SCIENCE AND REFORM IN CRIMINAL LAW

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FOREWORD

Even a casual glance at legal controls reveals the paramount role of criminal law. For nothing less than liberty and life are at stake as well as basic attitudes which determine whether decency and respect for human beings are realities or mere pretensions. And it may not be superfluous to note, in view of the insensitivity of leading members of the Bar to the importance of this field, that the criminal law affects all of us, sometimes in ominous ways that disturb and challenge.

In the international sphere, the prospect of personal penal liability raises interesting questions, and even more significant are foreign political movements in which criminal law is recast and used as the principal instrument of domination. If we wish to understand what is happening in the world, we must study the criminal law of those countries. In the settled areas of foreign affairs the uniformity of criminal law has long attracted scholarly attention, although we continue to ignore it. Nor do our current studies of foreign and international law draw upon the resources of specialists in criminal law—so departmentalized has modern scholarship become. Yet, as one probes the problems of local, national, foreign, and international criminal law, it becomes clear that common ideas permeate all of these artificially separated branches of a single discipline.

Accordingly, for the various reasons indicated above, almost any problem of criminal law is worthy of serious study. But there are times and tides in the development of a discipline which bring certain questions into greater relevancy than others. They are not neces-

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sarily problems which concern practical matters directly. They are often theoretical issues whose impact may in the long run be far more important than urgent immediate questions. Allowance should be made, also, for individual taste in such matters, and any writer can only hope that his sense of what is relevant will be shared by others. But we are interested primarily in contemporary American criminal law, and that sets some objective bounds to the quest for what is most significant. Thus, the insistence of the need to solve procedural problems has diminished because of the recent provision of the federal rules. Although these problems are, of course, never fully solved, we may in the immediate future concentrate on the substantive criminal law.

**System—an Essential Phase of a Science of Criminal Law**

In this area the broadest formulation of "significant problem" must be in terms of the dual aspect of any empirical science—its formal or systematic side and its content. So far as actually solving problems is concerned, the formal and the empirical attributes of any science are interdependent—we not only need verified generalizations, we must also be able to find them quickly and to recognize their full implications. Practical utility, itself, depends finally upon available knowledge; and such knowledge in the developed sciences comprises valid generalizations that are systematized. Stated otherwise, the significance of a scientific generalization depends largely on its location in a system of such generalizations. Accordingly, although an analogy drawn from physical science must be employed with due caution, it can be accepted for the present purpose, namely, to indicate that we need not only sound rules of criminal law but also an organisation, a system, of such rules. Whatever one's view of the social disciplines may be, organized knowledge is an ultimate desideratum.

In Europe, organization of the law has long been exhibited in codes, and the French Code Pénal of 1810, the culmination of legal developments in the latter part of the eighteenth century, became the basic system of criminal law in the civilian world. European codification had ancient antecedents which reached a peak in Justinian's Code; besides, the influence of scholars and their treatises as well as a philosophical tradition made systematization of the law both respectable and expected.

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In the Anglo-American legal world, the accepted dogma is that the common law, being the product of adjudication, is wholly disorganized; in Austin's blunt phrase, it is "a mess." One must be careful, however, how he interprets this criticism lest it become a gross exaggeration. In a sense there is just as much logic in the common law as in the civil law. For example, in the criminal law it has long been recognized that certain basic notions, e.g., "act," "mens rea," "concurrence," and so on run through the entire field of crimes; they are certainly systematizing constructs. Moreover, in the common law, treatises have also exerted great influence, as is evident on any notice of case-law references to Hale, Blackstone, Stephen, Bishop, Holmes, and Wigmore. Sound treatises are the essential instruments of systematization of the law and the prerequisite of its codification.

When codification was much debated in this country about seventy-five years ago, Bishop opposed Field's proposal on that ground, namely, that a necessary condition was lacking—scholarly treatises containing sound analyses of the basic problems. One may believe that we are now better situated in this regard than was Bishop, and not least because of his contributions. But it would surely be fatuous to assume that it is possible to proceed directly to the codification of the criminal law without relying on or providing treatises, essays, and monographs that perform the essential job of analysis and systematization. Whatever validity available treatises may lack, the important thing is recognition of the function of thorough analysis and systematization and, then, improvement of the extant work.

The writer's efforts in that direction, building on earlier scholarship in the field, culminated in the classification of the substantive criminal law into three main divisions: (1) principles—the foundations of criminal law, (2) rules—specific "material" elements of crimes, and (3) doctrines—general "material" elements of crimes. Rules and doctrines differ substantively as well as in the degree or level of generalization. Combined, they express the criminal law. The principles (they may be called premises or postulates or hypotheses if one prefers) are the ultimate ideas permeating the criminal law. That

2. The relevance of this for the accepted theory of "the case-method" of instruction may be noted. The pertinent question is—how much of the general ideas or theory of the subject is simply left unexpressed until the instructor is ready to discover the ratio decidendi by "sheer induction"?


4. GENERAL PRINCIPLES OF CRIMINAL LAW (1947) and CASES AND READINGS ON CRIMINAL LAW AND PROCEDURE (1949).

5. One advantage of such terminology might be to foster critical testing of the validity of the principles. E.g., a willful taking of property without animo furandi is not larceny, but larceny is committed by subsequent conversion of it with animo
is, given rules and doctrines combined, the principles are intended to answer the question, what common ideas are represented?

Of the three primary divisions of the field, that termed "principles" is the most important because of its central, ultimate place in the system and because of the consequences of the acceptance of the principles. Just as the addition or radical modification of a fundamental law of physics has great effect upon the entire science, so, too, as regards the principles of criminal law. Yet, to some persons the word principles is obnoxious—perhaps their own principles oppose the use of language that suggests objective values. Or they fear that some sort of arbitrary dogma is being thrust upon them. But this is surely to ignore the structure of any science. In the writer's opinion, the principles of criminal law—a traditional and practically universal term among scientists as well as elsewhere—are more than bare postulates. They include meanings to which various degrees of validity (truth-value) are ascribed. One may prefer to minimize their status in order to encourage critical testing, but in any event they are more than mere assumptions, as may be seen if one attempts to substitute their opposites and organize the criminal law accordingly.

LEGALITY, PUNISHMENT, AND HARM

Since the principles of criminal law are not only organizational constructs but are also substantively important, it is possible and necessary to consider them from both viewpoints. Here we can discuss only a few of the important problems involved. Specifically, of the seven suggested principles of criminal law (legality, conduct, mens rea, concurrence, harm, causation, and punishment) we shall briefly discuss certain aspects of legality, punishment, and harm, in the course of which it will become necessary to allude to the principle of conduct and to the doctrine of criminal attempt.

Specifically, the problems to be considered involve difficulties resulting from a pervasive ambiguity in the professional literature due to

6. CAMPBELL, PHYSICS—THE ELEMENTS 50 (1920).
7. E.g., JEVONS, THE PRINCIPLES OF SCIENCE (1907, 2d ed. 1924).

Einstein opposed the view that physical laws are mere conventions. "This 'simplicity of nature' is the observable fact which cannot be reduced to a convention on how to use some words." FRANK, MODERN SCIENCE AND ITS PHILOSOPHY 11 (1949). So, too, it is probable that at least some important attributes of human nature are "given." That limits and guides "postulation"—at least if one wishes to work in the realm of fact.
to the failure to consider the standpoint one is taking when he analyzes the criminal law or when he criticizes another scholar's theory of it. What are the chief standpoints? First, one may be interested in studying the existing criminal law and its functions, the elucidation of meanings, the organization of the rules, and so on. Second, one may wish to criticize the existing law for various inconsistencies and imperfections while accepting the principles of the present criminal law. For example, if one's study of the criminal law leads him to conclude that the principle of mens rea (understood to include intentionality and recklessness) is sound, he may, for reasons he articulates, criticize adversely certain segments of criminal law where ordinary negligence is held sufficient, consider the implications of the felony-murder rule and of objective and strict liability from that viewpoint, and so on. Third, a scholar may engage in much more drastic criticism of the existing law, challenging basic principles and proposing far-reaching reforms.9

The fact that these perspectives shift, sometimes imperceptibly, increases the difficulties in the way of communication. It does not render it less essential to cogent criticism to determine what perspective has guided a scholarly contribution for the most part, and at what points a different perspective was operative. No less important is the scholar's awareness of his own perspectives. Their articulation would permit precise discovery of apparent differences, which would often become greatly narrowed once the issues were precisely formulated. The subject is of such importance and difficulty in criminal law, where deeply rooted attitudes are naturally involved, that it is worth pursuing farther.

For example, if a writer defends the inclusion within the criminal law of harms caused by ordinary negligence, he may mean that that is the present law, that negligence is within the presently accepted meaning of mens rea (without stating what he understands that to be, and why). He may mean that that ought to be the law. He may intend to say both. In any case, he should first determine by careful analysis just what the criminal law is regarding negligence and in what crimes, if any, such behavior is penalized. The homicide field, especially criminal homicide by automobile, would be important in such an inquiry. An historical survey reveals trends regarding criminal liability for negligence, hence it is essential to keep a close eye on the dates of the decisions relied upon. Presumably, such a survey of

criminal liability should precede proposals for reform. If negligence has been progressively and almost entirely eliminated from the sphere of criminal liability wherever the question has been directly faced, especially during the past two decades, that might influence one's evaluation of the criminal law and restrain the advocacy of punitive treatment of negligent persons. In any event, if it is clear that reform is the perspective involved, it becomes essential to know whether prevailing standards of criminal liability are accepted or not, together with the supporting reasons. Whatever position is taken, much more than the assertion of a preference is required. E.g., there are non-legal, as well as legal, studies relevant to the wisdom of penalizing negligent persons. This literature may be seriously deficient, but an obligation to read it and to provide a thoughtful discussion of the grounds of preference seems axiomatic.

**Legality**

Let us now consider briefly some of the polemics on the principle of legality, the "rule of law" in the field of crimes. The difficulties encountered here frequently stem from the same failure to distinguish analysis of existing law from sweeping proposals to reform that law, which sometimes imply wholesale rejection of widely accepted standards. The gap between the perspective of criminologists and that of lawyers, including most legal scholars, is noteworthy. The influence of recent developments in authoritarian states seems to have had a greater effect on the latter. Prior to the last war, American academic opinion, greatly influenced by the Italian School, was largely opposed to legal controls, including the strict construction of penal statutes. Confidence in the social sciences, including psychiatry, ran extremely high, and the problem of protecting the political values of a democratic society lay dormant. In effect, the proposed reforms sought the abrogation of legal guarantees and the substitution of the opinions of sociologists and psychiatrists in their place. With regard to strict construction of penal statutes, it was argued that the need for it, obvious in interpreting the harsh law of the eighteenth century, no longer existed. The rise of brutal dictators and powerful governments everywhere would seem to have outmoded such complacency.

If some scholars have not been influenced by recent history, many courts, aided by established principle regarding common law offenses, have insisted on the preservation of legal values, at least in ordinary cases. In Louisiana, e.g., the new code provided for "genuine construction" of criminal statutes. With reference to a case involving
the word "immoral," it was argued that this implied abandonment of "strict interpretation," and reliance was placed upon an assumed civil law doctrine, supposedly French, a persuasive kind of argument in Louisiana. Actually, French law accords with ours in requiring strict construction of penal statutes.\textsuperscript{10} The Louisiana Supreme Court, without benefit of French law, repudiated the recommendation that it interpret the criminal code liberally.\textsuperscript{11}

Undeterred, the current Wisconsin project would abolish strict construction of criminal statutes.\textsuperscript{12} The commentary lists a goodly number of states as having abolished the common law principle and as having substituted "liberal construction." But no citation of cases is provided, and there are cases in many, if not all, of the states listed which make it perfectly clear that they have not abandoned the common law principle.\textsuperscript{13} Here, again, it would be helpful to know whether the perspective of the Wisconsin project is analysis of existing law or whether far-reaching reform is sought regarding the construction of penal statutes. So, too, it is important to know if strict construction has been repudiated by some courts and, if so, where, as regards which crimes, and to what extent? A precise determination of these questions would stimulate careful differentiation of specific problem-areas and promote sound appraisal of proposed reforms.

A similar confusion is evident in discussions of the Model Youth Correction Authority Act, which assert that the Model Act has been adopted in several states. It would be much more accurate, though not adequate, to assert that it has not been adopted in any state. For the provisions which aroused criticism, namely, those that comprise the unique features of the Model Act, sought to narrow greatly or eliminate entirely an important phase of legality, \textit{i.e.}, legal control of treatment. These provisions were not included in any of the statutes enacted by the five states which adopted the so-called "Authority programs."\textsuperscript{14} The statutes actually adopted represent progress mostly

\textsuperscript{10} \textsc{Vabres, Traité Élémentaire de Droit Criminel} 68-69 (1937); \textsc{Bouyat, Traité de Droit Pénal}, 66 ff. (1951).

\textsuperscript{11} \textsc{State v. Vallery et al.}, 212 La. 1095, 34 So.2d 329 (1948).

\textsuperscript{12} \textsc{Report of the Wisconsin Legislative Council} 2 (1951). It may be added that this Report contains many excellent proposals.

\textsuperscript{13} For indications of a current tendency of English judges to apply strict construction more rigorously than in the recent past, which is especially significant because they are applying it to minor offenses, see \textit{The Rule of Strict Construction of Penal Statutes}, 14 \textsc{J. Crim. L.} 188 (London 1950).

\textsuperscript{14} \textsc{B. M. Beck, who recently made a careful study of the operation of the Youth Correction Authority laws in the five states which adopted them, states that "the statutes enacted bear, in many instances, however, only a remote relationship to the Model Act. It is not possible to find any aspect of the program in these five states which is common to all five states and which would set these states apart from those states which have not established what are known as 'Authority programs.'" \textsc{Beck, Five States, A Study of the Youth Authority Program as Promulgated by the American Law Institute} 5 (1951).
in the administration of penal institutions,¹⁵ and everybody agrees that improvements there are sorely needed.¹⁶

It should be superfluous to add that nothing written above is intended to discourage criticism of the criminal law or to suggest that the discovery and advocacy of sound reforms are not important. But it must still be recognized that the advocacy of reform is quite different from disinterested inquiry, including the discovery of needed reforms. That, at least, is the essential postulate of any science. If it is not accepted, the obstacles in the way of communication, not to speak of those barring the construction of a science of criminal law, are practically insuperable.

**Punishment**

The persistent observance of the difference between advocacy of reform and scientific inquiry is most difficult in discussions of punishment and treatment. For, added to especially complex linguistic requirements, if precision and clarity are to be attained, are the limitations resulting from deeply rooted attitudes regarding basic issues which inevitably involve a complete philosophy of life. It is therefore a serious, not a rhetorical, question to ask: is it possible to improve considerably the analysis, research, and discussion of punishment? If one answers that affirmatively he should carefully attend to ways and means of doing it.

The “prevention of crime” and the “protection of society” are ends accepted by everyone, hence it should be obvious that their mere affirmation does not solve problems any more than it helps to argue as though some persons reject those ends. And if we are considering the existing criminal law, the institution conveniently dated from the thirteenth century and Bracton’s treatise, it will also be generally agreed that, whatever else is included in them, the sanctions contain a punitive element. That is the reason for designating punishment as a principle of criminal law. But the meaning of “punishment” is far from univocal and the linguistic difficulties can be resolved only by sustained efforts. In the present state of the literature, it will be helpful if those who discuss punishment specify: (1) whether they are

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¹⁵. “The newness of the Youth Authority program is the integration under one governmental agency of the several aspects of the treatment process; i.e., diagnosis and classification, institutional treatment, parole and delinquency prevention through community organization.” Holton, *California Youth Authority: Eight Years of Action*, 41 J. Crim. L. & Criminology 22 (1950).

talking about the existing criminal law; (2) whether they are repudiating its premises and are proposing substitutes for them; and (3) what, concretely, they regard as treatment and punishment by pointing to what actually happens in various situations and institutions. These measures would help, but they would not suffice in the absence of carefully formulated standards, as may be seen when one asks whether suspended sentence and probation are punitive or not. To some extent, linguistic conventions would also be needed. In any event, certain elementary expectations seem reasonable as regards professional writing, e.g., that punishment under civilized laws be not identified with vengeance or other merely emotional reactions or with cruel and inhuman imposition of suffering.

Cogent analysis would be facilitated if it were generally agreed that involuntary incarceration is punishment regardless of the kindliness of the administrators of the institution or the unexceptionable quality of the treatment program. This might also aid the adoption of worthy reforms because if the public need for a punitive element in the criminal law were satisfied by imprisonment, that would enable administrators to individualize treatment in the most humane, enlightened ways known to them, limited only by the fact and the legal limits of confinement. The careful use of an improved terminology and of the other indicated methods of promoting clarity and precision would free the literature of much irrelevant polemic. It would be folly to expect that differences in opinion stemming from deeply rooted attitudes regarding punishment can be wholly eliminated. But it ought to be possible, without the aid of psychoanalysis, to discover rather definitely what the actual disagreements are and what working compromises can be made by scholars holding diverse perspectives, who wish to improve the criminal law.¹⁷

In addition to the ambiguities of “punishment,” the lack of careful articulation of theories, and the unavoidable fact that the problem involves ultimate “can’t helps” which have reverberated through the ages, there is another serious difficulty which, however, seems to be more readily soluble; and its solution would greatly improve the present

¹⁷. E.g., Professor Dession, after an able presentation of the corrective viewpoint, refers to public fears that crimes would increase if punitive sanctions were seriously weakened, and he adds:

“Whether on their merits or their emotional appeal, these qualms at the prospect of a softening of retribution deserve attention and should, so far as is compatible with advance rather than regression in the penal field, be relieved.” Dession, Justice After Conviction, 25 Conn. B.J. 221-2 (1951). If this realistic attitude were widely emulated, it would provide the basis for effective cooperative research among scholars holding divergent perspectives. See, also, the sound estimate of P. W. Tappan, Sentences for Sex Criminals, 42 J. Crim. L. & Criminology 332 (1951).
state of the professional literature. This difficulty stems from the advocacy of a particular theory of punishment or objective of criminal law—retribution, or deterrence, or correction. In the recent past in academic circles, correction was espoused and retribution was damned as a vestige of man's instinctual past, while deterrence was excluded as ineffective, rationalistic, and even as a cause of crime. In legal and official circles, on the other hand, deterrence has been supported as a necessary and potent defense of social values, and rehabilitation has been summarily dismissed, e.g., by Holmes. Surviving also, but hardly noticed until recently except among students of ethics, are theories of retribution, implying a moral attribute of criminal law. Finally, there is the theory, defended by the writer, that all three elements—justice, deterrence, and reformation—are essential. Because the morality of criminal law had been greatly neglected, that factor was emphasized, but it was made clear that deterrence and correction are also important.

It is interesting to observe that criticism of this theory is apt to focus on its inclusion of the moral quality of criminal law. The problem is much too large for adequate discussion here; indeed, it is the major issue of our times and permeates all the social disciplines. But this much may be ventured here: to interpret just punishment

18. Elmer L. Irey, Former Chief, Enforcement Branch, United States Treasury, describes the trial and conviction of Ralph Capone for tax fraud and reports that the next day and every day after that for several weeks many underworld operators went to the collector's office "to pay Uncle Sam voluntarily $1,000,000 in taxes . . . [They] were afraid Uncle Sam would find out." IREY AND SLOCUM, THE TAX DODGERS 35 (1948). Cf. "On the other hand, to regard deterrence as the sole end of the criminal law is a confession either of defeatism or cynicism." PATON, A TEXTBOOK OF JURISPRUDENCE 352 (1946).

19. For an excellent brief discussion distinguishing the retributive theory of Plato and St. Thomas Aquinas from those of Kant and Hegel, see Hawkins, Punishment and Moral Responsibility, 7 Mod. L. Rev. 205 (1944).

20. After criticizing the defects of mechanical views of retribution, Morris Cohen wrote: "Despite the foregoing and other limitations of the retributive theory, it contains an element of truth which only sentimental foolishness can ignore." Cohen, Moral Aspects of the Criminal Law, 49 YALE L.J. 1011 (1940).

21. A similar, inclusive theory was recently stated by Lord Justice Asquith, as follows: "A third theory, and it is the one which seems to me to come nearest the truth, is that there must be an element of retribution or expiation in punishment: but that so long as that element is there, and enough of it is there, there is everything to be said for giving the punishment the shape that is most likely to deter and reform." Asquith, The Problem of Punishment, The Listener, May 11, 1950, p. 821 (pub. by B. B. C.).

22. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 130, 245, 421, 535 (1947).


24. For the writer's discussion of this problem, supplementing that in General Principles of Criminal Law (1947), the reader is referred to Living Law of Democratic Society (1949), especially chapter 2.
narrowly as the mere infliction of suffering for a past harm is only to construct a straw man lacking any resemblance to the relevant realities and meanings. It is but slightly less misleading to ask only: "for what end is punishment imposed?" because this automatically excludes the intrinsic value of any moral experience. It is equally unfortunate to neglect thorough investigation of the thesis that just punishment also operates in some, perhaps many, cases to bring about reformation and to deter potential offenders.25

Although it is impossible here to discuss in any detail the consequences of particularistic theories of punishment, it is important for the present purpose to indicate the logic of the opposing theories. Let 1 = rehabilitation, 2 = deterrence, and 3 = justice. A affirms only 1; B affirms only 2; C affirms only 3; while D affirms 1 and 2 and 3. It should not be difficult to plot the issues involved in the various combinations, and thus articulate the different positions represented in the literature. Much clarification would result if the implications of such an exercise for discussions of punishment were considered. For example, it would be clear that D, when he adversely criticizes deterrence or correction, cannot be understood to reject those objectives. If he is consistent, he can criticize only exclusive or excessive claims for deterrence or rehabilitation.

To apply the logic of the theories more specifically to the extant literature, it may be noted that: A espouses rehabilitation, but he never inquires whether "corrective treatment" is wholly free of punitive elements. Is it possible to eliminate retribution entirely, while assuming that involuntary incarceration or other control is a necessary condition of correction?26 Nor does A consider the implications of "pure correction" for cases like those of Professor Webster, Whitney, and other numerous "white collar" criminals—men who are often better educated and more intelligent than the penological experts themselves, at least those likely to be members of a treatment board. On the other hand, what does A say regarding the many thousands of incorrigible petty offenders? Motivated by humanitarian ideals, is he willing to incarcerate them for life, so that they may never rejoin their friends

25. One of the very interesting changes in the history of ideas is represented in the shift from Plato's axiom that punishment, justly imposed, is always corrective, indeed, that it is a major educational institution, to the axiom of contemporary academic penologists, that punishment never has any beneficial effect. But if corrective treatment unavoidably includes a punitive element, the two perspectives are not actually in such complete opposition as the polemics imply.

26. "Experienced penologists do not dismiss the idea of punishment. They recognize the fact that being sent to a prison, however humanely it is operated, is punishment in itself. They know that it is impossible to make a prison so pleasant that the prisoners will not consider their imprisonment punishment." MacCormick, The Prison's Role in Crime Prevention, 41 J. CRIM. L. & CRIMINOLOGY 42-43 (1950).
and families? If A could be persuaded to deal carefully with such questions, he might contribute a more precise knowledge of "treatment," help to discover exactly what the areas of actual difference of opinion are, and prepare the way for cooperative concentration on the reforms that are greatly needed.

We may briefly indicate analogous questions to be asked of B and C. B, the advocate of deterrence, would be shocked by the suggestion that insane persons or petty thieves should be executed regardless of any amount of proof that criminal conduct would be thus greatly deterred. The execution of civilian hostages in the last war and harsh repression in dictatorial states seem to have been effective deterrents; certainly we cannot ignore such data on the comfortable assumption that very severe punishment does not deter. But if B does not articulate his thinking in relation to that phase of punishment, he will not recognize that an element of "retribution" (i.e., justice) is required in any legal order he can fully approve.

So, finally, C, who sees only the intrinsic moral worth of carefully determined public condemnation of intentional or reckless harms, should consider that from the beginning of Western thought deterrence has been approved and education (correction) of the corrigible has been emphasized by many great thinkers who, nevertheless, did not subordinate justice to those ends. The finest teachings of religion emphasize brotherhood and forgiveness, which should temper the administration of criminal law. And, on the other hand, the elementary needs of survival require the deterrence of potential harmdoers. We should not shut our eyes to that and irresponsibly advocate the substitution of agape for criminal law no matter how generously we may treat those who have seriously harmed us.

If theories of punishment took adequate account of the various values involved, they would not only increase the knowledge of criminal law; the problems needing research would also be discovered and carefully formulated. The entire outlook so far as scientific research

27. "To achieve the maximum deterrent effect it would be necessary either to impose excessively long sentences or to inflict harsh treatment and impose rigid restrictions and deprivations on the prisoners." Id. at 42.

28. "Criminals may well be called public enemies. But they are men and women. They are entitled to the benefit of the Biblical injunction that we must love our enemies. Perhaps we could come to love them if we made a sacrifice for them." Gausewitz, Realistic Punishment, pub. in The Administration of Criminal Justice, Virginia Law Weekly Dicta, 47 (1948-49). 


29. "The effort to make life more decent therefore always involves a struggle against opposing forces. And in this struggle men find hatred as well as love, tonic emotions. Indeed, we must hate evil if we really love the good." Cohen, supra note 20, at 1018.
is concerned—and consequently also with reference to administration and reform (though not for judges and administrators who already have an integrative viewpoint)—would be greatly altered. The overall problem would be recognized as one calling for the discriminating integration of the various values and their careful implementation along lines suggested by specific questions, e.g., in what particular offenses, regarding which types of offender, in relation to what prevalent crime rates, and so on, should the peno-correctional treatment be determined and adjusted thus and so in order to preserve the maximum values? This approach would exemplify the truism that the job of theory is to be objective. When compromises are made out of regard for the progress of reform, theory abdicates and reform suffers.

While the above discussion has ranged beyond the purely logical problem of organizing the criminal law, it is also true that improvement in any of the basic principles has far-reaching effects. For the principles, functioning as major organizational constructs, refer ultimately to facts and values. As the principles are improved, they therefore gather around them more valid supporting data, suggestive implications, and other important consequences. In sum, the improved empirico-value significance of the principles is reflected throughout the entire body of legal rules and doctrines.

HARM

The formal function of the next principle of the criminal law which we shall briefly discuss—the principle of harm—is more readily recognized. It can hardly be doubted that a marked advance is gained by using "harm" to resolve the ambiguity of "act." The necessity to deal with the effects of conduct for some purposes and with the conduct, alone, for others makes evident the advantage of having two distinct notions so far as case-analysis is concerned. Superior craftsmanship depends on the availability of sharp, precise tools.

30. For a specific illustration of the sort of questions that need to be asked by both theorists and judges, see Coddington, Problems of Punishment, 46 Proc. Arist. Soc. (n.s.) 155 (1946), reprinted in part in Hall, Cases and Readings on Criminal Law and Procedure 99 (1949).

31. Legality is the presupposition of all the other principles, and thus of the entire criminal law; and punishment is so involved in different contexts of knowledge and reform that it is not easy to regard it, also, as a formal, organizing construct of criminal law.

32. In addition to the ambiguity of "act," noted in the text, consider the involvement of the following passage:

"That is, even in those cases where, as explained . . . supra, the act and the criminal consequence are one and the same, it is the surrounding conditions and circumstances under which the act was committed which make it criminal; apart from these the act is quite colorless." (Italics added.) Sayre, Criminal Attempts, 41 Harv. L. Rev. 838, n.65 (1928).

Cf. the comments on the above by Arnold, Criminal Attempts—the Rise and Fall of an Abstraction, 40 Yale L.J. 64 (1930).
But what of the larger problem of system in the criminal law? How does the notion of harm contribute to that so importantly as to become a principle, a basic organizational construct? One answer to that question is simply a spelling-out of what has just been said regarding case-analysis, i.e., if the idea of harm improves that, there must be good reasons for it, hence we have only to extend the implications throughout the criminal law. But we can approach the problem from more specific directions.

In order to place our major inquiry in a relevant context, we may note that harm serves the following purposes:

1. It is essential in distinguishing criminal law from ethics and a theory of ethics from one of law.  

2. It provides a rational basis for the range and differentiation of punishments, i.e., in general proportion to the gravity of the harm.

3. Causation, another principle of criminal law, is meaningful in explanation of the relation between conduct and harm. If harm is excluded, causation becomes meaningless, and the combined result is a great loss in systematization of the criminal law.

4. It is necessary in interpretation of statutes and in solving many other questions, e.g., jurisdictional ones.

5. It is important in corrective treatment if an offender's harm to social values is considered in determining his dangerousness.

6. Finally, and most important, is the function of the principle of harm as a basic organizational construct. It is impossible here to discuss the above phases of the principle of harm, but we can attend briefly to this one.

If we examine the major crimes, i.e., both the legal prescriptions and the relevant fact-situations, the harms involved are usually recognized without difficulty. Physical harm is the simplest type found among them, e.g., a human being dies, a dwelling-house burns, a human body has been injured, and so on.

But it is equally clear that the proscribed effects of criminal conduct are not confined to physical harms. For example, criminal libel

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33. E.g., "... the aim of the law is not to punish sins, but to prevent certain external results ..." Holmes, J., in Commonwealth v. Kennedy, 170 Mass. 18, 20, 48 N.E. 770 (1897), which concerned a criminal attempt.

34. If the harm done is held irrelevant to dangerousness, what criteria are available to determine the degree of dangerousness, which can be utilized with assurance in incarcerating human beings? And what decision would be reached regarding the dangerousness of persons who committed harms in unusually critical situations, such as a man who killed in sight of adultery committed by his wife, i.e., where the recurrence of such a situation would be practically impossible?
damages an intangible interest, and in rape, physical injury is not the important one involved. That might amount to a minor battery, yet the gravity of the harm to such intangibles as the autonomy of women and the preservation of the family would be no less serious. These instances and other injuries to incorporeal values, which might be noted, are included in ultimate crimes; hence it is clear that harm cannot be restricted to physical injury.

It is against this background that we must interpret the "inchoate" or relational crimes such as the criminal attempts and the conspiracies. Criminal attempt is particularly suggestive with regard to the systematization of criminal law because of its relation to harm; hence, we may profitably consider two or three aspects of it in the present connection.

In studies of criminal attempt published in this country, including those of the present writer, the preponderant judgment of those writers who have expressed an opinion on the question is that criminal attempts include harms. Perhaps the common thought underlying these estimates is that in criminal attempts (and other relational crimes) the harm is a dangerous condition or situation, voluntarily produced, in which the probability of still greater harm is substantially increased. If that is a sound insight it has far-reaching implications because it brings within the orbit of defensible generalization numerous offenses such as possession of burglars' tools or stolen property, and it would also resolve uncertainties regarding burglary, larceny, kidnapping, and so on, i.e., wherever a more serious harm than the one committed may follow.

35. No exhaustive search of the literature on criminal attempts was made with reference to this point. But among the writers examined, those who expressed themselves on this question made the following relevant statements concerning criminal attempts:

"... a disturbance of the social order." May's Law of Crimes 191 (4th ed., Sears and Weihofen, 1938); "... in the ordinary judgment of mankind, and in the consequences to the community, the disturbance of the attempt has been created. ... But the public has not suffered so much, therefore it will not punish him so heavily." 1 Bishop, Criminal Law 530, 552 (9th ed. 1923); "... the corpus delicti of a criminal attempt might be stated as a substantial but incomplete impairment of some interest. ..." Strahorn, The Effect of Impossibility on Criminal Attempts, 78 U. of Pa. L. Rev. 962, 970 (1930). "An attempt ... causes a sufficient social harm to be deemed criminal." Hitchler, Criminal Attempts, 43 Dick. L. Rev. 211 (1939); "... societal harm. ..." Curran, Criminal and Non-Criminal Attempts, 19 Geo. L.J. 185 and 316 (1930). And see Strahorn, Preparation for Crime as a Criminal Attempt, 1 Wash. & Lee L. Rev. 1 (1939), and Hall, General Principles of Criminal Law 111 ff. (1947).

But cf., "... the act of attempt is not in itself harmful to the state. The crime is a mere shadow of the attempted offense. ..." Beale, Criminal Attempts, 16 Harv. L. Rev. 491 (1903).

And Wharton, in the course of misstating the law regarding voluntary abandonment of a criminal attempt ("this is a defense") adds as a reason: "Neither society, nor any private person, has been injured by his act. There is no damage, therefore, to redress." 1 Wharton, Criminal Law 306 (12th ed. 1932).
The necessary interpretation of intangible injuries as harms, as seen above, supports the insight that the relational crimes also include harms. In addition, the ideal of system undoubtedly provides some stimulus to advance tenable generalization to the point where a principle of criminal law is established. On the other hand, if those who simply dismiss harm from the material elements of the "inchoate" and many other offenses remain content with a negative exclusion, the result, involving also the principle of causation, etc., is a serious loss in an essential phase of criminal science, namely, its formal aspect.36

Nevertheless, if we are to be realistic regarding divergent viewpoints and if we wish to advance as far as possible toward construction of a science of criminal law, this would seem to present an area for necessary compromise and acceptance of some terms, in part, by convention. Specifically, if "effect" 37 were substituted for "harm" and this were generally accepted, it might go far to preserve the progress made toward systematization of the criminal law. From the perspective of those who hold that the criminal law rests ultimately on a moral foundation, "effect" would not be as acceptable a substitute as "wrong." But it would certainly be preferable to the serious disorganization that prevails when the many crimes involving incorporeal or relatively subtle harms are left outside the range of basic principles.

It is evident that theories of punishment which avowedly or tacitly deny any place to moral considerations in the criminal law are at the root of inadequate analysis of the problem of harm, including the difference between preparation and attempt, as well as that of the wide range of sanctions, etc. Indeed, the consequences are more serious than has been stated, because impairment of any basic principle, no less than its improvement, has systematic effect, e.g., on the principle of causation. And, in some discussions, even conduct is excluded from the scope of criminal law or its importance is depreciated. However defensible such theses may be in relation to penological reform, it is certain that they do not contribute to a science of criminal law.

A theory which takes due account of relevant moral values can provide an explanation of the problems raised in relation to the criminal law. And, as indicated above, the necessary inclusion of deterrent and corrective viewpoints permits adjustment and individualization, but it does not warrant abandonment of the evaluation of the harm done. Many of the current disputes could be thus resolved.

36. Although merely verbal conventions cannot suffice in legal science, that is not relevant with regard to the finding of harm in the relational offenses. Dissent from that judgment does not prove that it is formalistic but only that the insight has not been indubitably established.

For example, in some criminal attempts the offender may have desisted of his own accord; or his failure to consummate his intention may have resulted from the fact that when he finally faced his victim and the mechanism of identification became operative, he lacked the stomach required to execute his intention successfully. He would thus reveal evidence of being a less dangerous person than offenders who committed the ultimate harms. In these cases retributive punishment would tend to coincide with the requirements of correction. But there are some instances where, in theory at least, it is difficult to effect a harmony. Where, for example, failure was due to accident, correction would proceed as though the ultimate harm had been committed, while a retributive view would insist on distinguishing the respective actual harms. The flexibility of modern criminal law might permit even such theoretically refractory cases to be resolved in practice, e.g., if parole boards discharged at the earliest possible time some offenders who committed ultimate crimes while retaining in custody such attemptors, as the last indicated ones, for the maximum sentence. Yet, it must be granted, there remains an irreducible area of uncertainty where presently conflicting viewpoints lead to opposing solutions. At such points, in light of the limited knowledge available especially regarding borderline cases, both theorists and administrators should take a stand which is consistent with a sound view of the entire criminal law.

If systematic efforts to increase knowledge of the criminal law, including relevant empirical knowledge, are not employed, the problems of paramount importance remain insistently neglected. Everyone agrees that a science of criminal law would be of very great value; but the implications of that estimate are not thoroughly appreciated. For example, if a science of criminal law would be very valuable, that implies systematization of the field—and how is that to be accomplished? What, specifically, are the necessary ideas, principles, doctrines, bases, criteria, and so on; and what illustrations can be offered in support of claims that the job can be done along lines of a particular theory? These questions are asked neither in a spirit of idle challenge nor rhetorically, for the problems facing any serious scholar in the field of criminal law are much too difficult for complacency. They are raised to draw out the implications of various important viewpoints and to encourage experimentation with unexamined perspectives.

Postscript

Social research has long been emphasized in the field of criminal law. Indeed, while legal science in most fields even now remains largely
in the realm of hope or is confined to general discussions of methodology, many important contributions to an emerging science of criminal law have been made. One has only to cast a reflective eye over the professional literature of criminal law and criminology which has appeared during the past one hundred years, as compared with that of other fields of law, to appreciate the potentialities of the former with regard to the progress of legal science.

Even in the criminal law, however, we have only studies of relatively narrow problems and, significant as they may be, we have hardly begun the larger task of fitting the specific researches into a pattern of systematic knowledge. Sustained, thoughtful efforts to codify the criminal law might well lead to analysis of the relations between a sound code and a science of criminal law.\(^3\) We should then confront problems which have been neglected because they did not need to be considered when research was confined to segments of the criminal law. It has been the primary purpose of this discussion to raise some pertinent questions about inquiries of that kind.