background of man's realization of the growing scope of his self and which call for a comprehensive protection, including protection by means of criminal law.

What, then, is "harm" against which protection may be provided in criminal law? There is reason to believe that while pursuit of conventional morality is inadmissible by criminal law means, one might well consider including in the concept of harm to be averted by such means certain hitherto not punishable injuries to man's personality. A most difficult task facing modern legislators is making an informed and just decision on how to reconcile and balance personality protection and individual liberty.

But whatever may be the difficulty of the substantive problems to be resolved, it is certain that, when constitution or enlargement of punitive answerability is at stake, such resolution in a free society is a legislative task. A grant to "enlightened decision makers" of
authority to defy "formal codes" would destroy the very foundations of democratic criminal law, as developed in centuries of political-philosophical and social struggle. (44) Nor can such grant be justified by the alleged ambiguity of legislative language. True, statutory, as any other language is often ambiguous. But that ambiguity should not be exaggerated. We do communicate by words and words have an outer limit of meaning. Once that limit is reached, a code is meant to dispose of the policy-making aspect and judges ought to obey its mandates. There are many sound reasons for codification. The latter is expected to function as a guarantee against judicial arbitrariness, to constitute notice to the potential law-breaker of that which he is prohibited from doing and to assure as much equality of treatment as possible.

Where an issue of proper disposition arises within an area in which a definite legislative choice does not appear to be available, a distinction ought to be drawn between instances of "statutory ambiguity" and "statutory delegation of discretion." Where two or more reasonable interpretations of so-called "ambiguous statutory language" are possible, the judge in a free society has no choice. The principle in dubio pro reo binds him to decide upon the interpretation that is most favorable to the accused. Only as regards "reasonableness" of an interpretation and in cases of statutory delegation of discretion can the question be posed as to whether the judge should give effect to his own hunch or rather follow community views or community mores. No doubt, in judging the "reasonableness" of an interpretation as well as in exercising discretion, the judge should give paramount consideration in appropriate cases to scientific insights. In resolving doubts within the scope of discretion, it should be noticed that a penal code itself may afford a rule determining whether judicial predilection or community standards should govern. (45) The more democratic solution, to be preferred for adoption by a penal code and to be applied where a code affords no guidance, would seem to be that the judge should apply community views unless contrary community mores show these views to be but verbally professed.

(44) While postulating "man's dignity" as a paramount goal, Lasswell and Donnelly (supra, note 31) seem to forget that that dignity is best preserved where an individual's fate is governed by abstract, general and unbiased laws rather than by the fiat of another individual, however "enlightened."

(45) See Barna Horvath's Comment on Cahn's Authority and Responsibility, in Freedom and Authority in Our Time, op. cit., supra, note (30), at pp. 213, 214.