"NULLUM CRIMEN SINE ACTU"

by

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Ever since the National Socialists carried the originally "positivist school's" ideology of the "criminal law of the actor" (*Täterstrafrecht*) ad absurdum, punishing men for "being thus" (*So-Sein*) rather than for committing a specific socially harmful "act,"[1] the criminal law of civil law countries became cautious. Stress on presence of a socially harmful "act" as a condition of answerability not only in punishment but also in "security measures" is increasing. The present trend is to bar so-called "pre-delictual security measures," that is, measures which are not predicated upon engagement in any criminal activity but are administered upon a mere showing of a dangerous state or tendency of the individual. In the United States the "act" requirement as condition of punishment was recently held to be a constitutional postulate in *Robinson v. California*,[2] the full implications of which are not yet estimable. Indeed, it is perhaps proper to say that to the catalogue of "*nullum crimen*" principles[3] there has been added a new one: "*Nullum crimen sine actu.*" This means that the "*actus reus*" or "*Tatbestand*" cannot consist in a "being;" it must consist in a "doing."

Of course, "*nullum crimen sine actu*" is implied in the democratic ideology of *nullum crimen, nulla poena sine lege*, which requires as a condition of sanctioning, "an act" rather than a "being," in addion to "intent" or "negligence." The defendant should be apprized in advance

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(1) The "*Täterstrafrecht*" is a philosophy of criminal justice which assumes that criminal law must reach the personality of the actor rather than the specific "act" committed by him. In National Socialist doctrine this philosophy was carried to an extreme: punishment was based on what a man "is" rather than on what he "does." For a fuller description and analysis of this phenomenon see Helen Silving, "*Rule of Law*" *in Criminal Justice*, in *Essays in Criminal Science* 75, at 97—119 (Mueller ed., Sweet & Maxwell, London, Dred. B. Rothman, South Hackensack, N.J., 1961).

(2) 370 U.S. 660 (1962).

(3) The catalogue of these principles comprises: *nullum crimen sine lege; nullum crimen sine lege praevia, nullum crimen sine lege scripta; nullum crimen sine culpa.* There are corresponding "*nulla poena*" principles, and all these are partial realizations of the general "legality principle" or "Rule of Law."

of what he must not "do" to avoid punishment. Judges ought to be told specifically what conduct they are authorized to punish. But the "act" requirement in this century reaches into greater depths than it did when it was conceived by the French revolutionary ideology. Why.....we might ask.....could not *nullum crimen, nulla poena* be satisfied if the potential offender were told in advance what type of person he henceforth must not be and the judge instructed what type of being he is authorized to punish? The answer to this question according to traditional theory is that in the evil "act" the actor expresses an evil "intent," whereas a "mode of being" may not be thus immediately determined by a state of mind. For this reason also, if there is an "act" expressing an evil intent, the offender should be punishable even though he was unsuccessful, in that no harmful result ensued. Within this doctrine, the "act" is not an independent constituent element of crime; it is but a reflection of intent. In one prominent theory, that of "teleological action"(*finale Handlungslehre*,), the "act" is deemed not even conceptually separable from the intent that steers it. However, in the light of psychoanalytical insight, such complete dominance of the act by a conscious intent appears fallacious. Human actions are determined by unconscious as well as by conscious factors. Between the outward occurence, as described in a criminal statute, and the mind of the actor there exist not only conscious relationships, as recognized by traditional doctrine, but also unconscious ones. The "intent-act" nexus, conceived by that doctrine, is thus complicated by the impact of unconscious forces, reflected in the "act." This endows the latter with a certain degree of independence from conscious "intent." As reflection of the unconscious, the "act" acquires a meaning of its own.....a meaning, indeed, that justifies its being placed ahead of the "intent" not only systematically, for the purpose of satisfying the legality principle, but also "psychologically."

The "act," as thus conceived, is linked to the personality of the actor in a new sense. The objective, outward occurrence, the "doing" as well as the "accomplishing" of a result in the external world, affords a significant clue to the actor's unconscious attitude toward that occurrence. Thus, for example, contrary to the traditional view that an attempt expresses the actor's evil mind as fully as does consummation, the latter failing only "accidentally," such failure in the light of psychoanalytical insight shows a "missing of the actor's intent"...unconscious factors which impede the actor from materializing his conscious aim.

In this sense, every human action is an expression of the actor's "mode of being".....his being a particular "type" of person.(4) To this extent, one migth say that the "criminal law

(4) The "*Täterstrafrecht*," as visualized by the "positivist school" of criminal law, is concerned with "actor types" rather than with "types of acts"(*Tattypen*). Often the view has been expressed, even by psychoanalysts, that a person's specific "act" does not necessarily reflect his personality. But this view is hardly consistent with the rest of psychoanalytical doctrine.

"*Lebensführungsschuld*," guilt consisting in having permitted oneself to become "thus" by indulging in a continued course of antisocial conduct, has been used to combine the "actor type" ideology with the "guilt principle."

of the act" is at the same time implicitly also a "criminal law of the actor." But precisely for this reason, no additional ingredients of the latter law can be justified: no feature can be said to express a man's personality more reliably than that which he "does" and that which he "accomplishes." While not basing their respective policies on psychoanalytical doctrine, both the Supreme Court of the United States, in outlawing "status crimes," and the framers of the Draft of a new German Penal Code (1962), in rejecting the concept of "*Lebensführungsschuld*" (guilt consisting in a life conduct), express this view.

Further analysis of the "act" concept for purposes of "***nullum crimen sine actu***" will be necessary, particularly in situations such as those of crimes of omission, where "doing" and "being" may be said to be close to each other. But when it is considered that the principle of "*nullum crimen sine culpa*" is still not fully systematized, despite the efforts that have been made to comprehend the nature of "*culpa*," one ought not to expect reaching full systematization of the "act principle" overnight. There is need, nevertheless, for stating at this time certain basic postulates implicit in this principle, with the understanding that it is a part of the "legality principle" or "Rule of Law," so that it operates always in favor of the defendant but not against him.

1. The maxim that a crime must have as its substratum an "act" or "voluntary act" is not new. The novelty of the *Robinson* holding lies in the fact that the conventional "act" requirement has not been hitherto thought to prevent formulation of "status crimes." The Model Penal Code of the American Law Institute correctly interprets its provision that "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act which it was physically possible to perform,"(5) as barring status crimes. In a comment to this provision(6) the Model Code draftsmen point out that the latter "also would require that such offense as vagrancy be defined and interpreted to condemn specific actions, or omissions rather than to refer to states of being." That a reformulation of the Model Code's provision on vagrancy in the Proposed Official Draft(7) satisfies this requirement is at best doubtful. This section reads in pertient part:

> "A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for lawabiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity..."

It would seem that to be answerable, a person must not only "do" something, but must in addition cause some identifiable harm. Alarm might constitute harm, but the section does not require that alarm be "caused" by the act charged, merely requiring that the alarm be "warranted."

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(5) Section 2.01, ALI Model Penal Code.
(6) Commen 1 to the cited Section, Tent. Draft No. 4, at 120 (1955).
(7) Section 250.6, Proposed Official Draft (1962).

2. While, thus, the "doing" of an act alone should not be deemed constitutionally sufficient to constitute an "*actus reus*," there is reason, on the other hand, to view with skepticism the correspondence of the conventional doctrine of the "voluntary act" to the policy of the "act" requirement, as expressed in the *Robinson* case. The former has been often used to circumvent the disadvantages flowing from a successful exemption from punitive responsibility because of insanity. Where there has been allegedly no "voluntary act" at all, as for example, in sleepwalking or epileptic attacks, the person concerned is acquitted without being at the same time subject to confinement in a hospital because of mental disease. This result has been often criticized.[8] Actually, the "act" requirement need not be assigned such scope, which has doubtful implications. It should suffice if, as held in the *Robinson* case, criminal punishment required that the defendant engage in some harmful external activity or omission and not merely "*be thus*."

3. Once the "act" requirement is posed, the problem of its proper scope within the total structure of constituent elements of crime is opened. The situation may be analogized to that which developed in the course of a closer inquiry into the logical consequences of adoption of the so-called "guilt-principle." "Guilt" was first required as a condition of responsibility only to the extent that the "act" or "*Tatbestand*" had to be accompanied by some *mens rea*, intent or negligence, without it being necessary that such mental states cover each ingredient of the *actus reus*.[9] "*Nullum crimen sine culpa*" was satisfied if only a fraction of the "act" was intended. A fortiori was this principle satisfied when, within a crime carrying most serious consequences, only a minor result was intended. The allegedly "accidental" serious consequence was attributed to the actor on the basis of the medieval notion that "*versanti in re illicita imputantur omnia quae sequuntur ex delicto*" (if a person "moves about" in prohibited matter, everything that results from the crime is imputed to him). Such "praeterintentional crimes" are still current in common law countries, particularly in the form of "felony-murder," though even in these countries efforts are noticeable to reduce their impact. In Germany, such crimes, called "*durch den Erfolg qualifizierte Delikte*," of which assault with fatal result is a classic example, have been subjected to a systematic challenge. Attention was called to the fact that where the intended result is minor and responsibility attaches for an "accidental" major consequence, particularly death, the "deviation" from the "guilt principle" differs but slightly from a total abandonment of that principle; the actor cannot be fairly said to have brought about death "guiltily." Accordingly, in several civil law penal codes aggravation of punishment in such situations came to be predicated upon the actor's having caused the

(8) See *e.g.*, Glanville Williams, *Automatism*, in *Essays in Criminal Science* 343, at 346, *op. cit.*, *supra*, note 1.

(9) This feature is most conspicuous in the common law world, where knowledge of constituent factual elements of a major crime is frequently not required even as regards most crucial facts. Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875). But see Morissette v. United States, 342 U.S. 246 (1952).

graver consequence at least negligently.[10] This is thought to coordinate the *mens rea* and the *actus reus* elements of crime, in the sense that every portion of "factual ingredients of a crime as described by statute" is now required to be covered by some mental element.

The coordination of "act" and "intent," however, raises an issue also in the corollary situation: there are crime structures which constitute opposite to those of praeterintentional crime; in them the "intent" requirement exceeds the "act" requirement. One might say that these crime structures also violate the "guilt principle", in that in them there is assumed a notion of "guilt" that is only minimally attached to an "act", and is to this extent, quasi "free-floating. But it is more accurate to describe these structures as violating the "act principle", since they lack an "act portion corresponding to all "intent" ingredients, as the praeterintentional crime structures lack "intent" portions corresponding to all "act" ingredients. In Anglo-American law crimes of this type are called "crimes of specific intent", and in German law they are called "*Delikte mit überschiessender Innentendenz*", literally, "crimes with an overflowing inner tendency".

In Anglo-American law —this is also true of German law— there are two distinctive varieties "of crimes of specific intent", and in one of these the "overflowing" portion of intent does not lack an act substratum but merely overdetermines it. This variety may not be structurally objectionable on the ground of violating the principle of "*nullum crimen sine actu*", though there may be present in some crime types within this category other questionable features.[11] Thus, in "murder in the first degree" in some American jurisdictions "premeditation and deliberation" is characterized as specific intent, while apart from this qualified "intent" feature, decision to kill comes within "general intent". Both such "specific intent" and the "general intent" to kill are directed to the same act, the killing. The "overflowing" ingredient is distinctive mostly in being required to be proven by the prosecution, whereas "general intent" is inferred from the "act" itself. This variety of "specific intent" is not included in the present discussion.

The second type of "specific intent" is best illustrated by the Anglo-American "burglary" construct. In this crime, the "general intent" and the specific intent are directed to different objects. The actor must intend to enter a building belonging to another without permission, and he must in fact enter such building; to this extent reaches "general intent", which thus

(10) Section 56, German Penal Code; Art. 15, Polish Penal Code(1932); Art. 15, Korean Penal Code (1953). However, in the present paper we are not concerned with this crime construct, except to the extent that it affords a corrolary to the one which forms a principal object of our analysis here.

(11) On this seen Helen Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U.Pa.L.Rev. 350, at 361-363(1954). In both Anglo-American and the civil law, all crimes in which there is required a special "motive"(in addition to "intent") directed to the "act" are within this category. A classic example is larceny, which requires a motive of "appropriation" of the thing taken from another.

"coincides" with the act. Beyond this, the actor must, when entering···and not merely as an afterthought···,also intend to commit another crime within the building, e.g., larceny; but he need not in fact commit such other crime, so that no act corresponding to such intent is required. It is important to note that in some jurisdictions the entry is a very minor crime and in some, not even a crime but merely a tort. The same "entry" becomes a significant crime, indeed, if committed at night a felony, because of a factor that may remain entirely within the actor's mind, and as to the nature of which the entry itself affords no clue. Yet, it is this "specific intent", the intent to commit a crime within the building, that constitutes the crux of the crime of "burglary", as evidenced by the fact that where the defendant is charged with "entering with intent to steal" whereas the proof adduced shows him to have "entered with intent to rape", the "burglary" charge fails, even if he actually stole, the intent to steal having originated after entry.(12) It is this utter incongruity between the "intent" element and the "act" ingredient that renders the common law "burglary" concept precarious.

Since it might be difficult to insist on exclusiveness of crime types in which "act" and "intent" are perfectly coextensive, the issue to be resolved is what scope of excess of "intent" over the "act" should be tolerated. An example of a construct that may be deemed unobjectionable may be found within the German law of murder. That law mentions as one of the tests of a "murderer" that the killing be done from a "base motive."(13) Let us assume that the killer's motive consists in his desire to marry the victim's spouse. As in the Anglo-American burglary, there is required to be anticipation but not necessarily realization of an act beyond the confines of "*actus reus*," in the former "entry," in the latter "killing". The motive in the latter may be thus wholly in the actor's mind, as in the former. The difference between the two constructs lies rather in the fact that in the German "murderer" concept the "base motive" bears no disproportionate relation to the "act," the killing(14). The homicide is still the decisive element, and the motive affords but a moderate aggravation ground. By contrast, in the common law type of burglary, it is the intent to steal that makes the decisive difference between the felony of burglary and a tort of trespass. The very essence of the crime lies in a state of mind, to which no "act" portion needs to correspond, so that the punishment imposed is a veritable *cogitationis poena*, a punishment for thought alone.

The crime type of "attempt" raises serious problems of structural analysis both in the civil and the common law because of a discrepancy obtaining between its ideological conception and the reality of its treatment in penal laws. Seldom is an "attempt" characterized as a

(12) See on this Helen Silving, *Philosophy of the Special Part of a Penal Code*, 33 Revista Juridica de la Universidad de Puerto Rico, No. 1, 1964.

(13) Section 211(2), German Penal Code.

(14) In fact, in particularly grave cases, the punishment of a "manslayer" may be the same as that of the "murderer." Section 212(2), *id.*

"crime of specific intent" in the common law,[15] and it is not usually recognized as a "crime with an overflowing inner tendency" in the civil law. This is probably due to the fact that the law indulges in a pretense as though an attempt were but a phase in the *iter criminis* (road of crime), and not an indepedent crime construct. It is assumed that the "act" in an attempt is a realization of its intent, however it may fail to reflect it.[16] Therein attempt differs from common law burglary, in which the crucial intent is purely collateral to the act of entry. Actually, however, an attempt in most legal systems of both the common and the civil law may afford no greater clue to the nature of the attempted crime than does the entry in burglary indicate the type of offense which the actor intends to commit upon entry. The attempt act may be a completely indifferent conduct, not even a tort, that is made to constitute a serious crime, in some laws punishable as severely as consummation, solely because of the accompanying intent.[17] Whether one construes this phenomenon as affording evidence of the actor's evil will (guilt) or as demonstrating his dangerousness, what is being realistically punished is the defendant's thought and not his act.

4. In some crime constructs the "intent" not only exceeds the "act", but is, indeed, purported to serve as a substitute for gaps in the "act" description. The "intent" is taken to make an otherwise vague and uncertain "act" description definite and certain. A classic example of this form of manipulation of "act" and "intent" may be found in *Screws v. United States*,[18] as construed by the Court minority.

This case arose under the Civil Rights Act, which provides for the punishment of anyone who under color of law willfully deprives any person of any rights to which such person is entitled under the United States Constitution.[19] Screws, acting as sheriff of a small community, together with several others, arrested a Negro under pretext that the latter had stolen an automobile tire. They took him handcuffed to jail, but before delivering him there beat him mercilessly, so that he died. Indicted under the Civil Rights Act for violation of the victim's

(15) It is doubtful that the term "specific intent" is used in a technical sense when it is referred to "attempt," as is the case in *Rollin M. Perkins, Criminal Law* 496-497 (Brooklyn, Foundation Press, 1957), and cases cited. *Glaville Williams, Criminal Law, The General Part* § 16 (Stevens & Sons, London, 1953), does not refer to attempt as a crime of "specific intent."

(16) "The actor [in an attempt] expects the occurrence of the total objective *Tatbestand*, but cannot materialize it, whether because the circumstances which he assumes are absent..., or because he incorrectly estimated the means or the causal effect..."

Reinhart Maurach, Deutsches Strafrecht, Allgemeiner Teil 188 (sec. ed., C.F. Müller Karlsruhe As shown above, according to the traditional view, failure of consummation in attempt is not referable to the actor, whereas according to the psychoanalytical view it is causally related to his unconscious attitude toward the "act."

(17) See Paul K. Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U.L.R. 1170, 1188-89 (1957), for discussion of Lord Mansfield's famous statement that "the intent may make an act, innocent in itself, criminal."

(18) 325 U.S. 91 (1945).

(19) § 20 of the Criminal Code, 18 U.S.C. § 52, 18 U.S.C.A. § 52.

rights secured by the "due process clause" of the Federal Constitution, Screws challenged that Act as unconstitutional on the ground of vagueness and uncertainty. He contended that since the number of civil rights under the "due process clause" is not fixed but subject to enlargement by interpretations of the Supreme Court, a potential offender cannot know in advance what he must not do in order not to come into conflict with the Act. The majority of the Supreme Court rejected this challenge, asserting that since the Act made it a condition of responsibility that the violation be "willful", lack of advance notice of criminality is not apposite, provided that the federal right protected by the Act must have been "made definite by decision or other rule of law."[20] A dissenting Court minority denied the propriety of substituting a state of mind requirement, "willful", for definiteness of statutory description of any portion of the "act", that is, the "physical conduct" or the "result".[21] The dissenting Justices thought the Act, as construed by the majority, comparable to a statute to the effect that "Whoever *wilfully* commits any act which the Supreme Court of the United States shall find to be a deprivation of any right, privilege, or immunity secured or protected by the Constitution shall be imprisoned not more than, etc."[22] They said: "If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening (Citations), then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable."[23]

Of course, weighty ethical considerations,[24] combined with certain jurisdictional arguments,[25] supported the majority solution. But on the issue of the use of intent to define any otherwise

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(20) *Supra*, note 18, at 103.

(21) Justices Roberts, Frankfurter and Jackson, dissenting, 325 U.S. 138, at 154.

(22) *Supra*, at 152.

(23) *Supra*, at 154.

(24) Actually, under State law, the act which the defendants committed was murder. Their argument in the Federal Court was, among other contentions, that what they did qualified as a crime under State law and was hence immune from Federal jurisdiction, and for the purpose of this argument, they admitted all elments of murder. Yet they were not prosecuted for it before a State court. See concurring opinion of Justice Rutledge, *supra*, 113, at 114, and see n. 5, ibid.

One might well argue that rather than prosecuting persons guilty of such heineous crime on a charge of a relatively minor offense, punishable by a maximum imprisonment of one year and a fine of $ 1,000, a device should be planned for a Federal action to compel State authorities to prosecute for homicide. But, short of such device, the prosecution at issue in this case afforded at least a method of some documentation of social censure of the defendants' act. Of course, as suggested by the dissenting Justices, the Civil Rights Act could be reformulated by Congress in such a manner as to satisfy the essential "Rule of Law" requirements. *Supra*, at 157.

(25) The constitutional challenge might have been rejected on the simple ground that though the exact scope of constitutional rights is indefinite, the rights in issue in the Screws case...particularly, the right to be tried by a court of law and not by ordeal (*see supra*, at 106)...were undoubtedly within that scope, so that the appellants had no standing to complain of the vagueness of the pertinent statutory terms; to their conduct these terms applied beyond the shadow of a doubt.

indefinite portion of the "act" description,[26] the minority position was clearly sound in the light of demands of "Rule of Law" in a free society. Any other position actually reflects the idea of a "criminal law of the actor," in which the "black heart" of the actor rather than his socially harmful "act" is the object of punishment, the evil intent being used as a substitute for statutory description of prohibited conduct.

5. Assuming the validity of the above stated postulates contained in the "act principle", the question arises whether they require a certain order of inquiry into the presence of the so-called "constituent elements of crime". Such order is posited by the classical doctrine of such elements, as particularly emphasized in Germany. Leaving aside the problem of "illegality" (*Rechtswidrigkeit*), which merits special discussion, in the stated doctrine the *Tatbestand* (*actus reus*) is established first, and only after its presence is ascertained, attention is directed to the problem of mind with regard to it.[27] The "teleological action doctrine"(*finale Handlungslehre*), however, has abolished the primacy of the "act" in the sense of "physical conduct" and "result", and shifted the focus of inquiry to the "intent" as that which steers the "act" and is according to this doctrine, of the essence of the "*Tatbestand*"(*actus reus*) itself. It has thus performed in German law a revolution that brings that law closer to the initial stage of Anglo-American law. The latter law has traditionally proceeded from the primacy of *mens rea* as originator of crime; the spirit of that tradition has been rather challenged in recent times.

As long as the four postulates enumerated above are satisfied, one might argue that there is no need for insisting on a particular order of inquiry into crime elements. Adherents of the "teleological action doctrine" assert that the traditional order is often wasteful.[28] However, insistence on not inquiring into a mental state prior to establishment of a harmful act flows from an independent ethical and political postulate...that the privacy sphere of the human mind, including an "evil mind", must be respected as an essential of human dignity. This implies protection not only against "*cogitationis poenam*" but also protection against government

(26) It is assumed for the purpose of the present discusson that this issue was correctly raised by the framework of the case.

(27) Compare *Adolf Schönke and Horst Schröder, Strafgesetzbuch, Kommentar* 11 (8th rev. ed., Becksche Verlagsbuchhandlung, München und Berlin 1957). See also Paul K. Ryu & Helen Silving, *Toward a Rational System of Criminal Law*, Seoul National University Review 1962.

(28) Maurach, *op. cit., supra*, at 186-187, asserting that in the case of error of fact (a man shoots in the dark at another believing him to be a scarecrow) inquiry into the facts before consideration of intent is comparable to the situation of a man who, "living on the ground floor, must grope in an attic for the key to the cellar." Maurach complains that practioners have no understanding whatever for the wastefulness implicit in such proceeding. Clearly, the practitioners are right, if only for the reason that knowledge of "other men's" minds presents more difficulty than finding external facts and that, however one might insist on "intent," the first clue to it is in practice always some external conduct.

interference with, including government inquiry into, the very "*cogitatio*". The order of priority, that requires giving first consideration to the "act" may be said to constitute a fifth postulate of "*nulla poena sine actu*", provided that investigation into crime is itself regarded as "punishment".