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The Principle of „Harm“ in the Concept of Crime

A Comparative Analysis of the Criminally Protected Legal Interests

THE PRINCIPLE OF "HARM" IN THE CONCEPT OF CRIME: A COMPARATIVE ANALYSIS OF THE CRIMINALLY PROTECTED LEGAL INTERESTS

ALBIN ESER*

INTRODUCTION

Contrary to most continental European criminal theories, in which the notion of harm—defined as a violation of some legally protected interest—plays a key role in determining criminality, Anglo-American criminal jurisprudence has paid little attention to the theoretical exploration and practical employment of the principle of harm.

There are, of course, numerous cases in which judges speak of "harm," "evil consequences," or "injurious effects" resulting from criminal conduct¹ or where the harm is considered by the violated statute in determining the criminal sanction.² Scholars also seem increasingly interested in the principle of harm and recognize it as one of the basic notions of the concept of crime.

And yet, with the exception of Jerome Hall, Gerhard O. W. Mueller and Orvill C. Snyder, there are few legal theorists who really present a clear and comprehensive view of the meaning of "harm." Thus, it is not improper to state, along with Professor Mueller, that "the principle of harm is the most underdeveloped concept in our criminal law."³

This statement should evoke some surprise, since harm is the very essence of the crime or, as Hall calls it, the "fulcrum between criminal conduct and the punitive sanction."⁴ Besides its constitutional relevance, the principle of harm can also illuminate shadowed elements of the crime.

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1. See, e.g., *Respublica v. Teischer*, 1 Dall. 334, 1 L. Ed. 163 (1788); *State v. Western Union Tel. Co.*, 13 N.J. Super. 172, 80 A.2d 342 (1951).

2. See *United States v. Rubinstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 131 (1957); *People v. Von Rosen*, 13 Ill.2d 63, 147 N.E.2d 327 (1958).

3. Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L.J. 206, 220 (1959).

4. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 213 (2d ed. 1960) [hereinafter cited as *GENERAL PRINCIPLES*].

The principle of harm may appear in many areas, but it is sufficient here simply to state the most important functions the harm requirement is designed to serve.

First, harm is an essential substantive element of every crime. It may even be called the *ratio essendi* of the crime,⁵ for it is the criminal harm inflicted that makes the perpetrator's conduct sanctionable. In addition, since the evidence of harm is an external result, the requirement of a certain proscribed harm is valuable as a criterion in order to distinguish criminal conduct from merely immoral behavior (*i.e.*, from pure ethics).

Second, in its function as an essential "organizational construct"⁶ of the crime concept, the notion of harm is of major importance with respect to the specific nature of the various special crimes and for an explanation of other elements of the crime concept. First we must consider the construction and interpretation of the definition of the crime per se and its related problem of legality. Frequently, the question of the normative range of a particular criminal prohibition can only be answered by examining the legal interest which the statute is designed to protect. Merely analyzing the statutory definition of the crime does not always lead to a satisfactory answer; only an inquiry into the harm it is designed to prevent will make a proper interpretation possible. Analogously the proof of legality, *i.e.*, whether all factual and legal elements and circumstances of a statutory definition are met, cannot be found except through an interpretation of statutory intent—ascertaining the harm against which the prohibition is directed.

However, the harm principle as an "organizational construct" reaches still further in the determination of other crime elements, such as the substance of *mens rea*, the punishability of attempt, or the validity of consent by the offended person. Also, the problems of causation, merger, and double jeopardy can be brought closer to solution by considering them in their relation to the principle of harm.

The concept of harm may well be useful in the measurement of punishment. Once we know that harm consists in the impairment of certain legally recognized interests and that it acquires a certain gravity and quality in terms of the specific interest which it opposes, a rational basis for differentiating punishment in proportion to the harm inflicted emerges.

In light of the examination thus far, the principle of harm might seem only to be of theoretical interest. Perhaps this was the reason why Anglo-American jurisprudence, in its strong pragmatic tradition and its general

5. In this sense harm, indeed, has a fundamental place among Hall's seven "general principles of criminal law": see HALL, *GENERAL PRINCIPLES* 18; also his *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 10 (1958) [hereinafter cited as *STUDIES*].

6. HALL's phrase, *GENERAL PRINCIPLES* 222.

aversion to mere theoretical speculation,⁷ paid it little attention until today. The comparatively recent development of modern regulatory offenses has made it a matter of important constitutional concern; the harm requirement emerges as more than an academic exercise.

In traditional common law crimes, which dealt with the basic impairments of human rights and interests, the presence of harm was so apparent that there was no need for special emphasis on its requirement. In contradistinction, the objects of modern welfare offenses are usually so minor in scope and so highly technical in nature that they are often scarcely recognizable. In all such cases, a vital question arises as to the proper legislative boundaries of penalizing certain human actions. For example, may a legislature validly outlaw acts which, in fact, are not likely to do harm at all? If not, of what must the nature and quality of the harm consist in order to be penalized by a criminal sanction? Let us relate these theoretical considerations to practical application: is photographing for compensation without a license a "wrong" which deserves criminal punishment? Or, what is the purpose of a statute which limits gasoline price signs to a certain size while a farmer or car manufacturer may advertise his products with placards as large as he pleases?

These and similar products of modern penal legislation compel us to reexamine the material substance of crime. If we inquire about what harm conduct must cause in order to be punishable, we not only raise a theoretical question but we also undertake a fight for the freedom of human activity which, in our day, is threatened by a state anxious to be protected against activities which are perhaps quite harmless.

This article could not possibly answer all the questions raised. This survey seeks only to point out why a further elucidation and reevaluation of the principle of harm is urgently needed and to indicate the many respects in which the notion of harm is of essential importance in the determination of other phenomena of criminal law and legislation.

I. HARM AS THE SUBSTANCE OF THE CRIMINAL WRONG

The best approach to the problem of harm commences with a determination of the position this element occupies within the concept of crime. Considering harm without knowing its systematic status and its normative significance leads one easily to speculation, thus rendering the analysis and elucidation of harm all the more difficult. Our first task, therefore, will be to delimit the function of harm in the crime concept.

Harm and Formal Unlawfulness

Although "crime" as a general concept is a compound phenomenon of factual as well as legal, objective as well as subjective, factors and circum-

7. See GUSTAV RADBRUCH, *DER GEIST DES ENGLISCHEN RECHTS* 5-15 (1958).

stances which are interrelated, we can theoretically distinguish between the state of mind of the perpetrator and the exterior effects of his conduct. Whereas subjective personal factors pertain primarily to the question of personal imputability (*i.e.*, *mens rea*, personal guilt), objective elements (such as the overt act, the breach of the law, the causation of the proscribed effect) constitute what may be called the "criminal wrong." Since the prevention of a criminal wrong is the very purpose of a criminal provision, the criminal wrong is an essential element of any crime.

A more difficult question arises: of what does the criminal wrong consist? If we look only to the most obvious effect of a criminal act, we immediately notice the breach of law, for, since the criminal wrong is the product of an illegal (*i.e.*, prohibited) act, any crime necessarily contains a violation of some formal legal provision which prohibits or commands certain conduct. It cannot be doubted that such violation of a penal provision is a form of harm to the public which stands behind the law. But, since this kind of disobedience appears in any crime, it is not a distinctive criterion for explaining and illustrating the peculiar *character* of a crime. In accordance with Gerhard O. W. Mueller's position,⁸ this disobedience can be considered as harm only in its general or broad sense; but this sort of harm is an essential structural element of any crime. It may be called the "formal" wrong of the crime, a wrong distinct from the harm which, beyond the mere breach of the law, turns the premeditated killing of a human being into murder and forced sexual intercourse with a woman into rape. The substantial element—which varies from one crime to another because it is the specific object of the crime and thus gives each crime its peculiar character as either larceny, perjury or traffic violation—may be called the "material" wrong of the crime. Harm in the sense of a "material" wrong denotes the fact that the crime, in addition to the mere breach of the law, injured the object which the criminal provision is designed to protect.

Although we must leave the exact determination of the nature of harm to a later stage of this investigation, we can at this point state that criminal wrong means more than the formal unlawfulness of breaching the law; it also consists of some sort of material harm.

One may wonder, therefore, why most statutory crime definitions, as well as many treatise crime definitions, do not mention this material wrong—only formal unlawfulness is considered. If, for example, we take the crime definition of section 2 of the New York Penal Code, which reads: "A crime is an act or omission forbidden by law and punishable by death or imprisonment . . ."⁹ we receive the impression that the wrong

8. *Supra* note 3.

9. Similarly the FRENCH PENAL CODE art. 1: "An infraction which the laws punish with an effective or shameful penalty is a crime."

of the crime consists only in the disobedience of a legal command or prohibition.

The apprehension of crime, which apparently is the theoretical background of this and similar definitions, is not only inadequate, but is also dangerous. Such a definition makes it all too easy for authoritarian law-makers to enforce their self-protective criminal measures by pointing to the purely formal character of such crime definitions (which fail to contain any reference to the purpose upon which all penal commands must be based), thus allowing the legislature to supply the purpose when and if it pleases.

Our first task, therefore, will be to demonstrate that the notion of harm comprises more than mere formal disobedience of the law. This can be accomplished not only by tracing the historical development of the crime concept, but also by demonstrating that many common law and civil law scholars of criminal law recognize harm as a material element of the criminal wrong.

Historical Considerations

It is rather paradoxical that, originally, purely private wrongs, those directed against the goods of individuals, lost their substantive material character and merged into a more formalistic concept of crime which views the essence of the criminal wrong as the breach of the law or disobedience against the state.

As far as the historical origins of present crimes are concerned, it is irrelevant how we answer the old question concerning the distinction between tort and crime, viz., whether there ever was a distinction of this kind at all, as contended by Roscoe Pound¹⁰ and Max Weber,¹¹ or whether even the early legal systems differentiated crimes as public wrongs and torts as purely private wrongs.

Holdsworth, who represented the latter view,¹² discovered a number of offenses which could not be recompensed with money, such as violations of the religious or moral sense or offenses against the organization of the community. It was but a natural consequence that such offenses were to be dealt with by the king.

In a more recent investigation which reached the same result, Mueller concluded that both the old Germanic and Roman laws, as well as other ancient legal systems, drew a distinction between purely private wrongs

10. POUND, *CRIMINAL JUSTICE IN AMERICA* 90 (1930).

11. *RECHTSSOZIOLOGIE* 92-95 (Winckelmann ed. 1960). Cf., also Mueller, *Tort, Crime, and the Primitive*, 46 J. CRIM. L., CRIM. & P.S. 303-304 (1955). A difference between tort and crime is also denied by KENNY, *OUTLINES OF CRIMINAL LAW* 1 *et seq.* (17th ed. by Turner, 1958).

12. HOLDSWORTH, 2 *HISTORY OF ENGLISH LAW* 48 (3d ed. 1927).

(*delicta privata*) and wrongs with which the community or its sovereign had to deal (*delicta publica*).¹³

Whatever theory we follow, it remains true that both tort claims and public prosecutions were instituted for the restitution or prevention of injuries done to certain goods, interests, or rights of the individual member of the community (*delicta privata*) or to the community itself (*crimina publica*). The main reason for a claim or prosecution was not, therefore, the breach of the law, but rather the corporeal injury to such valuable goods as life, body, property, etc. Thus, the idea of a formal unlawfulness in addition to the material harm was not possible prior to a more developed conceptualization of the crime concept. In English legal history this tendency towards abstracting the crime into a breach of the law and, thus, a disobedience against the king, was originally commenced by the device of the "*king's peace*."¹⁴ This was at first purely a *jurisdictional* matter. Pollock & Maitland¹⁵ described it in this way: at one time the king's protection was not universal but territorial. Only the king's family and house, the king's attendants and servants, and other persons personally chosen by him, were protected by the power of the king and his courts. In view of the king's strong interest in preserving the manpower of his country by suppressing the blood feud¹⁶ and his interest in solidifying his own personal position, it was natural that the king's peace, and with it his jurisdiction, was steadily extended beyond his household and court to the king's highways and finally to the whole country, culminating as the normal shield and safeguard of public order.¹⁷ Strangely enough, this jurisdictional expansion of the king's peace also had a great influence on the concept of the criminal wrong. Since a breach of the king's peace was considered an act of personal disobedience to the sovereign, the people and their interests were better protected through inclusion in the king's peace. As time passed, therefore, the king's peace was not protected for its own sake; it safeguarded individual or social interests. However, these very interests were slowly absorbed by, or at least integrated into, the king's interest in public peace and security.

13. Mueller, *supra* note 11, at 309-10. With regard to the Roman law (12 tables), Mueller follows a distinction already suggested by REIN, *DAS CRIMINALRECHT DER RÖMER* (1844):

- (i) acts against piety and removal of the sacred boundary stones,
- (ii) *crimina publica*, crimes against the existence of the state, esp. treason and conspiracy,
- (iii) private wrongs; but here the state may have had an interest in enforcing the proper observation of the limits of the *talio*.

14. As to the development of *Königsfriede* and *Volksfriede* in the German law see H. BRUNNER, 2 *DEUTSCHE RECHTSGESCHICHTE* §§ 65-66 (1892).

15. 1 *HISTORY OF THE ENGLISH LAW* 22 (1895).

16. HOLDSWORTH, *supra* note 12, at 50-51.

17. POLLOCK & MAITLAND, *op. cit. supra* note 15, at 23.

Through this steady process of converting the harms to individuals into harms to the interests of the king or, later, the state, the real harm of crimes caused by the impairment of certain rights and goods was forgotten; the disobedience against the king or the state emerged as the substance of the crime. From this point it was but a short step to the recognition of the crime as a public wrong consisting in the commission or omission of an act either prohibited or compelled by law.

In times like ours when individual freedom is seriously threatened by a flood of regulations, the purposes of which too frequently seem obscure, it is essential that one examines the origins of criminal liability. From this examination it may be learned that criminal prohibitions are justified only if made for purposes and interests which are worthy of such protection. We need, therefore, to *reexamine the basis of criminal liability*. We need to discover once again the true substance of that which justice requires must be sanctioned. In this search, legal history demonstrates that the predominance of formal unlawfulness in many current crime definitions is merely an historical product of the notion that individual and social interests are best protected if identified with the king's interests. Nonetheless, we should not be led erroneously to conclude that the wrong of the crime consists only in the violation of the king's or state's commands, *i.e.*, the law. Rather, it should always be understood that the formal breach of the law has its material substance in the impairment of the interests the law is designed to protect.

As far as general statutory definitions of crime are concerned, a rare unanimity exists among most states. Nowhere can a definition be found which even considers the principle of harm or describes the material wrong of the crime. Most definitions simply speak of the crime as an act or omission in violation of a law with punishment annexed to it.¹⁸

A more colorful picture is presented by the definitions submitted by scholars, most of whom have their own definitions of crime. This is of no great significance as long as there is a difference only in the wording. However, since crime definitions are usually conditioned by the author's idea of law in general, the difference between inconsistent definitions becomes one of the essence and is, therefore, irreconcilable if the underlying legal conceptions are basically different. Nevertheless, when reviewing the history of the attempts to define the nature of crime, we can recognize a distinct line of development commencing with an initial indifference toward the problems of crime definitions in attempting to describe the formal nature of crime and terminating with the present trend of an increasing inclination toward a material concept of crime.

18. See *supra* note 9 and accompanying text. Cf. also CAL. PENAL CODE sec. 15; OKLAHOMA STATUTES art. 21 sec. 3; TEXAS PENAL CODE arts. 47, 48.

Let us consider the definitions of crime enunciated by early legal scholars. Edward Coke found no need for a definition of crime, a fact possibly attributable to the then unbroken feeling for the true substance of the crime. At any rate, he opened his work on crimes with the question of capacity to commit crimes.¹⁹ His answer is interesting in so far as he says that in criminal cases the "act and wrong" of a madman shall not be imputed to him. Coke thus makes a clear distinction between the criminal action and the criminal result, *i.e.*, the wrong. But what does he mean by "wrong"? A breach of the law? Harm to legal interests? Coke gives no answer.

William Blackstone presented a more detailed proposition. Due to a more highly developed stage of legal abstraction, Blackstone defined crime as "an act committed, or omitted, in violation of a public law, either forbidding or commanding it."²⁰ In these words, repeated by many others, Blackstone's definition is an excellent example of those concepts which think only of the formal unlawfulness as manifested by a breach of the law. By placing this singular citation into the context of his entire legal framework, it becomes evident that Blackstone, despite the formalistic appearance of his crime definition, did not intend to lose sight of the material element of the criminal wrong. Not only had he something material in mind when he spoke of "wrong"²¹ (the explanation of his definition) but he also indicated that material element when he stated that crimes, as "public wrongs," were a breach and violation of the rights and duties owed to the entire community.²² Even though many questions are left unanswered by this description of crime,²³ one may still recognize a firm adherence to a material concept of crime which does not find the criminal wrong solely in the formal breach of the law.

Following Blackstone, the trend toward abstracting the notion of crime increased. As a natural consequence, the formal elements of crime were over-stressed at the expense of its material nature. Thus, crime soon came to be seen only in its formal relation to the law, *i.e.*, the breach of the law. Among the authors who propounded crime definitions of this variety were

19. See COKE, *FIRST INSTITUTE OF THE LAWS OF ENGLAND* 416 (Thomas ed. 1836).

20. 4 BLACKSTONE, *COMMENTARIES* *5.

21. Thus, in his general introduction to the "wrongs" (3 BLACKSTONE, *COMMENTARIES* *1-2) he declares that the laws have a material purpose, namely the "establishment of rights and the prohibition of wrongs."

22. *Supra* note 20. This material notion is still more clearly expressed by the statement that "in all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community" (*id.* at 6).

23. *Cf.* KENNY, *OUTLINES OF CRIMINAL LAW* 1-20 (15th ed. 1936) who, with good reason, deplors the ambiguities in Blackstone's definition and the difficulty of interpreting the two inconsistent wordings.

James Fitzjames Stephen,²⁴ Wharton,²⁵ Austin,²⁶ Miller,²⁷ and, recently, Burdick.²⁸ Typical of these is the short definition of McClain: "A crime is an act or omission punishable as an offense against the state."²⁹

It is quite probable that these formalistic concepts of crime born in the 19th Century were a natural offspring of the then predominant legal positivism. Nevertheless, some authors maintained a contrary view, the most prominent being Henry John Stephen³⁰ and Joel Prentiss Bishop. The latter demonstrated a very fine insight into the problem of harm. He emphasized the fact that not every injury resulting from an act was sufficient to make the act indictable, but that such an act had to be "injurious to the public at large, in distinction from individuals; or else it must be a wrong to individuals of a nature which the public takes notice of as done against itself."³¹ Very similar considerations were made by Wingersky.³²

Pronouncements on the principle of harm become more definitive as we approach the 20th Century. We must first view the followers of the sociological school, such as Gillin and Brasol, for whom crimes were socially dangerous acts, or acts which violated certain legal rights of society.³³ This school, because of its inherent distrust of legal formalism

24. STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 1 (1863): "A crime is an act of disobedience to a law forbidden under pain of punishment." Stephen later repudiated this definition, holding that only a "description" of what is the subject matter of criminal law is achievable. There he gives a description of the principal material interests protected by criminal law; see his 1 *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 1, 3; cf. also Vol. 2 at 94: when stating the "conditions" under which a man is criminally responsible, he does not mention the harm requirement.

25. WHARTON, *CRIMINAL LAW AND PROCEDURE* 16 (12th ed. 1932): Crime is "an act made punishable by law." There are some changes in subsequent editions.

26. Austin: "Crime is a violation of criminal law"; see SNYDER, *AN INTRODUCTION TO CRIMINAL JUSTICE* 8 (1953).

27. MILLER, *ON CRIMINAL LAW* 16 (1934): Crime is "the commission or omission of an act which the law forbids or commands under pain of punishment to be imposed by the state by a proceeding in its own name."

28. BURDICK, *LAW OF CRIMES* § 70 (1946): Crime is the "commission . . . of any act, in violation of a public law either prohibiting or commanding it, and which is punishable by the offended government. . . ."

29. MCCLAIN, *CRIMINAL LAW* § 4 (1897).

30. STEPHEN, 4 *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 77 (4th ed. 1858): "A crime is a violation of a right; when considered in reference to the evil tendency of such violation, as regards the community at large."

31. BISHOP, 1 *COMMENTARIES ON THE CRIMINAL LAW* § 232 (5th ed. 1872); cf. also §§ 32, 230-31.

32. CLARK & MARSHALL, *ON THE LAW OF CRIMES* 14-15, 79, 89 (6th ed. by Wingersky, 1958) [hereinafter cited as CLARK & MARSHALL].

33. BRASOL, *THE ELEMENT OF CRIME* 30 (1931). Similar, though not originating in the sociological school, are the results of those who would punish not for the harm done in a crime but for the dangerousness the perpetrator has evidenced by his harmful behavior; Cf. Gausewitz, *Considerations Basic to a New Penal Code*, 11 *WIS. L. REV.* 346, 368 (1935/36); Mackay, *Some Reflections on the New Canadian Criminal Code*, 12 *TORONTO U.L.J.* 206, 209-10 (1957/58).

and its sociological comprehension of the law, inevitably reached a material concept of crime. This, however, need not be true of representatives of the classical common law tradition. And yet, they too, by also considering the basis of criminal liability, arrived at a position which recognized harm as an element of crime.³⁴ The shortest and most precise definition of this sort was given by Perkins—"any social harm defined and made punishable by law."³⁵

Even greater support for the requirement of harm is provided by those scholars who, though remaining within the common law tradition, attempted a definition of crime on a more theoretical-philosophical basis. In their view, the general nature of crime could be conceptualized by means of several general principles, including among them the principle of harm. Here, the harm requirement naturally receives its most significant endorsement, since, thus founded, it was not only an incidental but an essential part of the crime. Thus, harm was placed in the context of a higher order, *i.e.*, as one of the fundamental principles of criminal liability. Among the authors who share this view, particular mention should be made of Jerome Hall,³⁶ Gerhard O. W. Mueller³⁷ and Orvill C. Snyder.³⁸ In terms of his seven general principles (a union of formal and material elements), Hall defines crime as "legally forbidden (voluntary) conduct which (teleologically) causes a proscribed harm, for which the offender is subjected to a punitive sanction."³⁹

When we speak of the presence of the harm requirement in the American law, we must recognize a doctrine which actually grew out of constitutional rather than criminal considerations, but which is, nevertheless, an immensely significant aspect of the harm problem: the so-called *utility principle*. In a recent publication,⁴⁰ Professor Scott convincingly demonstrated that it is of vital importance to have a device which would effectively restrain over-anxious lawmakers from exceeding constitutional limits, particularly in the face of a steadily increasing number of poorly considered, indiligent products of penal legislation. Since many such statutes are not always in clear violation of some constitutional provision, the traditional arguments for declaring them invalid are not satisfactory.

34. Cf. Hitchler, *The Physical Element of Crime*, 39 DICK. L. REV. 95 (1934/35), who holds punishment justified only upon proof "that an act has been done which by reason of its harmful results or tendencies should be repressed by criminal punishment." Also KENNY, *op. cit. supra* note 11, at 5, considers harm one of the three elements characteristic of a crime. Cf. also DANGLE, *CRIMINAL LAW* 3 (1951); *State v. Western Union*, *supra* note 1.

35. PERKINS, *CRIMINAL LAW* 8 (1957).

36. GENERAL PRINCIPLES 18 and 212-246.

37. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1052, 1066 (1958).

38. SNYDER, *AN INTRODUCTION INTO CRIMINAL JUSTICE* 112, 759 (1953).

39. GENERAL PRINCIPLES 225 n.47.

40. Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MT. L. REV. 275, 280-83 (1957).

Fortunately, however, there are a growing number of courts which, on one theory or another, summon the courage to nullify legislative products which are excessively unreasonable or useless.

This is, of course, not the place to decide whether the utility principle, upon which the unconstitutionality of many unreasonable prohibitions is actually based, can be included within the concept of crime. Doubts were raised by Mueller when discussing this question in a review of Hall's General Principles,⁴¹ but this view is too pessimistic. In dealing with the value aspect of the legal interests (*infra* III), we shall see that the utility requirement is in fact a part of the constitutional foundation of criminally protected interests and, as such, an integral part of their structure. Here, it is sufficient to note that the present evolution of the utility idea is but another symptom of the growing recognition and significance given to the principle of harm within the common law.

Most penal codes of the so-called civil law countries contain no material definition of the crime or, if at all, usually define crime in a rather formal way—as an illegal and culpable act or omission made punishable by law.⁴² This fact, which at first glance might seem to indicate a disregard of the harm requirement, should not be given undue weight, since gaps in the penal code usually are filled by the courts with rules and propositions developed by distinguished jurists. Therefore, if we wish to determine the views of the harm requirement held by the civil law systems, we must look to the opinions of the authoritative schools and scholars on these matters.

Within the reach of the civil law, we can observe some distinctive differences between the systems of Romanic derivation and those of Germanic origin. The Romanic countries in general demonstrate a more formal, logical approach toward the problem of harm, excluding, of course, the followers of the sociological school and the social defense movement.⁴³ In French criminal theory, for example, the crime (*l'infraction*) is composed of three elements: (a) *élément légal*, (b) *élément matériel*, (c) *élément moral*.⁴⁴ At first glance, it might seem that the *élément matériel* contains our definition of the harm requirement; however, it does not, for while the *élément légal* embodies the principle of legality and the *élément moral* that of culpability (*mens rea*),⁴⁵ the *élément matériel* re-

41. Mueller, *supra* note 3, at 224-5.

42. "Crime is any illegal act imputable to the perpetrator and made punishable by law." GREEK PENAL CODE art. 14 (1950). Even briefer is this: Crime is "any voluntary act or omission subject to punishment by law." CHILENIAN CODE art. 1 (1875). As to the similarity of the Japanese definition cf. SAITO, DAS JAPANISCHE STRAFRECHT, in MEZGER-SCHÖNKE-JESCHECK, DAS AUSLÄNDISCHE STRAFRECHT DER GEGENWART 209, 227 (1955).

43. Cf. Ferri, *The Reform of Penal Law in Italy*, J. CRIM. L., CRIM. & P.S. 178 (1921/22).

44. See Pierre Bouzat, *Traité théorique et pratique de droit pénal*, No. 64 (1951).

45. *Id.* at Nos. 65, 103.

lates only to the external facet of the crime, *i.e.*, the question of whether the prohibited conduct is shown by an external commission or omission.⁴⁶ The problem of the external result is thus raised but, as we shall see later, this phenomenon is different from that of harm. Yet, even though the French definition of crime does not expressly include a recognition of the harm requirement, the theory does not completely circumscribe the principle. In addition to the formal crime definition, French theory presents a material description of crime in its substantive sense. Thus, Bouzat "describes" crime as "an act or omission which manifests itself externally as an attack upon the social order, peace and tranquility, and which the law, for that reason, sanctions with punishment."⁴⁷

A similar differentiation between a formal definition and a material description of the crime is made by the Italians. However, Italian scholars are divided into two schools⁴⁸ with reference to the formal elements of the crime; there is still less agreement as to the substantive nature of the wrong. In the 1860's, Carrara had given a very positivistic description of the crime as the "violation of the state, resulting from an external act of a human being which is neither justified by the accomplishment of a duty nor by the exercise of a right and which is threatened with a penalty."⁴⁹ In spite of the great effort made by the sociological school and the strong influence coming from German criminal theory, the Italian classical school is still skeptical of any integration of the harm element into the crime definition.⁵⁰ Even the notion of material unlawfulness as promulgated by Franz von Liszt is still rejected by some.⁵¹

Other criminal theories in which the notion of material unlawfulness as harm to legal interests is expressly denied include those of Greece,⁵²

46. *Id.* at No. 97: "L'élément matériel, c'est la fait extérieur par lequel l'infraction se révèle et, pour ainsi dire, prends corps."

47. *Id.* at No. 57.

48. The traditional school divides the crime into two parts, an objective and a subjective element, the first being concerned with the question of criminal conduct, the latter with the problem of guilt. Followers: Manzini, Florian, Ranieri; for more details see ANTOLISEI, *MANUALE DI DIRITTO PENALE, PARTE GENERALE* 147 (1957). The other school, following the German theory, makes a threefold division into act, unlawfulness (*antigiuridicità*) and guilt. So BETTIOL, *DIRITTO PENALE* 140 (2d ed. 1950); also Delitala, Maggiore, Petricelli; *cf.* ANTOLISEI, *supra* at 144-5.

49. CARRARA, *PROGRAMMA DEL CORSO DI DIRITTO CRIMINALE, PARTE GENERALE* §§ 21 *et seq.* (1863).

50. *Cf.* BETTIOL, *op. cit. supra* note 48, at 133. But for the rest Bettiol is a firm supporter of the idea of material unlawfulness; *cf. id.* at 193: "Un' *antigiuridicità* senza contenuto non ha alcuna ragione di esistere" (An unlawfulness without contents—substance—does not have any reason to exist).

51. *E.g.* ANTOLISEI, *op. cit. supra* note 48, at 137. *Contra* BETTIOL, *cf.* his statement *supra* note 50.

52. *Cf.* MANGAKIS, *DAS GRIECHISCHE STRAFECHEIT*, in 3 MEZGER-SCHÖNKE-JESCHECK, *op. cit. supra* note 42, at 255, 281. Here the substance of crime is not related to a material harm but exclusively to the violation of the legal norm.

Japan,⁵³ and Argentina.⁵⁴ Like the Italians, they are content with the element of formal unlawfulness as it is manifested in the "*tipicità*" (typicalness) of the act,⁵⁵ and the absence of any justification.

Here, as well, the need for a concept of material unlawfulness becomes urgent when questions of attempt and justification are considered for resolution. Thus, for example, it is impossible to ascertain the crucial borderline between preparation and attempt without reference to the legal interests involved. With reference to Greek law, Mangakis⁵⁶ has recognized that the problem of necessity requires the comparison of the legal interests of the injured on the one side and those of the perpetrator acting in an emergency situation on the other.

Contrary to the systems just presented, the idea of material unlawfulness is commonly recognized in the Germanic countries (Austria, Germany, Switzerland). Rittler, in the Austrian criminal law system, emphasizes that the formal breach of the law gains its deeper sense solely by reference to the legal interests which are harmed by the formally unlawful act.⁵⁷ Vital Schwander, a Swiss criminal law scholar, also recognizes material unlawfulness as the endangering or destruction of legal goods or legally protected interests. He further stresses that in the final analysis formal and material unlawfulness are coincident with each other.⁵⁸

These conceptions of material unlawfulness and the material concept of crime were shaped to a large extent by the influence of German criminal jurisprudence. Thus, it is worthwhile and necessary to trace the development within the German theory more explicitly, in particular with regard to its notion of "*Rechtsgut*" which still seems to be the most refined concept of the legal interests and, thus, of criminal harm.

We can retrace the present doctrines of harm and material unlawfulness in the German material concept of crime⁵⁹ to Paul Johann von Feuerbach

53. Cf. SAITO, *op. cit. supra* note 42, at 234. Here, too, material unlawfulness is narrowly restricted to what is formally prohibited by law.

54. The Argentine criminal theory still uses the concept of unlawfulness in the sense of a formalistic rule-exception relationship as developed by Von Beling; see NÚÑEZ, *DAS ARGENTINISCHE STRAFRECHT*, in 3 MEZGER-SCHÖNKE-JESCHECK, *op. cit. supra* note 42, at 11, 23.

55. *I.e.*, the fulfillment of the typical elements and circumstances of the statutory crime definition.

56. MANGAKIS, *op. cit. supra* note 52, at 290.

57. THEODOR RITTLER, 1 *LEHRBUCH DES ÖSTERREICHISCHEN STRAFRECHTS* 116 (2d ed. 1954). Similar FRIEDRICH NOWAKOWSKI, *DAS ÖSTERREICHISCHE STRAFRECHT IN SEINEN GRUNDZUGEN* 51-53 *passim* (1955).

58. VITAL SCHWANDER, *DAS SCHWEIZERISCHE STRAFGESETZBUCH* 61 (1952). *But cf.* also ERNST HAFTER, *LEHRBUCH DES SCHWEIZERISCHEN STRAFRECHTS, ALLGEMEINER TEIL* 93-4 (1946).

59. To the following see ROBERT VON HIPPEL, 1 *DEUTSCHES STRAFRECHT* 19, 17 (1925); ERNST HEINITZ, *DAS PROBLEM DER MATERIELLEN RECHTSWIDRIGKEIT* (1926); RICHARD M. HONIG, *DIE EINWILLIGUNG DES VERLETZTEN* (1919).

(1775-1833), the father of modern German criminal jurisprudence. Based on early liberal ideas of natural rights which obtain legal protection by a social contract between the state and its citizens, Feuerbach believed that any attack against the state by breach of its laws is also a violation of the individual rights the state seeks to protect. Thus, for Feuerbach, crime is a violation of the rights of the state or of an individual.⁶⁰ This definition, however, soon proved itself to be too narrow and ambiguous. What was meant by "right?" Right in an objective or subjective sense? What is the relationship of legal values which cannot be classified as rights? Out of the controversy which then developed, two lines of thought emerged—one leading to the essentially formal unlawfulness of Binding, the other to the material unlawfulness of Franz von Liszt.

The theory of formal unlawfulness had a rather complex development. From the historical school of the early 19th Century and from the theocratic legal philosophy of Julius Stahl, a movement came into existence which strictly rejected any rights outside of, or paramount to, those of the state. In contradiction to the natural law theory of a "social contract," the state was not thought to be the sole basis of individual rights and interests.⁶¹ The logical consequence of this premise was that the crime was not wholly the violation of an individual right, but rather an endangering of the state by breach of a public law.

This development was further extended by Karl Binding. Although he recognized and even advanced the "*Rechtsgut*" idea (legal good), he did not employ it for the determination of the substance of crime because he felt that its value and significance were restricted to purposes of law making. In his crime concept, he used a purely logic-positivistic approach based on his theory of the "norms." Since all legal rights and interests were deemed to be protected by embodiment in corresponding norms of the state, they necessarily were absorbed by the norms, thereby losing their significance in the material substance of the crime. Since a norm of the state demands obedience from the citizens to whom it is addressed, the breach of the norm is disobedience to the state, which grants the state a right to punish.⁶² Therefore, for Binding, the substance of the criminal wrong does not consist in the impairment of certain interests or rights, but in the disobedience of a norm, *i.e.*, a command of the state. Since this disobedience is common to all crimes, it is, in essence, no more than a purely *formal* unlawfulness.

The development of the concept of *material* unlawfulness took yet another course. After Feuerbach had defined crime as violation of a private or state "right," it became evident that all those traditional offenses,

60. See v. HIPPEL, *op. cit. supra* note 59, at 296-7.

61. Cf. HONIG, *op. cit. supra* note 59, at 46.

62. See KARL BINDING, 1 HANDBUCH DES STRAFRECHTS 181, 503 (1885).

the objectives of which could not be called a "right" in its precise sense (e.g., rape, bankruptcy, etc.), would have to be excluded from the concept of crime.⁶³ This concept was, of course, unsatisfactory. Finally, Karl Birnbaum replaced Feuerbach's "right" by his own concept of "*Rechtsgut*" (legal good); this suggestion received almost general acclaim. Crime now was considered to be the "violation or endangerment of a good equally guaranteed to all by the power of the state."⁶⁴ After lengthy debate over the elements of the "*Rechtsgut*," it became generally defined as a "legally protected interest."⁶⁵ Although there are various definitions of "*Rechtsgut*," its basic concept has surely become a principal notion of modern German criminal thinking.⁶⁶

From this position it was not a great step to the development of the concept of material unlawfulness and thus to the material concept of crime. A major stride towards this concept was taken by Franz von Liszt when he declared that the attack upon legally protected interests was unlawful as such, and that beyond this there was no need for the special prohibition by the legal order. As von Liszt said, "the concept of *Rechtsgut* necessarily includes the prohibition of any interference."⁶⁷ Thus, the substance of the crime was no longer the formal breach of the law but rather the injury to legally protected interests.

Unfortunately, the progress of this development was not fully realized because of the argument over the relationship between formal and material unlawfulness and their final separation.⁶⁸ Therefore, the normative-systematic combination and integration of both into one concept of criminal unlawfulness was impeded. The result was that formal unlawfulness, as an easily perceivable concept, is now part of every crime definition, while material unlawfulness is not yet incorporated into a comprehensive

63. So in fact Feuerbach's own conclusion that incest, rape, bankruptcy, self-mutilation are to be punished, but only as non-criminal offences since they are not directed against a "right." See v. HIPPEL, *op. cit. supra* note 59, at 297 with n.4.

64. BIRNBAUM, 15 ARCHIV FÜR CRIMINALRECHT 149, 179 (1834).

65. v. LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 8 (4th ed. 1891). About the development in particular see HONIG, *op. cit. supra* note 59, at 60-76 and his criticism at 83-112.

66. See MAURACH, DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL 168 (2d ed. 1958) [hereinafter cited as MAURACH]. In recent decades, however, the "*Rechtsgut*" as focus of the material wrong of crime was challenged by two movements, one coming from the so-called Kiel-School (Dahm, Schaffstein, Gallas) which, under Nazi influence, saw the criminal wrong less in an injury to certain protectable interests but more in the violation of duties owed to the state. The other movement, as an extreme consequence of Welzel's finalistic theory of conduct, puts the main emphasis on the subjective personal disvalue of the act rather than on the harm done to objective interest. But in this, Welzel stands almost alone: See *infra* II.

67. v. LISZT, *op. cit. supra* note 65, at 145.

68. For details see Nagler, *Der Begriff der Rechtswidrigkeit*, in 1 FESTGABE FÜR FRANK 339 (1930).

concept of crime. Nonetheless, material unlawfulness as an expression of the harm requirement is certainly recognized in its particular importance for the motivation of criminal legislation and the explanation of other aspects of the crime.⁶⁹

A special presentation of the socialist school of the criminal law is essential since it maintains precisely the opposite extreme of a one-sided material concept of crime.⁷⁰ Here, the harm caused by "socially dangerous acts" stands in the center of the crime concept. It is not the formal fulfillment of a clearly defined and legally determined prohibition which makes the perpetrator criminally liable; it is instead the perpetration of a socially dangerous act manifested by the destruction of, or jeopardy to, interests which the socialist state desires to protect.

Although a discussion of the development of Soviet criminal law requires more detailed analysis, we cannot disregard it completely; without it the socialist crime concept will hardly be understood. Following the complete breakdown of the Tsaristic law, Soviet criminal law soon was recognized as an important part of the socialist revolution. Contrary to the ideas of western liberalism, this new law was not primarily a safeguard of the individual against abuse by the state, but was a tool of the state for establishing its socialist order. For that reason, the old principles of "*nullum crimen, nulla poena sine lege*" were no longer feasible since they would bind the government's hands in suppressing anti-revolutionary individuals and groups.

This new understanding of law as a function of the state⁷¹ was the occasion for a basic change in the concept of crime. At the very outset, the first "Principles for the Criminal Law of 1919"⁷² obliterated all clear definitions of crimes. Instead, in one general clause, the "Principles" provided that a crime was "any act dangerous to the Soviet system." To fill the cup of insecurity to the brim, such socially dangerous acts were to be judged according to the "revolutionary conscience of justice."⁷³

69. Cf. MAURACH, *op. cit. supra* note 66, at 168-180; MEZGER, STRAFRECHT 197-204 (2d ed. 1933).

70. This material character of the Soviet crime concept is always praised as an advancement in comparison to the formal concept of the "bourgeois" criminal law; see ROGINSKII AND KARNITSKII, UGOLOVNIY KODEKS R.S.F.S.R. 3 (1936). English translation in HAZARD & WEISBERT, CASES AND READINGS ON SOVIET LAW 43 (1950). To Soviet criminal law in general see: Hazard, *Reforming Soviet Criminal Law*, 29 J. CRIM. L., C. & P.S. 157 (1938); Hazard, *Trend of Law in the USSR*, WIS. L. REV. 223 (1947); Berman, *Principles of Soviet Criminal Law*, 56 YALE L.J. 805 (1947); MAURACH, SYSTEM DES RUSSISCHEN STRAFRECHTS (1928).

71. See Decree on Basic Principles for the Criminal Law of the R.S.F.S.R. of Dec. 12, 1919, in HAZARD & WEISBERG, *op. cit. supra* note 70, at 2.

72. *Ibid.*

73. See MAURACH, DAS RECHTSSYSTEM DER USSR 18 (1953).

After a short period of greater security to the Soviet subjects in the Penal Code of 1922, a new, but more severe codification was promulgated in 1926 which remained in effect until 1958.⁷⁴ Here we can clearly recognize the four main features of the socialist concept of crime.

Contrary to the liberal attitude of non-socialist penal laws which protect both the interests of the individual and the state, Soviet penal law enunciates a clear preference for the interests of the socialist state and society. This is frankly expressed in art. 1 of the R.S.F.S.R. Penal Code of 1926, which designates "the socialist state of workers and peasants and the established order therein" as the sole object of criminal protection.

The same object of protection also appears in the crime definition of art. 6 of the Penal Code. Perhaps it is a mistake even to speak of "crime" since the Code uses only the term "socially dangerous acts." Socially dangerous, however, refers to any act "which is directed against the Soviet regime, or which violates the order of things established by the workers' and peasants' authority for the period of transition to a Communist regime." The peculiarity of this crime definition is that it is related not to the breach of certain legal rules, but rather directly to the interests to be protected. Thus, in order to prove a crime, it is not sufficient to show the breach of a law, but rather a damage to the interests enumerated in that article of the Code.

This predominance of the material element can be made more evident by the use of analogy. If the substance of crime is not ultimately determined by the breach of a law, the question arises as to whether it is at all necessary to make punishment dependent upon the proof of the breach of the law, provided the act in question is in fact socially dangerous. To deny the requirement of the breach of a specific prohibition naturally means to allow analogy; it was thus permitted by Soviet law. On these grounds, art. 16 of the Code provided that socially dangerous acts, even if not expressly dealt with by the Code, may be sanctioned according to the criminal provision most closely applicable. It is but the perfection of this concept that an act, socially dangerous according to the Code, may not be penalized if "by the time it comes up for investigation or trial it has lost its socially dangerous character" or if the perpetrator "cannot now in the opinion of the court be considered socially dangerous" (art. 8). Thus, if the substance of the crime does not consist of the breach of the law but of a dangerous, anti-social act, it is only logical that an act, although within the meaning of the Penal Code, is no longer a crime when no longer "dangerous" to the socialist society.

In 1959, however, a fundamental reform of the Soviet penal law was commenced by four legislative acts of the federal government. The most

74. An English translation of the Penal Code of the R.S.F.S.R. of 1926 was published by the British Foreign Office (H.M. Stationary Office, London 1934).

important was the "Basic Principles of Criminal Legislation,"⁷⁵ which brought a number of significant changes, most of them favorable to the Soviet subjects.⁷⁶ The material concept of crime, however, was preserved. This is true even in spite of the fact that analogy was abolished,⁷⁷ for the substance of crime remains the socially dangerous act. This not only follows from sec. 7(1) of the new Principles, which still defines crime as a socially dangerous act, but more specifically from the principle recognized anew in sec. 7(2) that an act, although contained in the legal definition of a crime, will not be considered a crime, "if owing to its insignificance it is not socially dangerous."⁷⁸

The material concept of crime was also adopted by many other socialist countries. Among the first to do so was Yugoslavia in its Penal Code of 1947.⁷⁹ Although art. 4 of the Yugoslav Penal Code defines crime as "a socially dangerous act the elements of which are defined by law,"⁸⁰ which thus adheres to the principle of legality and excludes analogy, the material substance of the crime is based not so much on the breach of the legal provision as on the social "dangerousness" of the perpetrator. This conclusion flows from the provision, similar to that in the Soviet "Principles," that an act, although fulfilling the definitional elements of a crime, is not punishable if at the time of the judgment it cannot be considered a danger to society (art. 4). This rule can only be understood in connection with the proposition that the criminal offense deserving of punishment must be more than a formal breach of the law. In Donnelly's words, "behavior

75. English translation in SZIRMAI, 3 *LAW IN EASTERN EUROPE* 34-151 (Leyden 1959). Since the USSR is a federal union in which the union republics have jurisdiction over criminal matters, the new "Principles" are theoretically not in force prior to their enactment by the union republics. But as a matter of practice, they are of immediate influence on the whole Soviet criminal legislation.

76. E.g., the resurrection of the requirement of guilt which had been abolished in 1926 (see sec. 3); the abolition of analogy (sec. 3); the extension of the objects of criminal protection to individual rights and interest; the reintroduction of the terms of "penalty" and "punishment," instead of "measures of social defense." For more details see Grzybowski, *Main Trends in the Soviet Reform of Criminal Law*, 9 *AM. U.L. REV.* 93 (1960); VAN BEMMELEN, *INTRODUCTION TO SZIRMAI*, *op. cit. supra* note 75.

Very informative also is the recent report by F. J. Feldbrugge, *Soviet Criminal Law—The Last Six Years*, 54 *J. CRIM. L., C. & P.S.* 249-266 (1963) who also concludes that in recent years Soviet criminal law has shown a rapid development in a generally favorable direction.

77. See sec. 3 (grounds for criminal responsibility) which reads: "Only a person who is guilty of the commission of a crime, i.e., a socially dangerous act, committed intentionally, and forbidden by law (!), bears criminal responsibility."

78. As to the practical handling of cases in which at the time of the trial the illegal act was no longer socially dangerous see MAURACH, *AUS DER RECHTSPRECHUNG DER SOWJETISCHEN GERICHTE ZUM ALLEGEMEINEN TEIL DES STRAFRECHTS*, 4 *JAHRBUCH FÜR OSTRECHT* 66 (1963).

79. Cf. Donnelly, *The New Yugoslavian Code*, 61 *YALE L.J.* 510 (1952); MUNDA, *DAS STRAFRECHT JUGOSLAWIENS*, in 1 *MEZGER-SCHÖNKE-JESCHECK*, *op. cit. supra* note 42, at 369.

80. See Donnelly, *supra* note 79, at 512.

must constitute a danger to the social order which the criminal law was designed to protect and to foster."⁸¹

The Czechoslovak criminal code of 1950 is essentially the same as those of the USSR and of Yugoslavia. It is more advanced, however, in that it attempts to adapt the traditional systematic structure of the classical-liberal crime concept to its new material substance. As a reaction against the "bourgeois" crime concept of the past, the term "unlawfulness" was replaced by "social dangerousness." Whereas formerly the fulfillment of the definitional elements of the crime demonstrated the unlawfulness of the act, it is now interpreted as an indication of "social dangerousness." The first task of the Czechoslovakian judge is not to find the formal fulfillment of the definitional elements of a crime, but to examine the act to determine whether it is socially dangerous. Only if these elements are present may he find the violation of a legal prohibition.⁸²

We shall conclude our survey on the socialist concept of crime with a brief comment on the peculiar situation existing in Eastern Germany. Although the "bourgeois" imperial penal code of 1871 is still in force, the old element of "Rechtswidrigkeit" (unlawfulness) is still preserved; social dangerousness is now said to be the fundamental substance of the crime. Consequently, an act, though formally illegal, is not a crime if it lacks "social dangerousness."⁸³ This change necessitated the creation of the rule that an act is not illegal if its "social dangerousness" is insignificant.⁸⁴

Conclusion: A Material Crime Definition

This survey of the various criminal concepts demonstrates that in one way or another the requirement of harm is almost universally recognized as a material element of criminal law. Whether the principle of harm is considered only as a factor of criminal policy (as in most non-socialist criminal theories) or whether harm in the sense of "social dangerousness" is made the real and decisive substance of the crime (as in socialist theories), there is at least universal agreement that society and government may not justly penalize human activities as long as they are not harmful in fact.⁸⁵

If, however, the harm requirement is a basic principle of criminal law and an essential element of any crime, it would seem necessary that it be

81. *Id.* at 513.

82. Cf. SCHARF, DAS TSCHECHOSLOWAKISCHE STRAFRECHT, in 2 MELZER-SCHÖNKE-JESCHECK, *op. cit. supra* note 42, at 359, 409.

83. See LEBBUCH DES STRAFRECHTS DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK, ALLGEMEINER TEIL 265, 490 (Gerats-Lekschas-Renneberg eds. 1959).

84. See §§ 158, 164, 221 CRIMINAL PROCEDURE CODE of Oct. 2, 1952. See to this Gerats-Lekschas-Renneberg, *op. cit. supra* note 83, at 492.

85. § 153 of the GERMAN CRIMINAL PROCEDURE CODE of 1877 reads: "Offences are not prosecuted if the guilt of the perpetrator is small and the consequences of the act are insignificant, provided the procurement of a judicial decision is not in the public interest."

integrated into and expressed by the definition of the crime. Thus, we must reject all theories which make a distinction between a formal crime "definition" and a material crime "description." To make this distinction is a useless, if not confusing, doubling of notions, also ontologically incorrect. Only if one follows a pure theory of law, such as Hans Kelsen's,⁸⁶ is it possible to make such a distinction between the legal form and the sociological substance. We must, after a dangerous period of idealistic legal positivism, carefully examine all attempts to "free" legal formalism from the sociological facts. This is particularly important in penal law, which deals with a human perpetrator. If we attempt to comprehend an act with exclusively formal concepts, we run the risk of neglecting essential parts of the human personality which cannot be separated from the material substance of the criminal act. This is precisely the reason why we must include the harm element in the crime concept: it gives the formal breach of the law its social significance and the color of life.

Using these considerations and the suggestion of Jerome Hall, we can define crime as legally forbidden conduct which causes a proscribed harm, for whose perpetration the offender, provided he acted with *mens rea*, is subjected to a punitive sanction.⁸⁷

II. THE NATURE OF CRIMINAL HARM

The objective of the first chapter was simply to circumscribe the position which the harm requirement occupies within the concept of crime. We concluded that it is a part of the criminal wrong, and that, in fact, it is the true material substance of the criminal wrong. As such, it must not be confused with the breach of the law, which is only the formal unlawfulness of the criminal wrong.

Since we are dealing with the principle of harm in general rather than with the harm of a specific crime, we must seek a definition of the harm element which is broad enough to comprehend all of the various types of criminal harm, *i.e.*, murder, forgery, or driving without a license. The outcome, in turn, will be a definition of harm which logically reflects the main features of the harm, namely, those elements which must be present in all types of criminal harm.⁸⁸

Yet the problem of finding so general a proposition is hardly a matter of experimental analysis alone. Certainly one could compare the harms of various crimes and establish as elements of harm those factors common

86. KELSEN, *GENERAL THEORY OF LAW AND STATE*, 391-446 (1949); *cf.* also W. FRIEDMANN, *LEGAL THEORY* 112-125 (3d ed. 1953).

87. *GENERAL PRINCIPLES* 225 n.47. Hall's definition was to supplement the requirement of *mens rea*.

88. J. HALL, *LEGAL CLASSIFICATION*, in *STUDIES IN JURISPRUDENCE AND CRIMINAL SCIENCE* 150 (1958), is skeptical, too, if aside from the description of harm in certain legal sanctions we can define harm otherwise than in general terms.

to all, arriving at a theorization or generalization of the legislative purposes of those crimes. Our task is more a pre-legislative one. Since jurisprudence is not confined to mere commentarial interpretation of what the legislature has produced but involves also the task of providing new devices and propositions for the advancement of law and justice, we must not be content with what the legislators thought the essence of criminal harm to be. It is, rather, a permanent obligation of criminal jurisprudence to refine the principles of criminal liability, which, in turn, the legislators may then use to orient themselves when defining new crimes. In this sense we are trying to find the principal elements of which any type of criminal harm must be composed.

The first step in our investigation will be to distinguish harm as the objective material wrong of the crime from the subjective personal immorality of the offender. A short review of the more important objective harm theories which can be found in American criminal jurisprudence will follow. From there, we will proceed to a tentative determination of the nature of criminal harm.

Harm and Ethics

A crime, the voluntary act of a human being, in any case is a formal breach of the law. Beyond this, it not only causes a detrimental change in the outside world, but it also involves a subjective personal wrong of the perpetrator who, because he is a human being and, therefore, an ethical personality, simultaneously commits an offense against the moral values and maxims by which he is bound. Since, as demonstrated in the foregoing chapter, the essence of harm cannot be seen in the formal breach of the law, the question remains whether harm may consist in the personal immoral wrong of the offender or, alternatively, in the impairment of some objective right, interest, or external good. We shall attempt to establish a proposition which would regard the subjective personal immorality of the perpetrator as the essence of harm; thus, as the basis of criminal liability, it would clearly be inconsistent with sound common law tradition and repugnant to the spirit of the constitution.

It is true that in the early days of criminal law, moral and penal liability were perhaps too closely connected, as evidenced by the form and attitude of the statutes of that time.⁸⁹ This was, however, only an intermediate station in a process which had its origin in a religious understanding of law and state, furthered by the complex relationships between church and state at that time. As the independent, secular function of the state became more clearly recognized, criminal law retreated from dealing with wrongs concerned solely with moral and religious life which were more properly within the jurisdiction of the church. Since that time, criminal

89. HOLDSWORTH, 2 HISTORY OF ENGLISH LAW 50 (3d ed. 1927).

liability has been, in principle, confined to wrongs which result in an external injury. This result was exemplified in the first truly public crimes such as the *crimina laesae maiestatis*, which were punished not because the moral peace of the perpetrator's soul was disturbed, but only because the external public security and order were endangered.⁹⁰

The crimes derived from former tort actions are even stronger proof of the fact that the criminal sanction was dependent on the offender's interference with an external situation, either by trespassing on another's property or by endangering another's reputation. In all such cases there was more than a subjective moral fault on the part of the perpetrator; there was also objective damage to the victim. This is true, as Mr. Justice Holmes has shown, in spite of the fact that "the law of torts abounds in moral phraseology."⁹¹

It likewise appears from the constitutional position of the State that harm must consist of more than the immorality of the act. Since the State is not a moralistic institution, but protects its citizens from unlawful interference with their rights and interests, government would transgress the inherent limitations of its power if it attempted to correct the internal faults of its subjects rather than limiting its goals to the prevention of injury to their lives, liberties or property interests. For this reason, mere disobedience of the law, which is a personal wrong rather than an external harm, would hardly be a sufficient justification to subject the disobedient citizen to criminal sanction. This principle of preventing the state from involvement in the moral life of its subjects was briefly but precisely expressed by Mr. Justice Holmes' famous statement in *Commonwealth v. Kennedy*: "The aim of the law is not to punish sins, but is to prevent certain external results."⁹² A similar view was stated by Glanville Williams: "criminal law is generally concerned to repress conducts hurtful to

90. At first sight, this statement may seem inconsistent with the interesting observation made by RICHARD M. HONIG, *DAS AMERIKANISCHE STRAFRECHT*, in MEZGER-SCHÖNKE-JESCHECK, 4 *DAS AUSLÄNDISCHE STRAFRECHT DER GEGENWART* 45-46 (1962) that American criminal theory and practice still keeps to the old distinction between *mala in se* (crimes which are "against good morals") and mere *mala prohibita* (offenses against the interests of the state and the welfare of the society) as well as with the fact that in sexual offenses, since they are considered inherently immoral, the defendant hardly may be discharged for mistake of fact (*op. cit. supra*, at 126-128). But actually these peculiarities do not affect our proposition that the offender's immorality as such is not the basis of penal liability, for the concept of a crime *malum in se* does not necessarily imply that the moral wrong be the only wrong the perpetrator is punished for. The immorality of the crime *malum in se* is, beside the external harmful effects it produces, merely an additional distinctive characteristic of such a crime. And as far as mistakes of fact in sexual offenses are concerned, this is simply a question of *mens rea* and personal imputability that does not pertain to the essence of the criminal wrong.

91. HOLMES, *THE COMMON LAW* 79; *cf.* also Morris R. Cohen, *On Absolutism in Legal Thought*, 84 U. PA. L. REV. 681, 686-87 (1936).

92. 170 Mass. 18, 20, 48 N.E. 770 (1897).

society."⁹³ It was only a difference in emphasis when Michael & Wechsler⁹⁴ declared that the end of criminal law is to control socially undesirable behavior, for the very purpose of that end is "to promote the common good." The Model Penal Code also expresses a purpose of the criminal law to be the forbidding and preventing of conduct "that unjustifiably and unexcusably inflicts or threatens substantial harm to individual and public interests."⁹⁵ Many similar statements could be added.⁹⁶ All support the fundamental principle that it is not the subjective ethical immorality of the offender, but the damage done to objective interests and values which is the true substance of criminal harm. Thus understood, the harm requirement is precisely the principle which, if properly employed, would restrain the state from punishing purely immoral wrongs.

To ascertain a complete picture of the opinions on this matter we must also note that there are a number of criminal theories which are not reconcilable with our proposition of an objective harm.⁹⁷ This reference is not to Hall's so-called moralistic conception of *mens rea* which does not sufficiently take into account the basic changes in the sociological basis of the public morality of this technical age.⁹⁸ But, as Hall himself has often stated, *mens rea*, though the "ultimate summation of the moral judgments,"⁹⁹ is not the only basis of criminal liability. Harm is as important as *mens rea*. Furthermore, the moral judgment of *mens rea* is not the expression of some subjective ethical code but a code as "expressed in the proscription of the voluntary (intentional or reckless) commission of numerous social harms."¹⁰⁰

Quite a contrary view, however, is taken by Hans Welzel, the primary originator of the so-called finalistic theory of the act (*finale Handlungs-*

93. WILLIAMS, CRIMINAL LAW, THE GENERAL PART 17 (2d ed. 1961).

94. MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 9-10 (1940).

95. MODEL PENAL CODE § 1.02 (Tent. Draft No. 2, 1954).

96. Cf. CLARK & MARSHALL, ON THE LAW OF CRIMES 81 (6th rev. ed. Wingersky 1958): Criminal law does not punish a man for his acts merely because they are immoral. There must be something more than this, e.g., a common nuisance such as public immorality or indecency. A very interesting symposium on the relationship of ethical values and law in general is published in 12 OHIO ST. L.J. 1-68 (1951): *Ethical Values and the Law in Action*, with contributions by Cohen, Brown, Hartman, Jenkins, and Smith. See also Paul D. Carrington, *The Moral Quality of the Criminal Law*, 54 NW. U.L. REV. 575 (1959).

97. Cowan, *A Critique of the Moralistic Conception of Criminal Law*, 97 U. PA. L. REV. 502 (1948/49) who sharply criticizes Hall's proposition that penal liability is founded on moral consciousness of the guilt, and that *mens rea* is to be regarded as evil or conscienceless behaviour.

98. In face of these changes G. O. W. Mueller's suggestion to differentiate the substance of *mens rea* as to cultural criminal law (requiring knowledge of the evil nature of the act) and as to regulatory criminal law (requiring knowledge of unlawfulness) is the only logical way out. See Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1057-61, 1066 (1958).

99. GENERAL PRINCIPLES 146.

100. *Ibid.*; see also *id.* at 104.

lehre). For Welzel, the primary function of criminal law is the promotion of the elementary social-ethical act values and, only secondarily, the protection of various legal interests.¹⁰¹ The logical consequence is that the criminal wrong is said to consist in the personal disutility, *i.e.*, an impairment of some legal interest, and is significant only in so far as a supplement to the personal wrong. This means that objective harm can be missing without affecting the personal disutility of the act, and, thus, without affecting the essence of the criminal wrong.¹⁰²

This, indeed, shows a very dangerous trend towards a penal law which concerns itself more with the morality of its citizens than with the protection of the common good. Welzel certainly is correct in reasoning that interests are best protected if citizens are morally stable. However, the question of whether to prevent social harm by preserving certain moral standards is not merely an issue of efficiency; it also involves the constitutional concern for moral freedom. The right of citizens to freedom of conscience simply forbids the government to direct the morals of its subjects.

For this reason or another, Welzel's theory has few followers.¹⁰³ To the contrary, his ideas have been vigorously assailed by Thomas Würtenberger.¹⁰⁴ Even so distinguished a supporter of Welzel's finalistic doctrine of the act as Reinhart Maurach does not approve of Welzel's idea of making the personal disutility of the act rather than the harm to objective interests and values the fundamental substance of the criminal wrong.¹⁰⁵

In connection with the problem of personal wrong, we should also comment briefly on the novel proposition of the so-called subjective elements of unlawfulness. In his study on common law *mens rea*, Mueller observed that in some cases the law requires a certain state of mind beyond the regular requirement of *mens rea*. Thus, for burglary, it is not sufficient that the burglar breaks and enters with *mens rea*; he must also do so with the intent to commit a felony in that building.¹⁰⁶ In another group of crimes, the act as such is completely indifferent; it becomes criminal only if it is committed with a certain state of mind. For example, it is perfectly lawful for a man to take a woman from one state to another

101. WELZEL, *DAS DEUTSCHE STRAFRECHT* 4 (8th ed. 1963).

102. *Id.* at 56-57.

103. The arguments with which Welzel's theory was recently supported by Günter Stratenwerth, *Handlungs- und Erfolgsunwert im Strafrecht*, 79 *SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT* 223, 237-250 (1963) are not convincing since Stratenwerth, in a one-sided way, considers the problem of the criminal wrong only from the situation of the perpetrator and thus neglects the objective effects the unlawful conduct produces.

104. WÜRTENBERGER, *DIE GEISTIGE SITUATION DER DEUTSCHEN STRAFRECHTSWISSENSCHAFT* 47-66 (1957).

105. MAURACH, 179-180, 233.

106. Mueller, *supra* note 98, at 1061-62.

but he makes himself criminally responsible if he does so "for any other immoral purpose."¹⁰⁷ Mueller calls the special intent, with which the act must be done, "*additional mens rea*." In cases where the specific evil frame of mind is the actual constituent element of criminal liability, he speaks of "*independent mens rea*."

German criminal theory was troubled by the same problems. While Mueller labelled those particular states of mind special forms of *mens rea*, German doctrine placed them in the *actus reus* portion of the crime. The German theory was that they influenced the substance of the wrong; it labelled them as subjective elements of that wrong (*subjective Unrechtsmerkmale*).¹⁰⁸

We need not decide which position is more accurate. Both have their difficulties, especially in cases of independent *mens rea*. The question, then, is whether penal liability is still based on an objective harm. Perhaps one could object to Mueller's view based on the fact that, in cases which require an independent *mens rea*, it would seem that the perpetrator is not punished for an objective harm but for his faulty state of mind. Using the German interpretation, one might wonder whether, with the notion of subjective elements of unlawfulness, the requirement of harm is replaced by the assumption of some subjective ethical wrong. Actually, it is not, although in situations containing subjective elements of unlawfulness, the punishability is dependent upon a certain state of mind. That state of mind can never be considered the true basis of liability: the specific frame of mind is but a filter through which harmful conduct, which otherwise could not be distinguished, is selected and separated from harmless conduct. Hence, the subjective elements of unlawfulness are not the *ratio essendi*, but merely the *ratio cognoscendi* of otherwise harmless acts. "What makes the act unlawful," says Mueller, "is its recognized misuse for socially harmful purposes by persons with evil intentions of a particular sort."¹⁰⁹

The conclusion to be drawn from this inquiry is that the criminal wrong, as a whole, is a three-fold phenomenon: the formal breach of the

107. *Id.* at 1064.

108. It took a long time before these elements were recognized as elements of unlawfulness rather than of personal guilt. The controlling point is that only by the presence of the proscribed frame of mind can the proscribed wrong be committed. Thus, the subjective state of mind is eventually decisive in determining whether an externally manifested act is deemed unlawful or not. For more details see MAURACH, 179 and in particular the monograph by E. S. SCHMIDHÄUSER, *GESINNUNGSMERKMALE IM STRAFRECHT* (1958).

109. Mueller, *supra* note 98, at 1064—The argumentation of the German doctrine is similar. PROFESSOR SAX, *GRUNDSÄTZE DER STRAFRECHTSPFLEGE*, in BETTERMANN-NIPPERDEY-SCHÜNER, 3(2) *DIE GRUNDRECHTE* 941 (1959) thinks that the legislator does not use such personal characteristics of the mind in order to proscribe an illegal form of life, but rather to get those illegal violations of legal interests in his grips. Subjective definitional elements, thus, only specify the wrong which consists in an objective harm.

law, the personal ethical unworthiness of the act, and the detrimental interference with some external object, the nature of which remains to be determined. Although the objective wrong may be influenced by the personal disutility of the act (as where the crime definition contains subjective elements of unlawfulness), the essence of the criminal wrong, *i.e.*, the harm which the law seeks to prevent, must be found in the harmful effects of the crime and not in the moral fault of the perpetrator.

This analysis gives us a *negative* description of harm: the material substance of harm is neither the breach of the law nor the personal disutility of the act. We now can proceed to a positive determination of harm. Since it seems useful to know what has already been clarified concerning this question, we shall commence our investigation with a survey of the most prominent American opinions on harm.

Survey of American Theories of Harm

As we have noted, the efforts made by Americans to define harm are relatively recent. The first scholar to attempt a thorough and comprehensive interpretation of the harm element in connection with a description of the general principles of criminal law appears to have been Professor Jerome Hall.¹¹⁰ A discovery of principal importance was his recognition of the fact that harm is not exclusively a question of either fact or of normative evaluation alone, but a combination of both. We shall consider this and other doctrines of Hall's throughout this paper, but at this point it suffices to trace the main features of Hall's theory of harm.

From the outset, it is Hall's endeavor to distinguish the notion of harm from the similar phenomena in the crime. Thus, Hall properly warns of the mistake in equating harm with the external effect, of which any proscribed conduct or behavior results.¹¹¹ On the other hand, he stresses the material character of the crime as against formalistic misconceptions: "There is nothing formal about being robbed or killed."¹¹² This statement, which best fits visible injuries of common traditional crimes, must, however, be adjusted to new fact situations in which crimes are often refined to such an

110. See HALL, *GENERAL PRINCIPLES* 212-246; *STUDIES IN JURISPRUDENCE AND CRIMINAL SCIENCE* 143-157, 200-214, 235-252; *CASES IN CRIMINAL LAW AND PROCEDURES* 45 (1949).

111. *GENERAL PRINCIPLES* 214. A different question is whether Hall himself always attends to his own warning. As Honig observed, Hall seems to apply the notion of harm also to the physical object of the perpetrator's action rather than restricting it to the object the law seeks to protect (see Richard M. Honig, *Criminal Law Systematized*, 54 J. CRIM. L., C. & P.S. 276 (1963); also in *DAS AMERIKANISCHE STRAFRECHT*, in *MEZGER-SCHÖNKE-JESCHECK*, 4 *DAS AUSLÄNDISCHE STRAFRECHT DER GEGENWART* 47-48 (1962). But with respect to Honig's perhaps too formalistic apprehension of the legal interest (*cf. infra* III) it should be kept in mind that in our opinion harm can also consist in the detriment to some physical object and not only in the interference with the merely spiritually conceived legislative purpose. More to this in III.

112. *GENERAL PRINCIPLES* 215.

extent that external injury is no longer noticeable. Taking this concept into account, Hall sees penal harm as more than physical injury since in many crimes, such as libel, perjury, and kidnapping, no physical injury is visible although a harm was certainly inflicted. Therefore, the notion of harm is expanded from tangibles to intangibles, from purely corporeal objects to incorporeal interests and values. Thus, for Hall, harm is "a negation, a disvalue, the lack of natural condition, and the like,"¹¹³ or "harm must be stated in terms of intangibles such as harm to institutions, public safety, the autonomy of women, reputation and so on. In short, harm signifies the loss of value."¹¹⁴

Thus far, Hall's suggestion advances two important novelties: first, the attempt to find a notion of harm capable of fitting all sorts of crimes; and second, as a necessary consequence, the abstraction of harm towards a notion of incorporeal interests and values. Beyond that we can note a third feature. Since, for Hall, the "locus of a value or a disvalue is not simply in the thing itself, but is dependent on its perception by people,"¹¹⁵ harm necessarily implies the assumption of a normative relationship between the criminal objective and its social evaluation. In light of these normative-empirical elements, penal harm appears as a "complex of fact, valuation and interpersonal relation."¹¹⁶

In appraising Hall's notion of harm, which indeed already reveals its most fundamental elements, we nonetheless regret that he did not say more concerning the normative aspect of the social-legal valuation of harm. This is the most important link between the factual basis of harm and its legal value and quality, and, considering Hall's conceptual framework as a whole, the impression is given that Hall has perhaps over-accentuated the idealistic nature of harm. Finally, where Hall speaks of the social implication of criminal harm, he seems to have an ethical comprehension of the penal wrong in mind.¹¹⁷ Thus, in short, Hall can be characterized as an exponent of the incorporeality of penal harm.

Hall's proposition has been advanced and refined by Mueller who differentiates harm in a tri-level abstraction:¹¹⁸

113. *Ibid.*

114. *Id.* at 217. See also HALL, *op. cit. supra* note 110, at 45 (CASES): "Harm implies interests and values which have been destroyed, wholly or in part."

115. *Ibid.* Referring to HAROLD LEE, *METHODOLOGY OF VALUE THEORY*, in: *VALUE—A COOPERATIVE INQUIRY* 154 (Lepley ed. 1949) he defines value as "that aspect of an object by virtue of which I care for it," *GENERAL PRINCIPLES* 217 n.15.

116. *Ibid.*

117. *Id.* at 240-246, esp. at 242 where Hall suggests that, different from torts which almost invariably include actual damage to some person, crimes are signified by their social harm for which actual damage is not essential. This social harm, however, Hall sees essentially determined by the "moral culpability of the actor."

118. Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 *IND. L.J.* 206, 220 (1959).

a. In a general sense, every crime contains harm through the breach of the law, the disobedience against the law, a contempt of the sovereign. This is what we have previously denominated as the formal unlawfulness of the crime.

b. On the intermediate level, there is harm to the legally protected interests as they are distinguishable from the crime definition or from the code context in which the crime is listed. Here, we find such broadly defined harms as injuries to life, property, honor, etc. As Mueller demonstrated on another occasion, this is the harm which is ever-present in all crimes "even where bones are not broken, metal not bent or wood not charred."¹¹⁹

c. In addition to this general material harm, many crimes involve an additional problem—a harm to the specific purpose the criminal provision is intended to serve. This follows from the fact that most crime definitions, beyond their general purpose, are also designed to protect some special interests or to protect those general purposes in a special way. For example, *People v. Von Rosen*¹²⁰ dealt with a statute penalizing the desecration of the United States flag. The preservation of the national emblem was the general purpose; the special purpose was to avoid disturbances of the public peace invited by desecration of the flag.¹²¹

While considering the social aspect of harm Hall had spoken about, Mueller made an interesting observation about the victims of a specific harm. Only the third harm type is said to point to a particular individual; the second harm type refers to a victim-group found in situations similar to that of the actual sufferer of the loss. Such group members suffer only a symbolic loss.¹²² Although the general validity of this conclusion can be doubted,¹²³ it rightly stresses the *social* relevance of criminal harm. On no account does the individual victim of a specific harm suffer alone; rather, the public at large, which has an interest in the protection of all recognized rights and interests, is suffering with him.

If harm implies values and interests, as Hall assumes, it seems important to know how these values must be conceived, how their nature and structure are to be comprehended. "Value" and "interest" can be

119. Mueller, *Victims of Criminal Violence*, 8 J. PUB. L. 218, 233 (1959).

120. 13 Ill.2d 63, 147 N.E.2d 327 (1958).

121. Another example is that of larceny by false pretenses which not only protects another's property interests but also his "liberty . . . to deal with what is his as he himself chooses." Snyder, 24 BROOKLYN L. REV. 34, 48 (1958), commenting on *United States v. Rubinstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 313 (1957).

122. Compare *supra* note 119, at 221 with informative historical observations on the Roman and Germanic criminal laws.

123. In the case of the desecration of the flag where the specific harm consists in the disturbance of the public peace, is not the public in general rather than an individual the sufferer of the specific harm?

understood in a quite different sense. This idea is perhaps best demonstrated by contrasting Hall's and Mueller's rather idealistic notions of legal interests to the fundamentally different approach of Beutel's "experimental jurisprudence."¹²⁴ Beutel simply rejects any philosophical comprehension of values or other theoretical conceptions which could be the object of criminal law.¹²⁵ In his overstressed pragmatic attitude he even denounces the term "interest" as being abused by philosophers and jurists for purposes of theoretical and ethical speculation. Instead, he demands that "interest" be actually identified "with the real wants of individuals or society as they come into play or ought to come into play in the creation of rules of law."¹²⁶ These interests, so understood, are then organized by Beutel into the three classifications of demands, desires and needs.¹²⁷

Beutel's extremely naturalistic approach contains aspects which are of great significance in determining the factual substratum of values which are legally protected. Considered as a whole, however, Beutel's notion of legal interests is a purely sociological one, and, as such, the very opposite of what Hall understands to be the values and interests which are implied by harm. Whereas Hall raises them to idealistic heights, Beutel restricts them to a more practical appraisal. He thereby overlooks the fact that demands, desires and needs, even if sociologically founded, still need legal evaluation and recognition in order to be of legal relevance and protected by criminal statutes.

An intermediate position is held by Professor Snyder. It is regrettable that Snyder's contributions to criminal theory¹²⁸ have not been fully recognized. Not only did he make detailed investigations into the various forms in which criminal harm might occur,¹²⁹ but he also professed a strong belief in the requirement of harm as an essential part of the material substance of crime.¹³⁰ Likewise, he never tires of emphasizing that harm is, or rather has to be, a fact. For him, this is a constitutional requirement

124. FREDERICK K. BEUTEL, *SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE* (1957). He was very negatively reviewed by CAVERS, 10 J. LEGAL ED. 162 (1957).

125. *Id.* at 37-43.

126. *Id.* at 44.

127. To make clear what Beutel means by his terms, here is his explanation (at 44-45): "Demands" are wants which are expressed in such a manner that they may be objectively stated. "Desires" are human interests in things which the individual or group subjectively wants, craves or would if encouraged claim. "Needs" are those conditions or things in the current state of society which, if present and effective, would enable the individual or society to function with the least friction and more in accordance with the natural order of his or its universe at that moment."

128. SNYDER, *PREFACE TO JURISPRUDENCE* (1954); *AN INTRODUCTION TO CRIMINAL JUSTICE* (1953); *False Pretenses—Harm to Person from Whom Thing Obtained*, 24 BROOKLYN L. REV. 34 (1957/58).

129. *Id.* at 114-115 (INTRODUCTION).

130. SNYDER, *op. cit. supra* note 128, at 521-24 (PREFACE); *Id.* at 759-64.

based on the due process clause. According to the sense and purpose of this rule, no person shall be deprived of life, liberty or property through imposition of a legal sanction except for harmful conduct.¹³¹ Therefore, penal harm is not merely a theoretical element of harm "*ex hypothesi*,"¹³² but it must be actually, or, in some crimes, at least potentially present. Thus, "harm is not an immutable characteristic of certain human behavior nor merely a deduction from nonobservance of an authoritarian *fiat* but a fact."¹³³

Snyder's notion of harm is a step forward in so far as he emphasizes the significance of the factual side of harm. Although he also recognizes the normative implications of legal interests, he nevertheless avoids concepts in which harm is reduced to a mental category which is perhaps still intellectually conceivable but not factually sensible. Snyder thus preserves the relationship of harm to its sociological basis. In other respects, the problems remain the same. In particular there remains the clash between Hall's value concept on one side and Beutel's pragmatic sociological position on the other; it can be demonstrated that both aspects taken together make up the essence of penal harm.

The "Legal Interest" as the Focal Point of the Harm Concept

As we have seen in the foregoing section, Hall characterizes harm as implying interests or values which have been destroyed wholly or in part.¹³⁴ The important term in this statement is "implying." It indicates the recognition of a most significant phenomenon for analysis of harm, namely, the fact that harm is but a negative concept—the destruction of something good or the creation of something bad. "Harm," as such, does not have a definite meaning. When one speaks of harm, the question necessarily arises—harm to what? "Harm" indicates that some damage has been done which is the result of some unlawful action. Seeking the nature of harm, therefore, actually means ascertaining the objects which can be harmed. In other words, we must examine exactly what is injured by conduct which we believe to result in penal harm.

Although we cannot yet provide a final answer to this question, it seems methodologically necessary to adopt a terminology for further discussion. Anticipating our conclusions, we can best describe the objects of penal harm by the term "legally recognized interests" or, more briefly, "legal interests." Not only are the interests recognized by the constitutional order (indeed, the very objectives of any criminal act) but also, as to the terminology, the phrase "legal interest" seems most appropriate in indicating the substance and scope of penal harm. On the one hand, the

131. *Id.* at 520 (PREFACE).

132. *Op. cit. supra* note 129, at 763.

133. *Op. cit. supra* note 131, at 523; 24 BROOKLYN L. REV. 34, 37.

134. *Op. cit. supra* note 110, at 45 (CASES).

meaning of legal interest is broad enough to comprise all potential objectives of criminal behavior, be they corporeal goods or intangible values, and, conversely, it is narrow enough to avoid the vagueness and uncertainty of such terms of the socialist legal systems as "socially dangerous acts." Accordingly, by preferring the term "legal interests" to any other, we come close to Hall's concept of legal interests and values. Furthermore, we are in agreement with the continental European theories, though these tend to replace "interest" by "good" [as in Germany, Switzerland and Austria (*Rechtsgut*)] or by "value" [as in France and Italy (*valeur legal, valore legale*)]. All mean essentially the same thing—the interest which is legally recognized.

Authoritarian criminal concepts on the one side and, on the other, criminal systems based on constitutional principles are essentially different in the degree to which individual freedom is protected and guaranteed against the sometimes overweening interest of society in preventing social damage of any sort. It is only logical that in ideological systems like those of socialist countries, where the well-being of the socialist order is the main objective of all public and private activity, an open-ended concept of criminal harm is more practical than a definite or limited one. If the almighty State is able to prosecute any social damage, to punish any socially dangerous act and, furthermore, if the government is free to determine what it deems socially dangerous, the individual is completely at the mercy of the public power. It is then possible to declare any conduct which is not in accordance with the interests of the ruling class as socially dangerous. Where individual interests seem repugnant to the interests of the government or the dominant social groups, an open and vague concept of harm would make it easy to outlaw private action on the grounds that it is not in accordance with the interests of the State and thus is socially dangerous.

In a noteworthy address delivered at Würzburg University, the Italian criminalist Giuseppe Bettiol impressively demonstrated the great extent to which individual freedom is threatened by the socialist concept of harm.¹³⁵ In a system in which the content of criminal harm is dependent upon the unstable "historical conditionedness" of the legal interests,¹³⁶ penal harm necessarily loses all definite meaning. In such a system, even the formal retention of the term "*Rechtsgut*" means little since it is paralyzed by the notion of social dangerousness. In this interpretation, it has merely the teleological-political function of expressing the momentary interests of the socialist society, leaving no security to individual freedom

135. This address, entitled *Das Problem des Rechtsguts in der Gegenwart*, was later published in German in 72 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 276 (1960).

136. Thus, the East German socialist RENNEBERG, *DIE OBJEKTIVE SEITE DES VERBRECHENS* 20 (1955).

of activity.¹³⁷ Contrary to this, the concept of legally circumscribed interests, as understood here, remains the people's best safeguard against authoritarian abuse. It was in this sense that Bettiol declared the concept of legal interest, *i.e.*, interests circumscribed by the law, to be the fundamental cornerstone of the crime concept, since on the one hand it is a sufficient basis for the protection of social and individual values and interests and, on the other, the best guarantee for individual freedom and personal security.¹³⁸

This is precisely the reason why a society which believes in constitutional principles and legal security will prefer the concept and term of legal interests to any proposition of social damage or social dangerousness. Only social and individual interests which are legally circumscribed and recognized are worthy of criminal protection.¹³⁹

III. THE STRUCTURE OF THE LEGAL INTEREST

The Dualistic Structure of the Legal Interest in General: Sociological Substratum, Value Aspect

At first glance, the propositions of Hall and Mueller on the one side and of Beutel on the other seem completely irreconcilable. There are indeed basic differences. Hall places emphasis on the value character of harm, characterizing harm as the negation of an ideal value rather than as the destruction of a concrete, factually sensible good. Beutel sees only the sociological wants and needs of society, thereby completely overlooking the fact that social or individual interests do not deserve legal protection simply because they are claimed. Beyond that, they must also have legal value character which means that interests, in order to obtain criminal protection, must be worthy of criminal protection from the legal point of view, *i.e.*, by way of legal valuation.

The conclusion we must draw from this brief review of the opposite positions of Hall and Beutel is that neither of them provides that extensive proposition of the legal interests which we seek. Whereas the former is in danger of attenuating the factual substance of penal harm to a generalizing apprehension of ideal values, the latter misses the very value link by means of which the otherwise purely sociological needs and wants are integrated into the legal and constitutional order, thus achieving recognition as legal interests. The solution, therefore, seems to lie in an integrated combination of both the value aspect and the sociological substratum, each expressing a constituent part of the legal interest.

There are complications which might arise from shifting the solution of a legal problem to the shaky stage of controversial philosophical

137. See Bettiol, *supra* note 135, at 283.

138. *Id.* at 285.

139. For more details on the constitutional basis of the legal interests see *infra* III.

opinions. Actually, we do not intend to resort to any of those numerous systems and theories of values which already exist.¹⁴⁰ Rather, we intend to bring a philosophical distinction into play: a philosophical distinction which is almost universally acknowledged; namely, the distinction between *value quality*, i.e., the value as such, and the *value substratum* or the value carrier, i.e., the factual object on which the value rests.¹⁴¹

In philosophical terminology, the value substratum must be evaluated. The value substratum may be associated with various objects: physical elements such as the human body, life, money, and house; or it may consist of certain relationships and fact combinations, such as the confidential relationship between principal and agent, the advantageous expectancies of a shopkeeper based on the loyalty of his customers, the efficiency of public administration, or the integrity of the economic order.¹⁴²

The value quality, on the other hand, is what makes the value substratum important. In the words of Nicolai Hartmann, values are "that through which things are valuable."¹⁴³ In philosophical understanding, the value qualities are the true values. As such, they are neither comprehended as ideal entities of independent subsistence comparable to Plato's "*ideas*,"¹⁴⁴ nor thought of as having an intellectual subsistence recognized by human society as valuable. In Lee's words: "That aspect of things whereby they are cared about is their value."¹⁴⁵ In this sense they are considered as objectives which merit realization either by creating things or fact situations in accordance with them or by preventing evils which are detrimental to them. The pragmatic value theories of Dewey¹⁴⁶ and Pound¹⁴⁷ are particularly favorable to this effect.

140. For a brief survey cf. HALL, *GENERAL PRINCIPLES* 215, also POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 79 (4th ed. 1928).

141. Cf. to the following NICOLAI HARTMANN, 1 *ETHICS*, ch. XIV (Stanton transl. 1950); Harold Lee, *Methodology of Value Theory*, in: *VALUE—A COOPERATIVE INQUIRY*, at 147-166 (Lepley ed. 1949); HEINRICH RICKERT, *A SYSTEM DER PHILOSOPHIE* 96 *et seq.* (1921).

142. See VITAL SCHWANDER, *DAS SCHWEIZERISCHE STRAFGESETZBUCH* 62 (1952): Interests to be legally protected may be "any things, situations or other circumstances which might be of material or ideal value for an individual or a group of persons." Similarly, HANS WELZEL, *DAS DEUTSCHE STRAFRECHT* 4 (8th ed. 1963).

143. HARTMANN, *op. cit. supra* note 141, at 186.

144. *Ibid.* Similar also Ernst Seelig, following Alexius v. Meinong, reviewed by G. O. W. MUELLER, 47 *J. CRIM. L., C. & P.S.* 539, 543-44 (1957). In Rickert's philosophy the values have a peculiar form of existence: they are "valid" (*geltend*); cf. RICKERT, *op. cit. supra* note 141, at 113, also his *KULTURWISSENSCHAFT UND NATURWISSENSCHAFT* 20-22 (4/5th ed. 1921).

145. RICKERT, *op. cit. supra* note 141, at 147.

146. Cf. *ibid.*

147. ROSCOE POUND, *CONTEMPORARY JURISTIC THEORY* 82 (1940); see also the critical review by Powers, *Some Reflections on Pound's Jurisprudence of Interests*, 3 *CATHOLIC U.L. REV.* 10, 17 (1953).

For the philosopher, it is crucial to determine whether the values are, in fact, ideal entities or only creations or postulates of the rational and ethical capacity of the human personality. For the limited purpose of this legal analysis, however, we can leave this question open since legal values always have their normative basis in the value system of the constitution.¹⁴⁸ The important point is to show the difference between the value substrata, the factual value carriers which are to be evaluated, and the values themselves, through which the value substrata become valuable.

What conclusions are to be drawn from this philosophical distinction for the legal problems of harm or the legal interests? To answer this question, the character of law and the legal order must be briefly considered.

Contrary to natural science, which deals with the "is" of facts and situations, jurisprudence, in its deepest sense, is a science of "oughts" and thus, like philosophy, of values. Law does not merely describe life and society, State and individuals, as they are, but it considers them as they ought to be. For this reason, jurisprudence is not a descriptive science like physics or biology, but rather an *evaluating* science setting up rules for behavior among individuals or between the state and its subjects, as well as coordinating the relations of men to their things.¹⁴⁹ A necessary consequence is that legal interests cannot be treated like the objects of natural science. Even though they do and must have a factual basis in the demands and needs of society, such interests are objects of legal evaluation. Since they are integrated into the comprehensive context of legal principles and values, they are part of the legal order.

In this respect, legal interests have the same structure as "goods" in the general philosophical sense. Like "goods," which the philosopher understands to mean the actually evaluated objects or things which carry a value,¹⁵⁰ "legal interests" are related to both—to the legal values as well as to the factual sociological needs. Thus, "legal interest" is a relational concept in the sense of Rickert's "valuable reality."¹⁵¹ It is the integration of the sociological "is" and the normative "ought" of legal principles and ideals, for only interests which are found valuable in the eyes of the law can be recognized as legal interests.

148. More on this later in this section.

149. On the character of jurisprudence as "cultural science," i.e., a science of values rather than of facts, see RICKERT, *op. cit. supra* note 144, and particularly GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 91-104 (5th ed. Wolf 1956).

150. See HARTMANN, *op. cit. supra* note 141, at 186; also RICKERT, *op. cit. supra* note 141, at 96: in order to be realized, values have to adhere to objects which thereby become "goods."

151. RICKERT, *ibid.* On these problems from the legal point of view see RUDOLF SIEVERTS, *BEITRÄGE ZUR LEHRE VON DEN SUBJEKTIVEN UNRECHTSELEMENTEN IM STRAFRECHT* 119 (1934).

Thus, basing the analysis on the philosophical distinction between value quality and value substratum, we find that the legal interest comprises two elements: as "value substrata" the factual interests of the society, the state or its members require legal evaluation and recognition; as "value qualities" the legal values and ideals of the respective state or society require conformity through which factual interests become legally valuable.

The necessity of relating the interests protected in a crime to a legal value has been recognized by Professor Richard Honig.¹⁵² Similar considerations can also be found in Dean Pound's legal philosophy. Pound suggests that there are interests which, as such, are not created but found by the law. These interests, however, must be recognized and adjusted by the law, with the result that assertions or demands inconsistent with legal postulates are eliminated from immediate consideration by the legal order.¹⁵³ This is basically the same as differentiating between interests as the factual value carriers and as the value qualities recognized by the legal order. Perkins' conception of social harm approximates this distinction when he describes harm as "every invasion of any social interest which has been placed under the protection of a criminal sanction."¹⁵⁴ Here, too, the underlying premise is the distinction between a factual interest and its legal evaluation.

Although still considering the basic structure of legal interests in general, it is helpful to comment on misconceptions of the factual side of legal interests. By a constantly increasing process of abstraction and etherealization, the concept of legal interests is in danger of losing its material basis. Like Hall, in his rather ideal concept of harm, there are others who would submerge the special interests, needs, or wants of individuals or social groups into the general interests of the government through the protection of all valuable goods within its reach. For example, although the crime of larceny is designed to protect property rights as such, *i.e.*, ownership as a fundamental social institution, a theft of another's property is not only a harm to the government's interest in preserving and safeguarding property as a social value, but it also causes harm to the specific proprietary rights of the individual. Therefore, it is inaccurate to define legal interest only in terms of the state's interest in protecting the respective right or institution. The individual's own rights as well must be taken into the concept of the legal interest.

For this reason, we cannot agree with Perkins' suggestion to turn the "traditional label" of "offense against the person" into "offense against

152. HONIG, *DIE EINWILLIGUNG DES VERLETZTEN* 98 (1919).

153. Pound, *The End of Law*, 27 HARV. L. REV. 195, 233 (1914); *A Theory of Social Interests*, 15 PROCEED. AM. SOC. 16 (1920).

154. PERKINS, *CRIMINAL LAW* 653 (1957) [hereinafter cited as PERKINS].

the state in form of harm to the person."¹⁵⁵ Likewise, the German criminalist Jürgen Baumann¹⁵⁶ contends that in larceny no specific or concrete proprietary rights of an injured person should be considered as being protected beyond the general interests in property itself. The question may be raised whether this absorption of the special individual interest by one general interest of the state is not a complete reversal of the still valid notions of early criminal law. At that time, the interests of individuals were the very substance of public protection. Through the king's peace, the once private interests were absorbed by the abstract concept of the king's interest in keeping law and order by suppressing any kind of harm.¹⁵⁷ If the connection of our criminal law with the sociological substratum is to be preserved, this growing trend of abstraction must be terminated;¹⁵⁸ legal interests must once again be related to their natural basis—namely, to specific rights and needs of individuals, social groups, or the State. Even Richard Lange, a German scholar who espouses an "immaterialistic" harm concept,¹⁵⁹ conceded that the social-ethical value element of the legal interest must be related to a sociologically founded interest.¹⁶⁰

In this context, finally, we should comment on the theory, profoundly developed and defined by Professor Honig in his historical-theoretical study of the consent of the injured,¹⁶¹ which became known as the "formal" concept of legal interests.

Since the naturalistic, sociological concept of "*Rechtsgut*" as represented by the German Reichsgericht had led to various difficulties,¹⁶² Honig tried to explain the legal interests from the intent of the statute without considering outside factors or elements. Consequently, he came to define *Rechtsgut* as "that categorical synthesis by which jurisprudential thinking tries to comprehend sense and purpose of the single criminal rules in a compressed form."¹⁶³ Therefore, *Rechtsgut* is solely the legislatively-recognized purpose of penal laws in its shortest formula.¹⁶⁴

155. *Id.* at 21 with n.97.

156. JÜRGEN BAUMANN, *STRAFRECHT, ALLGEMEINER TEIL* 110 (2d ed. 1961).

157. *Cf. supra* section I.

158. *Cf. also* TH. WÜRTEMBERGER, *DIE GEISTIGE SITUATION DER HEUTIGEN STRAFRECHTSWISSENSCHAFT* 68 (1957); MAURACH 170.

159. KOHLRAUSCH-LANGE, *STRAFGESETZBUCH* 13 (43rd ed. 1961) where Lange denies that the single individual good injured could be decisive for the determination of the legal interest; so he understands "legal interest" as "inviolability (!) of life, health, property . . ." etc.

160. *Ibid.*

161. HONIG, *op. cit. supra* note 152.

162. *Cf. in particular* the critical review by Dahm, *Der Methodenstreit in der heutigen Strafrechtswissenschaft*, 57 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* 225, 231 (1938).

163. HONIG, *op. cit. supra* note 152, at 94.

164. *Ibid.*

Since this concept precludes reference to facts outside the statute, it seems inconsistent with our proposition that legal interests, in one respect, must have their basis in factual interests of the society. Such inconsistency is explained by a consideration of this formalistic harm concept as a method of stating and interpreting the intentions of the statute. Functioning in this manner, it can facilitate a proper application and construction of the law. It is, indeed, the best expression of the *ratio legis* of a penal statute.¹⁶⁵ Beyond this, however, it cannot accomplish more. In particular, it provides no yardstick by which the legislators could determine what harms ought to be criminally sanctioned. This can only be determined by use of a material concept of legal interests in which the factual interests of society are considered.

So far, we have determined only the basic dualistic structure of the legal interests. The two constituent elements naturally require further explanation. This special analysis shall commence with the sociological factual side of the legal interests by distinguishing harm from similar phenomena in the crime. Following that, the value aspect of the legal interests, *i.e.*, their constitutional evaluation, shall be dealt with in greater detail.

Harm—Its Distinction from Similar Phenomena in the Crime

The Factual Side of the Legal Interests. It is a fact of common experience that all criminal acts are not of the same genus. In examining various crimes, therefore, it is not surprising to discover many different forms in which criminal acts and their harmful results appear. Whereas in some the object of the act is identical with the interest the law seeks to protect, in others it is quite difficult to determine the protected legal interest, even though the external result may be quite evident. In these latter cases the things or persons which are perhaps injured by or at least involved in the illegal act are not identical with the interests that the criminal provision is designed to preserve.

An example of the first type of crime is murder. Here human life, the interest to be protected, is also the object of the act of killing. This, however, may not necessarily exist in other crimes. In forgery, for example, the harm is not to the paper on which the falsification was committed but to the commercial and social community's interest in being free from instruments which are not genuine.¹⁶⁶ Thus, the true end of criminal protection is the commercial public's interest in the safe exchange of property. In rape, when the perpetrator abuses a woman to secure sexual intercourse against her will, what is protected? Certainly not the sexual organs as part of the body but rather the woman's interest in being the sole mistress of her sexual freedom. The same peculiarity can be observed

165. Therefore Dahm, *supra* note 162, at 232-3 and BAUMANN, *op. cit. supra* note 156 are not quite correct when rejecting the formal concept of *Rechtsgut* completely.

166. PERKINS 290.

with other crimes, particularly those against property. Thus, in larceny, the legal interest is not the thing stolen nor its physical condition, but the former possessor's proprietary rights in it.

Even in murder, life per se was not always the true object of criminal protection, but rather the king's interest in saving his soldiers. Similarly, mayhem, today designed to safeguard physical integrity, formerly sought the protection of the fighting strength of the king's soldiers.¹⁶⁷ This makes it difficult, if not impossible, to provide a constantly accurate picture of the legal interests protected by the various crime provisions. It strongly supports our contention, however, that the object of the criminal attack is not necessarily the interest to be defended. This proposition could be demonstrated by many more examples.¹⁶⁸ The reason for this phenomenon is simple: many harms consist not in the change of physical things or conditions produced by the crime but in the infringement of interests or rights which are only intellectually conceivable. However, since a crime, in order to be a crime, must be manifested by some overt act, the external effect must be visible in those crimes in which the legal interest is of an immaterial nature. For example, the infringement of an owner's rights is evidenced by the taking and carrying away of a piece of his property; forgery is committed by producing a legal document which is not genuine though an actual fraud may not have resulted therefrom.¹⁶⁹ These examples clearly demonstrate that all criminal acts require an external platform, a sensually perceivable object, to be manifested. These cases also prove—and this is the more significant point—that each crime requires the distinguishing of the object of the protection, *i.e.*, the legal interest, and of the object of the act, the physically concrete thing through whose infringement or illegal use the proscribed harm appears.¹⁷⁰

With regard to German criminal theory, investigations into this problem date back to Schütze and von Liszt, both prominent scholars of the last century.¹⁷¹ For a long period it seemed as if no satisfactory result could be reached. At the same time, the above-described distinction between the legal interest and the object of the act was generally recognized in German criminal jurisprudence.¹⁷² Since it is a distinction of a general nature and, as such, not peculiar to a specific criminal theory, there is no reason why it cannot also be applicable and helpful to problems of American criminal theory.

167. Cf. KENNY, *OUTLINES OF CRIMINAL LAW* 102-104 (17th ed. Turner 1958); RUSSEL, *ON CRIME* 693-4 (11th ed. Turner 1958).

168. Cf. MAURACH 171.

169. Cf. PERKINS 296, 304.

170. The need for this distinction was particularly urged by Honig, *Criminal Law Systematized*, 54 J. CRIM. L., C. & P.S. 276-277 (1963).

171. See the very informative survey by MAX HIRSCHBERG, *DIE SCHUTZOBJEKTE DER VERBRECHEN* 14 (1910).

172. Cf. MAURACH 171; BAUMANN, *op. cit. supra* note 156, at 109.

It is not difficult to make a further distinction between the so-called simple conduct crimes and those which must evidence a proscribed result, with this distinction becoming particularly important in considering the relationship between harm and causation.

It is evident that where the harm of the crime consists only in the impairment of an intellectually cognizable interest, this interest must necessarily be different from the external result of the overt act. However, it is not necessary that the external result of such crimes be uniform. In some crimes, in which the legal interest is different from the object of the act, the conduct must cause a certain legally defined effect; in others, the criminal act need only be externally noticeable. Perjury, for example, can be demonstrated by proof of the false testimony, regardless of its consequences;¹⁷³ one can be punished for having carried dangerous weapons even though they were not used for any criminal purpose.¹⁷⁴ In these cases the criminal conduct, as such, produces the proscribed harm, while in others a certain legally circumscribed result must be shown, *e.g.*, for malicious mischief, physical injury to some property by which its utility is impaired or its value materially diminished must be proven.¹⁷⁵ Of course, in such simple conduct crimes¹⁷⁶ (so denominated because the conduct is held sufficient to procure the proscribed harm), all those definitional circumstances have to be present. Actually, this requirement is no more than a problem of legality, the aspects of which will be dealt with later.

Legal interests may be injured in many different ways and from various directions. Criminology perhaps best teaches us the vast number of ways property interests can be infringed, bodily health endangered, or personal honor impaired. Normally, the law does not prohibit all imaginable forms of harm to legal interests; only the most serious harms are proscribed. This is the reason for the need of crime definitions stating circumstances and conditions under which certain harmful conduct may be punished. Thus, a false statement is not perjury unless it was made before a court; homicide is murder only if committed with malice aforethought.

It is, of course, a requirement of legality that all conditions specified in the definition of the crime be met in order to warrant a conviction for the alleged crime. It is quite a different question to consider the fulfillment of the definitional conditions as part of the proscribed harm. This seems to be the opinion of Professor Hall. His statements on harm and the circumstances of the criminal act cannot be interpreted to mean anything

173. *Cf.* PERKINS 382.

174. *Id.* at 365.

175. *Id.* at 282.

176. This terminology was chosen according to that used in the German criminal law ("schlichte Tätigkeitsdelikte" vs. "Erfolgsdelikte"), *cf.* MAURACH 289; Honig, *supra* note 31.

except that the legally relevant circumstances of a crime are part of the criminal harm.¹⁷⁷ This is not entirely correct. While it is true that those circumstances are decisive prerequisites for the accomplishment of the proscribed harm, this is not the same as being a part of the harm. Certainly, there are many crimes where a required circumstance or result is identical with the proscribed harm. For example, if murder requires the killing of a human being, the destruction of a life is at the same time the proscribed harm. In other crimes, however, a certain condition or consequence, described in the definition, is only the indication that the proscribed harm was effectuated. Yet, this does not make the result a part of the harm in question. Thus, in larceny, which prohibits the taking of an object belonging to another, penal harm is not done to the stolen item but to the possessor's proprietary rights. Again, for perjury, a judicial proceeding must take place in which the false testimony is sworn. The harm, however, is not done to the court whose presence is a necessary circumstance of perjury, but rather to the ideal interest of the "integrity of a sworn statement in a judicial proceeding."¹⁷⁸

In the same manner, we could analyze crime definitions and find that in all crimes, except those in which the object of the act is concurrently the legal interest, a difference can be noted between harm to the protected interest and the other definitional circumstances, conditions, or consequences which must be present in order to fulfill the requirements of the crime definition. This is not a problem of the principle of harm, but a requirement of the principle of legality; according to this principle, there is no crime unless the perpetrator's conduct falls squarely within the prohibition.¹⁷⁹ By no means does that demand the inclusion of these circumstances as part of the penal harm.

This idea may be demonstrated by two cases. In the Illinois case of *People v. Von Rosen*,¹⁸⁰ the defendant was charged with desecration of the United States flag. Though the prohibition did not require that the desecration disturb the public peace, the Illinois Supreme Court reversed the conviction for lack of such disturbance. The court did so on the ground that the legislative purpose of the prohibition was to secure public peace that could be gravely endangered by a desecration of the flag.

177. Cf., GENERAL PRINCIPLES 237-240, which also contains a review of other contributions to the circumstances in the crime (Salmond, Smith). For the purpose of this analysis, however, it does not help further to enlarge on Smith's distinction between "pure" and "consequential circumstances" or the peculiarity of mitigating or aggravating conditions. When we speak of "circumstances," we mean those circumstances which are constituent requirements of a crime, regardless of whether they are subjective elements like premeditation and malice or objective ones such as the thing stolen, damage by fraud, etc.

178. PERKINS 382.

179. See Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L.J. 217 (1959).

180. 13 Ill.2d 63, 147 N.E.2d 327 (1958).

Analyzing this result, we find that proof of the desecration was obviously required by the principle of legality. However, if the desecration of the flag is primarily prohibited in order to preserve public peace, we must conclude that public peace rather than the dignity of the flag was the special legal interest of that provision.¹⁸¹ With respect to the principle of harm, the Illinois court was, therefore, correct in requiring proof of harm to that special interest. Of course, very often the harm to be prevented is also part of the crime definition. In such cases, the harm requirement is also covered by the principle of legality. In order to avoid any misconceptions or misinterpretations, one should always distinguish the definitional circumstances which are covered by the principle of legality from the proscribed harm which is a problem of the harm requirement.

Another instructive example is the New Jersey case of *State v. Bruns*.¹⁸² There, a borough ordinance prohibited:

- (a) uttering any loud, profane, etc., language "in a public place"; or
- (b) uttering any offensive, indecent, etc., language "which tends to endanger the public peace."

The defendant, who had shouted loudly and in profane language in a photography store, was discharged by the court, and rightly so. As to (a), the principle of legality was not fulfilled since a photography store is not a public place. As to (b), there was no danger to the public peace which the legal interest of the ordinance was designed to protect. Thus, there was a lack of the proscribed harm. Further, the requirements of legality were not met since the special harm, namely a danger to the public peace, was made a part of the crime definition. Since a danger to the public peace was not present, the harm requirement, as well as the principle of legality, prevented a conviction.

A still more interesting question is whether the defendant could have been convicted under subsection (a) if he had shouted profanely in a public place without endangering the public peace. In this case the requirements of the legality principle would have been clearly met; but what about the requirement of harm? Is not the obvious purpose of the prohibition to protect the public peace? In the writer's opinion, as in the *Von Rosen* case, the defendant would have to be discharged, although all of the definitional circumstances were proven, because the proscribed harm was not present. This case also shows that, for reasons of legal security, it is vitally important to specify, in the crime definition, the harm to be prevented. This is the only method by which the harm requirement can be given the more effective protection of the legality principle.

Therefore, when analyzing and interpreting criminal definitions, a sharp distinction must be drawn between the proscribed harm and the defini-

181. Cf. Mueller, *supra* note 179, at 221.

182. 134 N.J. 393, 48 A.2d 577 (1946).

tional circumstances, conditions, and consequences of the act which are not part but only prerequisites of the proscribed harm.

Differentiating harm from similar effects of the crime gives one a firm basis for determining the position of harm within the crime. First, we shall ascertain the relationship harm has to the act and *actus reus*. The answer to this depends largely upon how one defines *actus reus*, a very controversial problem. According to one opinion which probably originated with Kenny,¹⁸³ *actus reus* is understood as the result of an act—"the natural consequences of the criminal acts themselves."¹⁸⁴ In this sense, *actus reus* would be identical with the definitional consequences of the crime and, thus, could still be distinguished from harm. This is no longer possible, however, since Turner, though in principle following Kenny, defined *actus reus* as "such result of human conduct as the law seeks to prevent."¹⁸⁵ In this sense, *actus reus* and harm are similar. Since harm, as the violation of legal interests, can be nothing more than the result of the act, and if Kenny and Turner were correct, one of the two terms would be superfluous. In order to avoid any misleading terminology, the best approach would be to abandon either "harm" or *actus reus*.

It seems extremely doubtful that Kenny's and Turner's notion of *actus reus* is correct. Not only is it rejected by many prominent authors,¹⁸⁶ but also, from a logical point of view, *actus reus* must be more than the result of the act. Since *actus reus*, i.e., the evil act,¹⁸⁷ also contains the notion of act, it cannot be the effect of the act alone, but rather must include the act itself. The act is part of the *actus reus*. This also has an effect on the relationship between *actus reus* and harm. Since harm is the result of the criminal act, harm and act cannot be equated and, since *actus reus* includes the act, neither can harm and *actus reus*. Rather, *actus reus* is to be interpreted as the comprehensive notion of act, harm, and its connecting link, causation, with *actus* expressing the voluntary physical movement in the sense of conduct and *reus* expressing the fact that this conduct results in a certain proscribed harm, i.e., that it "causes" an injury to the legal interest protected in that crime.

Therefore, with this viewpoint, acceptance of Stallybrass' narrow interpretation of *actus reus* is impossible.¹⁸⁸ In his opinion, which closely

183. Cf. GENERAL PRINCIPLES 222.

184. KENNY, OUTLINES OF CRIMINAL LAW 9 (12th ed. 1926); similarly PERKINS at 653, 723-4.

185. TURNER, THE MODERN APPROACH TO CRIMINAL LAW 195 (Radzinowicz & Turner eds. 1945); see also KENNY-TURNER, *op. cit. supra* note 167, at 14.

186. Cf. GENERAL PRINCIPLES 222-37; GLANVILLE WILLIAMS, CRIMINAL LAW, THE GENERAL PART 16-21 (2d ed. 1961).

187. Cf. Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043, 1053 (1958). But Perkins is misleading when he translates *actus reus* as "guilty act" since a "guilty" act not only requires *actus reus* but also *mens rea*.

188. See Stallybrass in: TURNER, *op. cit. supra* note 185, at 397.

follows the path of Austin¹⁸⁹ and Holmes,¹⁹⁰ *actus reus* is no more and no less than the overt act.¹⁹¹ Obviously, this interpretation fails to take into account the real significance of *reus*. The term certainly cannot mean "overt," for this aspect of criminal conduct is already inherent in the notion of "act." It is probably closer to its meaning if it is understood as evil or illegal. As Professor Mueller pointed out, *reus* conveys the firm implication that criminal law is "not concerned with just any act, but with a legally relevant act. *Actus reus* connotes an outlawed act which fits a penal norm."¹⁹² As such, *actus* is only *reus* if it causes precisely the harm which was prohibited by law. *Actus reus* is indeed capable of uniting all the objective elements of the crime, *i.e.*, those which constitute the formal and material unlawfulness as distinct from the subjective *mens rea*.

On the other hand, Glanville Williams overextends the scope of *actus reus* to include such subjective characteristics of the crime as excuse,¹⁹³ while rightly trying to comprehend with *actus reus* the whole reach of the objective unlawfulness.¹⁹⁴ This is but a matter of minor concern here. Basically, Williams seems to recognize that act, harm, and causation together are essential elements of *actus reus*.

It can be concluded that harm is neither the act itself nor identical with the *actus reus*. It is rather the causal result of an act, the injury to a legal interest caused by the act. This explanation of *actus reus* is quite clear as long as we restrict our conclusions to crimes which, by their very definitions, require a certain defined effect. What is to become of the so-called simple conduct crimes which were considered earlier?¹⁹⁵ In declaring that act and harm cannot be the same, are we not then contradicting the concept of simple conduct crimes which do not require a certain proscribed effect? This would be true if criminal harm was sought in the personal ethical wrong or disvalue of the acting subject rather than in the harm to objective values or interests not identical with the actor. Only in a theory where the personal disvalue of the act is considered the essence of the wrong would the act, regardless of its effects, be the true harm.¹⁹⁶ From our analysis, where the impairment of certain objective

189. AUSTIN, JURISPRUDENCE 415 (5th ed.).

190. HOLMES, THE COMMON LAW 91 (47th print).

191. Also Hibbert & Jenks in 1 RESTATEMENT, TORTS § 2; *cf.* Hitchler, *The Physical Element of Crime*, 39 DICK. L. REV. 99 (1934/35).

192. Mueller, *supra* note 187.

193. WILLIAMS, *op. cit. supra* note 186, at 20.

194. *Id.* at 18: "*actus reus* means the whole definition of the crime with the exception of the mental element—and it even includes a mental element insofar as that is contained in the definition of an act."

195. *Supra* I.

196. So particularly Welzel with his theory of the personal disvalue of the act, see *supra* II.

legal interests is the basis of criminal punishment, the act cannot be the harm itself but the cause of harm.

This is also true with regard to simple conduct crimes. "Simple conduct" crimes by no means suggests that the conduct itself should be deemed the criminal harm. This connotation merely implies that certain conduct committed under the proscribed circumstances is deemed sufficient to cause the unlawful harm, even though it may not have caused any physical or otherwise visible damage. This can be clearly shown in perjury, where the false statement in a judicial proceeding on a material matter is considered a crime. In order to prove the harm of perjury, it is not necessary to show damage to the parties involved or to anyone else, for the harm concerned with is invisible since it is directed against the integrity of sworn statements before a court. In a simple conduct crime, harm is assumed to be caused by the legally prohibited conduct regardless of the external consequences.¹⁹⁷ The following section on harm and causation may elucidate the peculiar concept of causation in simple conduct crimes.

Causation is one of the key problems of criminal theory. As divergent as the propositions of the various theories may be; the basis or starting point of all approaches, both in Anglo-American and Continental law,¹⁹⁸ is the meaning of causation in its scientific sense, *i.e.*, the principle that the defendant's conduct was the necessary cause of the harmful result.

In American law this natural principle of causation is best characterized by the so-called "but-for" rule which means that "but for the defendant's conduct" the criminal effect would not have occurred.¹⁹⁹ In German law this is signified by the *conditio sine qua non* theory. This theory states that every imaginable condition culminating in a corresponding failure of the result is a necessary condition of the harmful

197. Since the question of harm in simple conduct crimes is a problem common to every criminal theory, the German doctrine also dealt with it. There is a general agreement, except for Welzel's theory of the personal disvalue of the act, that in pure conduct crimes the basis of liability is not the indifference of the actor to ethical-legal values, but the impairment of a legal interest vital to the common good. BAUMANN, *op. cit. supra* note 156, at 166.

198. In Anglo-American law there are some very recent extensive publications on causation problems with appraisals of the various theories; see Ruy, *Causation in Criminal Law*, 106 U. PA. L. REV. 773 (1958); HART & HONORE, *CAUSATION IN THE LAW* (1959). An approach basically new to the American Law was undertaken by G. O. W. Mueller, *Causing Criminal Harm*, in *ESSAYS IN CRIMINAL SCIENCE* 169 (Mueller ed. 1961), recommending the limitation of the causal chain by a teleological device. See also Hall, *Causation*, in *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 158, 199 (1958). As for the German law see TRAEGER, *DER KAUSALBEGRIFF IM ZIVIL- UND STRAFRECHT* (1904); Honig, *Kausalität und objektive Zurechnung*, in 1 FRANK-FESTGABE 174 (1930); more recently the survey by MAURACH 151-166.

199. See Mueller, *id.* at 172-3.

effect.²⁰⁰ In this sense, "all antecedents which contribute to a given result are, as a matter of fact, the causes of that result."²⁰¹

However, as recognized by an increasing number of authors, the establishment of causation in its scientific sense is but the first step. The problem then concerns the limitation of the endless chain of causes to those which may reasonably be imputed to the defendant. This is not a question of natural science but, as Mueller termed it, a "juridical concept."²⁰² While it is a far-reaching problem, it need not be considered here since in the context of harm and causation the only concern is natural causation, the question, namely, of how harm may be caused by criminal conduct, *i.e.*, whether in all crimes we can find the same causal link between conduct and harm or whether there are differences corresponding to different types of crimes. For this answer, we must return to the distinction between crimes with a certain definitionally required result and simple conduct crimes.

From the foregoing section (II), it is apparent that the causal relation between act and external injury is not necessarily the same as that between act and harm. Only where the legal interest to be protected consists of a physical good (such as life, body or a corporeal thing) or some other external (monetary, proprietary) value can causation in its scientific sense be relevant. The same is true concerning crimes which, by their definition, require a certain proscribed result. In the crime of false pretenses, for example, the offender must obtain money or some other chattel from another;²⁰³ in malicious mischief, the criminal conduct must cause the destruction of another's property.²⁰⁴ In all such cases, there exists a causal relation between the act and the definitionally required result. In simple conduct crimes, such causality is not evident.

As discussed earlier,²⁰⁵ simple conduct crimes, such as perjury or rape, are directed against legal interests of an immaterial nature. While the harm affects legal interests which are of an ideal nature, the commission of these crimes must take place in external reality in order to produce an overt act. Therefore, in these crimes, the act and the harm occur at different levels. The act is a phenomenon of the natural world while the interests, when of an immaterial nature, are harmed in a manner which is intelligible and evident. For this reason, it seems rather logically and

200. Particularly advocated by Glaser and Von Buri, this was also the position of the German Reichsgericht; *cf.* Mueller, *id.* at 189. The American "sine-qua-non-theory" is in principle the same, *cf.* PERKINS at 598.

201. PERKINS, *ibid.*

202. Mueller, *supra* note 198, at 212; see also at 173.

203. *Cf.* PERKINS 251.

204. *Id.* at 282.

205. *Supra* I.

ontologically untenable that the connection between act and harm can be called a truly causal one in conduct crimes. There is no real crossover from the act which occurs in external reality to the interests which are ideally supporting the needs and demands of the social, commercial, or cultural life.

This is probably the reason why German doctrine, without giving an explanation, denies a causal relation between act and harm in simple conduct crimes.²⁰⁶ Here, the principle of causation is replaced by a process tantamount to a legal presumption: the legislature presumes, provided certain acts are performed, that the legally recognized interests will be violated or at least endangered. In forgery, for example, there is no need to prove that falsification "caused" harm to the commercial interest;²⁰⁷ rather, it is assumed that any falsification impairs that interest. Thus, Maurach can validly speak of an "insoluble interlacing of act and effect"²⁰⁸ (in the sense of harm) in simple conduct crimes. Here, the crime is committed when all definitional elements are present; therefore, forgery is accomplished with the falsification, even if it were not followed by any other harmful consequence, such as damage to a bona fide purchaser. The harm consists in the fact that commercial life is endangered by the very existence of a forged instrument.

This observation of a presumption of harm in place of an actual causal harm is also supported by Snyder's classification of harm groups.²⁰⁹ Snyder discovered that in addition to crimes for which an actual or potential harm to certain persons or to the public at large must be proven, there are crimes in which a public harm is presumed, even though an effect on other persons may or may not be involved. He cites as examples a bribe which is immediately refused by the persons to whom it was offered and false testimony which is heard by other persons. "These acts do happen and must be proved for the overt act to be complete, though the harm they do is presumed."²¹⁰

These are exactly the types of simple conduct crimes we have in mind. The principle of legality demands that an overt act be present, but once the act is proven, the harm is assumed. We can conclude, therefore, that in simple conduct crimes the causal relation between act and harm is replaced by a legal presumption of harm, provided all other definitional requirements are met.

206. *E.g.*, MAURACH 189. He sees the main significance of the distinction between simple conduct crimes and crimes with a definitionally required result in the fact that only in the latter is the problem of causation of concern. Similarly BAUMANN, *op. cit. supra* note 156, at 176.

207. PERKINS 290.

208. MAURACH 150.

209. SNYDER, AN INTRODUCTION TO CRIMINAL JUSTICE 114-115 (1953).

210. *Id.* at 115.

This limited applicability of the concept of causation requires caution in any consideration of causation in connection with harm. It is, therefore, quite doubtful whether Mueller's contention that the principle of causation is "also applicable to offenses in which seemingly conduct alone constitutes a prohibited harm,"²¹¹ is tenable in this general form.²¹² Mueller seems to overlook the fact that only legal interests in the form of natural, corporeal, or otherwise external goods and only definitional circumstances and facts that are of an external nature can stand in a truly causal connection with the act.

Corpus delicti seems to have no universally recognized meaning, since it is employed in describing quite divergent functions of criminal law and procedure.²¹³ However, there are three frequently used interpretations of *corpus delicti*.

If used as suggested by Strahorn, *corpus delicti* comes close to our apprehension of harm. For Strahorn, *corpus delicti* is one of the three elements of criminal liability²¹⁴ and is proven if "a certain social damage," i.e., "a criminal result," is present.²¹⁵ From this statement, it would seem that Strahorn identifies harm with *corpus delicti*. If one considers the context of this statement, one might wonder if Strahorn did not understand *corpus delicti* in the general sense of the external effects required by most crime definitions. The latter interpretation is strongly supported by Strahorn's use of the term "criminal result." With this interpretation, however, *corpus delicti* would be simply another expression of the definitionally required consequences of the act. As such, it must be distinguished from the harm to legal interests.

The second and most common use of *corpus delicti* considers the definitional circumstances and conditions of the crime, indicating the occurrence of a specific kind of injury or loss plus the perpetrator's criminal act as the source of the loss.²¹⁶ On occasion this interpretation is extended to comprise all the material elements of the crime charged.²¹⁷ In this sense, the notion of *corpus delicti* serves as a function of the principle of legality in requiring all definitional elements of the crime to be proven. Thus interpreted, *corpus delicti* is but a comprehensive expression of the external circumstances and consequences defined and required for proof

211. Mueller, *op. cit. supra* note 198, at 212.

212. CLARK & MARSHALL, *ON THE LAW OF CRIMES* 183 (6th ed. Wingersky, 1958), are also unaware of the fact that the problem of causation is of no concern in the simple conduct crimes; see also Beale, *Proximate Consequences of an Act*, 33 HARV. L. REV. 632 (1920).

213. For details see GENERAL PRINCIPLES 224-7.

214. Strahorn, *Criminology and the Law of Guilt*, 84 U. PA. L. REV. 491, 492 (1933).

215. *Ibid.*

216. So 7 WIGMORE, *EVIDENCE* 401 (3d ed. 1940); similar MILLER, *ON CRIMINAL LAW* 93 (1934). For CLARK & MARSHALL, *op. cit. supra* note 212, at 109, *corpus delicti* signifies "the fact of the specific loss or injury sustained."

217. WILLIAMS, *op. cit. supra* note 186, at 17; cf. GENERAL PRINCIPLES 224, 226.

of a crime. For that reason, we can refer to what has already been said about harm and its differentiation from the other required circumstances of the crime—harm as limited to the protected interest, with *corpus delicti* as the total of all definitional elements of the crime necessary to bring about the proscribed harm.²¹⁸

If *corpus delicti* is employed for purposes of procedural law as suggested by Hall,²¹⁹ it loses its relation to the legal interests, for it is on a different legal plane. Here, an identification of the two is no longer possible. In any case, harm and *corpus delicti* are not synonymous.

The reader of Hall's discourse on *mens rea*²²⁰ will realize that harm plays a major role in its description. This is not surprising if one considers that harm and *mens rea* are the polar components of the crime, *i.e.*, harm as the impairment of the objective legal order and the interests protected by it and *mens rea* as the state of mind with which the harm was done. Thus, harm proves to be the end which the evil mind tends to accomplish. In this sense, harm and *mens rea* are the very principles around which penal liability centers. It is no wonder that a comprehensive study of the relationship between harm and *mens rea* reveals various connecting links between them.

Because of the limited scope of this analysis, we must restrict our investigation to one basic aspect of that relationship, namely, the question of whether *mens rea* is a necessary prerequisite of penal harm. This problem could also be called the question of the interdependence of harm and *mens rea*. It is surprising that only Jerome Hall seems to have dealt with this question, although not in any particular detail. In accordance with his emphasis on *mens rea* as the pre-form of actual conduct, harm is said to be dependent upon *mens rea*. Hall argues that, "since conduct, *i.e.*, voluntary conduct, expresses and actualizes *mens rea*, it would be incorrect to assert that conduct but not *mens rea* is the cause of harm."²²¹ Therefore, "there being no *mens rea*, no harm was committed."²²²

A proposition similar to Hall's had already been propagated by German criminalists of the late nineteenth century when the controversy over the distinction between objective unlawfulness and subjective guilt had

218. The problem of a difference between intangible harm and a tangible *corpus delicti* troubled the court in *Smith v. United States*, 348 U.S. 147, 154 (1954) when it noticed that in some crimes such as tax evasion "there is no tangible injury which can be isolated as a *corpus delicti*." But still the court had to establish a *corpus delicti* as to the agency of the defendant. Unfortunately the problem of the intangible harm in such crimes was apparently not realized.

219. GENERAL PRINCIPLES 227. Wingersky, too, recognizes the "procedural overtones" of *corpus delicti* though finally applying it for purposes of substantive law, in CLARK & MARSHALL, *op. cit. supra* note 212, at 109.

220. GENERAL PRINCIPLES chs. III-IV.

221. See HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY*, 159 n.3.

222. GENERAL PRINCIPLES 236.

reached its climax.²²³ At that time, so prominent a legal thinker as Adolf Merkel still espoused the opinion that there could be no unlawfulness without guilt, with the consequence that an insane person, by nature, could not be capable of causing criminal harm. The same conclusion was reached by those who advocated the so-called theory of imperatives (Von Thon, Ferneck, Graf Dohna). They believed that law was primarily a system of commands and prohibitions which could only be addressed to those capable of responding. Hence only people who had criminal capacity were capable of performing illegal acts. As a result, the subjective capacity to have *mens rea* was deemed a necessary prerequisite of criminal harm.

This theory, however, challenged by Von Liszt and Nagler, was substantially defeated when, three decades later, Edmund Mezger demonstrated that the law, in addition to the function of charging and commanding human beings, also has the task of evaluating and establishing norms for objective conduct and situations concerning the social order.²²⁴ Since that time, German criminal jurisprudence has made a fundamental distinction between a judgment concerning objective unlawfulness, including the presence of harm, and the subjective guilt of the perpetrator. Though both must be present in order to render the proscribed conduct punishable, each has its peculiar function independent of the other. Therefore, the proof of unlawfulness is used to judge the deed or *actus reus*, but not the personality of the perpetrator, which is only in question so far as personal guilt is concerned. For this reason, German law can assume the presence of an objective harm even in cases where subjective *mens rea* cannot be proved. This assumption, therefore, establishes a right of self-defense against those who, because of insanity, do not act with *mens rea*, for their conduct is still harmful and unlawful.²²⁵

Although American jurisprudence is not bound to accept a principle developed in another criminal system, it is, nevertheless, worthwhile to consider its merits because the problem it seeks to solve is universal. Hall, when holding that harm depends on *mens rea*, overlooks the fact that, even though there is no crime without *mens rea*, there may well be harm without proof of *mens rea*. Although evidence of a completed crime requires the judgment of the criminal act as a whole including the objective side of the *actus reus* and the subjective state of mind of *mens rea*, harm expresses only the notion that the human conduct in question has injured or endangered certain legal interests. This requires, of course, that the harmful conduct be voluntary. However, though the intellectual and volitional elements of conduct may be part of *mens rea*, they do not con-

223. To this and the following see ROBERT VON HIPPEL, 2 DEUTSCHES STRAFRECHT 183-186 (1930).

224. See MEZGER, STRAFRECHT, EIN LEHRBUCH, 163-167 (3d ed. 1949).

225. This is generally recognized today; cf. especially SCHÖNKLE-SCHRÖDER, STRAFGESETZBUCH, KOMMENTAR 13, 329 *et seq.* (11th ed. 1963); MAURACH 232-3.

stitute the complete *mens rea*. According to modern views (including Hall's), *mens rea* is not merely another expression for intention, but requires subjective moral culpability²²⁶ or at least the awareness of the prohibited quality of the conduct.²²⁷ This subjective appreciation of wrongdoing can add nothing to the objective disvalue of the harm.

Since the primary function of law is not to prosecute certain evil minds but to protect the legal order from infringements, this order is objectively violated as soon as one of its recognized interests is voluntarily or otherwise imputably injured or endangered, regardless of the perpetrator's frame of mind. Whether a man who did not know that his conduct was wrongful is to be punished is another question which on principle should be answered in the negative. Despite this, his conduct has proven harmful socially as well as legally.²²⁸

Furthermore, a logical objection may be raised against Hall's point of view. While Hall makes harm dependent on *mens rea*, he employs harm for determining the meaning of *mens rea*.²²⁹ Thus, is it not a vicious circle to determine a subject by means of a factor which in turn is supposed to be dependent upon the subject to be determined?

In summary, it is our understanding that *mens rea*, although an essential component of the crime, is not a prerequisite of criminal harm. Harm, of course, does not render the actor punishable unless his *mens rea* is proven. Nonetheless, both must be kept distinct: stated in general terms, harm connotes the substance of the objective unlawfulness of the criminal act, while *mens rea* comprises its subjective elements.

Harm—Its Constitutional Evaluation: The Value Aspect of the Legal Interests

The preceding section was concerned with only the factual aspects of harm. As discussed earlier, however, harm and legal interests as the objects of harm have a dualistic structure. The sociological factual substrata of the legal interests are not legally protectable simply because they have

226. So Hall himself, *cf.* in particular his criticism of Holmes' theory of non-moral penal liability, in *GENERAL PRINCIPLES* 146-170.

227. *Cf.* *Morisette v. United States*, 342 U.S. 246 (1952); *Lambert v. California*, 355 U.S. 225 (1957). Basic on this subject is Mueller, *supra* note 187. In his opinion intention and recklessness are only "forms" of *mens rea* whereas its "substance" is characterized by the consciousness of wrongdoing.

228. The examples discussed by HALL, *GENERAL PRINCIPLES* 230-32 support the writer's contention that Hall did not clearly differentiate between the forms of *mens rea* and its substance. It cannot be denied that in many crimes some form of *mens rea* must be present in order to make certain conduct harmful; so, taking a woman over state lines will not be a harm unless done for purposes of prostitution or debauchery, etc. But if so performed, isn't that harm accomplished even if the perpetrator did not know that his conduct was criminal?

229. *GENERAL PRINCIPLES* 72: "Two factors determine the meaning of *mens rea*—an actual harm and the mental state of the actor who voluntarily commits it."

value for some persons or social groups; rather, they must be of "legal" value because the state is the representation of the whole people. It may, therefore, provide protection only for those interests which, from the legal point of view, are worth protecting. Therefore, a sociological interest must always correspond to a legal value in order to be protected as a legal interest. This is precisely what is meant by the dualistic structure of legal interests. The sociologically grounded interest is but one side; it must be complemented by a legally recognized value—the factual interest has to be normatively evaluated by the law. This is not a novelty; courts have always decided in this manner, although not aware of it. Interests can never claim legal protection merely because they are interests per se, and the fact that an individual feels harmed does not make the injury a criminal harm.

This principle was clearly stated in the Connecticut case of *Taylor v. Keeffe*.²³⁰ There, Art. 1, § 12 of the Connecticut Constitution guaranteed redress "for any injury done" to the plaintiff. Against its plain wording, "any injury" was interpreted and restricted to mean "a legal injury, that is, one violative of an established law of which a court can properly take cognizance."²³¹ Also, the decision in *Richard v. Carpenter*,²³² though not a yardstick for valuation, emphasizes the need for weighing and balancing the interests to be protected in order to reach a just result. Similar views can be found in Dean Pound's jurisprudence of interests. Although the interests are not created by law, they have to be recognized and adjusted by the law.²³³

Why do such interests need legal recognition? We have already suggested that the government, as the representative of all the people, may not be partial to one group and, therefore, may only protect interests which are worthy of general cognizance. This is not the complete answer, however: there are other reasons which require a limitation on the government's penal power. At first sight, it might appear more humanitarian if the state protected the wishes of any of its citizens. However, the effect of such generosity would be a corresponding restriction of individual freedom of activity, because the individual interest in universal freedom and the community's interest in a maximum of security are never in so antithetical a tension as they are in criminal law.

It is well known that every criminal prohibition or command auto-

230. 134 Conn. 156, 56 A.2d 768 (1947).

231. *Ibid.* Similar interpretations of Montana Constit. in *Stewart v. Standard Publ. Co.*, 102 Mont. 43, 49, 55 P.2d 694 (1936) and of Pennsylvania Constit. in *Jackman v. Rosenbaum Co.*, 263 Pa. 158, 168, 106 Atl. 238 (1919).

232. Carpenter, *The Problem of Value Judgments as Norms of Law*, 7 J. LEGAL ED. 163, 167 (1954).

233. Cf. Powers, *Some Reflections on Pound's Jurisprudence of Interests*, 3 CATHOLIC U.L. REV. 10, 15 (1953).

matically results in the restriction of free activity and personal liberty, not to mention the danger of one easily becoming criminally liable and thereby losing liberty, property, and reputation. As the number of interests protected by the criminal law increases, the sphere of personal initiative shrinks. This necessitates the balancing of the interest which longs for protection against the loss of individual freedom which a criminal prohibition might bring. At this point, it becomes obvious that not all interests, however valuable they may be for one man or another, deserve criminal protection. Individual freedom is too highly valued to be sacrificed to any peculiar demands or desires. For this reason an interest, in order to deserve protection, must be grounded on a broader basis than that of the welfare of a single individual or a particular class; it must have the recognition of society. This does not mean that individual interests may not be recognized as a matter of principle—this is clearly evidenced by the protection of life, private property, and many other individual goods. It means instead that an interest, be it that of an individual, of a social group, or of the state, must have the express or tacit approval of the public at large. In other words, society must deem it valuable enough to safeguard, though it may be of direct benefit to only certain individuals or special groups in the community.

This is a fundamental principle of any criminal law which attempts to achieve an equitable balance between the individual interest in freedom and the social and state interest in maximum security. To force one's own interests upon the criminal legislation of a country at the expense of other individuals has always been a sign of dictatorship. In a democratic order, however, a group must be ready to struggle for the social protection of its peculiar interests, and the government will not grant legal protection at the cost of individual freedom if the interests are only of insignificant social use.

Fortunately, our courts have always held that the power of criminal legislation must be exercised in social responsibility, *i.e.*, with due respect to truly general needs, therefore refusing protection to all demands which were of purely private significance.²³⁴ The North Carolina Supreme Court in *State v. Ballance*²³⁵ presented this very problem:

An exertion of the police power inevitably results in a limitation of personal liberty, and legislation in this field is justified only on the theory that the social interest is paramount. In exercising

234. *Cf. Cantwell v. Conn.*, 310 U.S. 296 (1940); *People v. Pacific Health Corp.*, 12 Cal.2d 156, 82 P.2d 429 (1938); *Ex parte Kazas*, 22 Cal. App. 2d 161, 70 P.2d 962, 967 (1937); *State v. Mitchell*, 217 N.C. 244, 7 S.E.2d 567, 571 (1940). Also, 11 AM. JUR. *Constitutional Law* § 274 (1937). See also *infra* IV on the evaluation of public welfare offenses.

235. 229 N.C. 764, 51 S.E.2d 731 (1949).

this power, the legislation must have in view the good of the citizen as a whole rather than the interests of a particular class.

Likewise, for Professor Snyder,²³⁶ the imposition of penal liability is a question of balancing the interests. The preponderant weight is, however, the public interest.

So far we have discussed the social recognition of the interests to be protected and, indeed, this is a major step in processing an interest before it reaches full criminal protection. A social interest must be developed since, at first, it is the private concern of some individuals or a particular class. Nonetheless, since other members of the community would never restrict their liberty in favor of an interest of limited significance, the interest which is a private concern must be promoted to a social interest.²³⁷ Consequently, the picture of the legally protected interests is always changing. Each era of social evolution elevates new desires and needs, while others lose their former importance.²³⁸

Many private interests fail at the stage of social recognition. If, for example, an individual wants a newspaper publisher to use a better grade of printer's ink in order to keep the linen clean when the individual is reading in bed, perhaps one day he may find a majority of the community which considers this desire so valuable as to protect it by forcing newspaper publishers to use a cleaner print. As long as such social approval is not forthcoming, however, legal recognition and, thus, criminal sanction is not justified. In other words, demands and desires which are inconsistent with general concepts of the time and place do not receive immediate consideration by the legal order.²³⁹ In this case, they fail before the most important step, namely, that from social to legal recognition.

The social recognition of an interest is a process of social evolution alone. Although society at large may determine that certain interests merit protection, legal recognition does not necessarily follow. Social and legal concepts and standards can be quite divergent. A survey of cases in which criminal provisions were invalidated demonstrates many examples wherein the invalidation was based on lack of a protectable interest or an interest which was inconsistent with superior demands and needs. This brings us

236. SNYDER, PREFACE TO JURISPRUDENCE 521 (1954).

237. To this and the following section cf. ALBIN ESER, DIE ABGRENZUNG VON STRAFTATEN UND ORDNUNGSWIDRIGKEITEN 87-88 (Dissertation at Würzburg University Library 1961).

238. This dependence of criminal wrongs on the attitude of the respective community was recently commented on in *State v. Western Union*, 13 N.J. Super. 172, 80 A.2d 342, 361: "The concept of public wrong is the product of social evolution and whether an act has been or is deemed to be a public injury or menace depends on the stage of civilization and the conditions which confront a people."

239. Cf. Pound, *The End of Law*, 27 HARV. L. REV. 195, 233 (1914); Powers, *supra* note 233.

to a consideration of the values to which an interest must correspond in order to achieve recognition as a legal interest.

Obviously, legal recognition, on principle, can only be based on law.²⁴⁰ If there is an interest which has been socially recognized, such as the interest in freedom against wiretapping, the first step in legal evaluation would be to ascertain whether this specific value fits into any existing order of legal interests. This statement is based on observations made particularly by the German criminalists Thomas Würtenberger²⁴¹ and Dietrich Oehler.²⁴² Both, investigating the value concepts of past and present penal codes, have discovered that penal codes, besides being an accumulation or conglomeration of provisions for certain behaviors, have a normative function. They constitute a system of values and convictions which a society at a certain cultural stage deems necessary to preserve. Such a legal order regularly embodies a system of values which can be used as a means for evaluating new interests proposed for legal recognition. If they fit into this system, they can be recognized as legal interests worthy of criminal protection. However, not all new demands and needs can be measured according to the values of an already existing legal order. The development of modern public welfare legislation produced a great flow of new desires conditioned by developments of technology, industrialization, and a new way of life. Within this field there is no possibility of relating back to a preexistent penal order; the legislature can no longer rely on values already embodied in the traditional penal code. Therefore, the legislature must assume a creative role in establishing new norms and values demanded by society.

In this search for new standards, however, the question arises as to the power of the legislature to establish such norms. Is it completely free to recognize new interests and demands by advancing the penal value system to horizons and peaks previously unknown? At this point the Constitution must be brought into play. Since *Marbury v. Madison*,²⁴³ it has been understood that the Constitution is the "supreme law of the land" and that laws repugnant to it are void. This principle extends to all legislative acts and, therefore, is pertinent to penal legislation. The courts have always emphasized that the legislature, in spite of its broad police power, must keep within its constitutional restraints.²⁴⁴ Thus, as far as the penal

240. Insofar we cannot follow Dean Pound when he suggests the basing of the recognition of values only on the attitude of the society; cf. the criticism by Powers, *supra* note 233, at 10-26.

241. WURTENBERGER, DAS SYSTEM DER RECHTSGÜTERORDNUNG IN DER DEUTSCHEN STRAFGESETZGEBUNG (1933).

242. WURZEL, WANDEL UND WERT DER STRAFRECHTLICHEN LEGALORDNUNG 2, 202 (1950).

243. 1 Cranch 138, 5 U.S. 368 (1803).

244. See *State v. Western Union*, *supra* note 238, at 361: "The state is invested, by virtue of its police power, . . . with a large measurement of discretion in the creation and definition of criminal offenses. The power is, of course, subject to constitutional restraints,

system of values is concerned, the Constitution is the basis of the entire legal order.²⁴⁵

What are the consequences of this principle? This restraint simply requires criminal provisions, which would effect the legal recognition of new social interests, to be in harmony with the Constitution. Only interests which are within the constitutional framework of recognized rights and interests may receive protection by criminal sanctions. Whether such constitutional recognition is present is not always easily determined: the Constitution guarantees only a small number of values. In any case, however, the number of protectable interests is greater than the rights which are expressly enumerated in the Constitution. Like a penal code, the Constitution is the expression of a certain order of values. Its principles, statements, and policies constitute an integrated system of the basic beliefs of society and state. Unlike the penal order, however, the constitutional order of values contains generally defined rights, demands, and liberties. As was recently demonstrated in a study of criminal administration by Professor Walter Sax,²⁴⁶ the function of the constitutional value order is basically different from that of the penal order. The constitutional order is embodied in principles which constitute the "abstract frame" for all legislative activity, whereas the penal order of legal interests is more concretely formed and oriented toward interests frequently injured by unlawful attacks.²⁴⁷ For example, in murder, human life is protected only against certain types of injuries, namely, homicide committed with malice aforethought. Other types of homicide, *i.e.*, manslaughter, abortion, etc., have different sanctions. Similar variations could be found in other crime groups having a like main value while the crime provisions are directed against different aspects of that value. In larceny, for example, personal property is protected against being unlawfully carried away. The legal interest therein involved is primarily the proprietary right of the possessor,²⁴⁸ whereas in larceny by false pretenses, the owner is protected against willingly giving away his property upon false representations with the legal interests of ownership being included.²⁴⁹ These few examples are

and its exercise needs be reasonable and not arbitrary or capricious." Cf. also *State v. Balance*, *supra* note 235; *Carter v. State*, 243 Ala. 575, 11 So. 2d 766 (1943); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Stromberg v. California*, 283 U.S. 359 (1931); *De Jonge v. Oregon*, 299 U.S. 353 (1937). See also SNYDER, *op. cit. supra* note 209, at 759-64.

245. With reference to the constitution as the fundament of the legal order in general see CARL J. FRIEDRICH, *DIE PHILOSOPHIE DES RECHTS IN HISTORISCHER PERSPEKTIVE* ch. XXIII (1955).

246. Sax, *Grundsätze der Strafrechtspflege*, in BETTERMANN-NIPPERDEY-SCHEUNER, 3(2) *DIE GRUNDRECHTE* 911-913 (1959).

247. *Id.* at 912.

248. Cf. PERKINS 195.

249. Cf. *id.* at 249-51. See also Perkins' introduction to the acquisitive offenses at 187-90; it is proof of the fact that the legal interests are in steady flow. Though property as such always was a recognized interest, it took a while to gain the protection it has today.

sufficient to show that the penal order is much more differentiated with regard to its interests than is the constitutional value order.

The values positively enumerated in the Constitution are few in number. They are, however, values of wide range and scope. They do not require more differentiation for, as mentioned above, the Constitution has a function different from that of a penal order. The Constitution, in general, has only a negative function: it describes the frame within which new interests can reach constitutional, and, thus, legal interests. Naturally, that does not mean that the interest seeking recognition must correspond to, or must not contravene, an expressly declared constitutional provision. Rather, it is required that the interest fit within the broad framework of values which are embodied and carried by the constitutional spirit. The same conclusion was reached by Professor Snyder. In discussing the limitations of the legislative power to make certain conduct criminal,²⁵⁰ he suggested that we should not look for a particular constitutional provision "but something which is the spirit or sum total of all of them."²⁵¹

The Constitution of the United States has a very broad and general framework of values due to the dynamic due process clause and the wide scope of liberty and property rights. In addition, those crimes which were already known when the Constitution was adopted and the legal interests of which, therefore, were tacitly incorporated into the corpus and spirit of the constitutional value order must be considered. It would, of course, go beyond the scope of this paper to describe the scheme of the constitutional value system in full detail. In the analysis to follow, we shall give some examples, most of them decided by American courts, in which it was doubtful that the interests protected in a criminal provision were in harmony with the Constitution. First, a reflection on some interests which are either positively expressed by the Constitution or which are commonly recognized as consistent with it is required. Second, a description of some interests which, in spite of being constitutionally recognized, cannot be criminally protected because their protection would contravene other higher constitutional interests or rights will follow. The third section shall deal with problems of modern welfare legislation. This presents an oppor-

250. SNYDER, *op. cit. supra* note 209, at 760.

251. Cf. also Elmer M. Million, *Limitations on the Enforceability of Criminal Sanctions*, 28 GEO. L.J. 464 (1940). Dealing with the question of what constitutes a crime, what types of conduct can be made subject to criminal sanctions, and what persons can be treated as criminals, Million makes some surprising discoveries. Surveying numerous court decisions, he found that in some cases the scope of crimes was not only limited by means of constitutional provisions such as due process, but that even in the absence of constitutional prohibitions statutes were declared void where they infringed upon what was deemed a natural, inherent, inviolable, inalienable, common, vested, or reserved right. Though I doubt whether such a dangerous extension of the "constitutional spirit" can be fully supported, at any rate it shows that the constitutional provisions never should be considered alone but in the context of the whole integrative order the constitution is propounding.

tunity to report on the impact and significance of the newly developed utility and necessity principle.

The criminal protection of rights and interests which are expressly guaranteed by the Constitution presents no great difficulties, *e.g.*, the protection of life in homicide crimes, the body in assault and battery, house and home against burglary and arson, property against different forms of larceny, embezzlement, robbery, forgery, extortion. As previously mentioned, the reference to property, life, etc., denotes only the main value of those crimes. The individual crime type usually selects one of the many interests which are related to the main value. It is not always easy to determine the specific interest which the respective provision seeks to prevent. In addition, a combination of two or more interests constitutes the real substance of a crime in some cases. For example, in robbery, the unlawful attack is not only directed against property interests but also against the possessor's freedom and integrity.²⁵² With larceny by false pretenses, too, it can become quite difficult to tell which of the many forms of property rights are included within the scope of the crime. For example, by analyzing *United States v. Rubinstein*,²⁵³ Snyder²⁵⁴ proved that the crime of false pretenses protects not only the monetary interests of the defrauded party, but also his proprietary interest in being safe against deceit.²⁵⁵ Another crime in which the legal interest involved is rather complex is that of common law extortion, *i.e.*, the corrupt collection of an unlawful fee by an officer under color of office.²⁵⁶ Even though the provision is primarily designed to protect citizens' property against undue demands of a public official,²⁵⁷ it also must prevent "abuse of public in-

252. Cf. PERKINS 236.

253. 7 U.S.C.M.A. 523, 22 C.M.R. 313 (1957). In this case the defendant, while serving as a club manager in a Japanese U.S. air base, purchased whiskey from importers on the false representation that the beverage was to be used in the normal operations of the club. But actually the defendant bought it for a Japanese black market syndicate, thus evading the payment of high Japanese import duties. If they had known this, the importers would not have sold to the defendant since their license would have been revoked for violation of special license regulations. Defendant was convicted of larceny by false pretenses "notwithstanding the fact that the seller suffered no pecuniary loss since the seller bargained not only for the money but also for a legal sale which did not endanger his license."

254. Snyder, *False Pretenses—Harm to Person From Whom Thing Obtained*, 24 BROOKLYN L. REV. 34, 48 (1957).

255. Similarly also FRANK, STRAFGESETZBUCH § 263 I (18th ed. 1931) as for the German law. But according to the now prevailing opinion in Germany the legal interest of "Betrug," the crime comparable to false pretenses, is the property and only the property, see SCHÖNKE-SCHRÖDER, *op. cit. supra* note 225, § 263, I. Dissenting is MEZGER, STRAFRECHT, BESONDERER TEIL 164 (6th ed. 1958) who wants to have included the maintenance of truth and bona fide in the economic life.

256. See PERKINS 319.

257. Therefore, it is properly listed with the offenses against property, see PERKINS, *ibid.*

justice.²⁵⁸ Therefore, both interests make up the full substance of that crime.²⁵⁹

Of those legal interests which are not expressly specified by the Constitution but which were commonly recognized at the time the Constitution was adopted, it is necessary to mention here only the protection of state and government against treacherous and subversive activities, the administration of governmental functions against perjury, bribery and contempt, the protection of sexual life against rape and other offenses against morality and decency. Thus, all of the interests protected in the traditional common law of crimes, in so far as they did not become obsolete in the last century, can be considered part of the constitutional value system.

Since the early days of the Constitution, many new social needs and wants have arisen. Science and industrialization have made tremendous progress, but their welcome fruits have also created dangers to individual life and liberty and social security. They marked the commencement of an irresistible flow of modern criminal legislation, which, even today, continues to add to an already vast number of so-called public welfare offenses. This movement, of course, would not have been possible without the social and legal recognition of those newly discovered goods and interests.

Not all demands, however, have successfully achieved legal stature. In a number of cases, courts have declared statutes void when the new interests to be criminally protected were held inconsistent with the Constitution. On the whole, this period of public welfare legislation has brought a huge increase in new legal interests and, thus, a steady complementing and expanding of the framework of the constitutional value order.

Without pretending to be exhaustive, we might present some of these newly recognized legal interests. Among the interests which are of a more general nature and which can be threatened and injured from many sides are those of the public health, morals and general welfare. These interests were recognized in 1887 in *Mugler v. Kansas*,²⁶⁰ or shortly thereafter in

258. 4 BLACKSTONE, COMMENTARIES *141.

259. In these cases of one or more interests, however, an interesting terminological question arises. Professor Mueller, who comprehends harm as a three-level abstraction (see 34 IND. L.J. 220 and *supra* II, seems to suggest that the special or secondary interest of a crime should be put on the third, *i.e.*, the special harm level so as to contrast it to the main interest of the intermediate harm level. Though the secondary interest of a crime often gives that crime its distinctive character and, thus, can be considered as its special interest, we nevertheless would not put the fundamental and the special interests on different harm levels since both together are constituent parts of the same crime and, thus only together make up the full substance of that crime. Cf. also MAURACH 173.

260. 123 U.S. 623 (1887).

State v. Gilman,²⁶¹ *State v. Redmon*²⁶² and *Miller v. Board of Public Works*.²⁶³ In *State v. Ballance*²⁶⁴ the criminal statute is said "to promote the accomplishment of a public good, or to prevent the infliction of a public harm." In different language, Mr. Justice Holmes declared that the police power extends "to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."²⁶⁵

These general interests naturally can and must be broken down into specific interests—that of public safety into the security of traffic,²⁶⁶ the security of driving without distraction by advertising signs,²⁶⁷ that of public health into protection against overcrowded tenements and unhealthy slums, the requirement of removal and collection of garbage, or vaccination and segregation of infectious patients.²⁶⁸ Another well-settled criterion is the preservation and protection of public morals.²⁶⁹ Therefore, it is of legal interest to suppress gambling and houses of prostitution²⁷⁰ or to prohibit association with prostitutes.²⁷¹ However, certain areas are not protected, such as religious convictions regarding rest on Sundays.²⁷² Other modern wants which are held to be part of the general welfare and therefore worth protecting are the "well-being and tranquility" of city dwellers against broadcasts of public interest amplified to a loud and raucous volume by sound trucks²⁷³ and standards of a community against the creation of business establishments in certain residential areas.²⁷⁴ Likewise, the civic and social values of the American home are protected by establishing strictly residential zones.²⁷⁵

As to interests which cannot be categorized as welfare offenses, we should mention, in particular, the state's interest in self-preservation against advocacy of the violent overthrow of the government.²⁷⁶ Also

261. 33 W. Va. 146, 10 S.E. 283 (1889).

262. 134 Wis. 89, 114 N.W. 137 (1907).

263. 195 Cal. 477, 234 Pac. 381 (1925).

264. *Supra* note 235.

265. *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

266. *Cf. Kovacs v. Copper*, 336 U.S. 77 (1949).

267. *Cf. State v. Blackburn*, 104 So. 2d 19 (Fla. 1958).

268. For details see 11 *AM. JUR. Constitutional Law* § 270 (1937).

269. *Coppage v. Kansas*, 236 U.S. 1 (1914).

270. *Barbour v. State*, 146 Ga. 667, 92 S.E. 70 (1917).

271. *State v. McCormick*, 142 La. 580, 77 So. 288 (1917).

272. *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952).

273. *Supra* note 266.

274. *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364 (Fla. 1941); *Merritt v. Peters*, 65 So. 2d 861 (Fla. 1953).

275. *Miller v. Board of Public Works*, 195 Cal. 477, 234 Pac. 381 (1925).

276. *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States*, 249 U.S. 47 (1919); *Dennis v. United States*, 341 U.S. 494 (1951).

important are those interests which are offsprings of the old liberty rights. A rather extensive statement of these was rendered in *Meyer v. Nebraska*.²⁷⁷ In *Meyer*, the Supreme Court, speaking through Mr. Justice McReynolds, declared that the liberty guaranteed by the due process clause, without doubt, not only denoted freedom from bodily restraint,

but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

This is, indeed, a very comprehensive list of valuable interests, but it is a practical question in criminal administration whether all can be effectively protected by criminal sanctions. Yet, as mentioned before, the courts did not accede to all legislative recognitions of new interests. The following are some of the cases in which the courts invalidated criminal provisions because the interests concerned were not held to merit protection by penal sanctions.

In *Carter v. State*,²⁷⁸ an Alabama statute provided that

any person, firm, corporation or association of persons who, without a just cause or legal excuse, wilfully or wantonly does any act with the intent or with reason to believe that such act will injure, interfere with, hinder, delay, or obstruct any lawful business or enterprise in which persons employed for wages . . . shall be guilty of a misdemeanor.

This statute, the purpose of which would amount to a total protection of businessmen against any jeopardy through competitors, was held invalid because of a legislative abuse of police power. In a case in which a revenue regulation was capable of being construed so as to protect liquor prohibition interests, the court forbade such construction because, since the repeal of the 18th amendment, liquor prohibition interests were no longer protectable interests.²⁷⁹ In *State v. Varsalona*,²⁸⁰ the defendant had been convicted of arson because he had burned down his own liquor store despite any injury to anyone else. The conviction was reversed on the ground that the legislature, when prohibiting the wilful burning of any shop or storehouse, could not have intended to outlaw any wilful burning of property irrespective of ownership or any other circumstances. In *Lovell v. City of Griffin*,²⁸¹ the court refused to recognize the city's interest

277. 262 U.S. 390, 399 (1923).

278. 243 Ala. 575, 11 So. 2d 766 (1943).

279. *Wisniewski v. United States*, 247 F.2d 292 (8th Cir. 1957).

280. 309 S.W.2d 636 (Mo. 1958).

281. 303 U.S. 444 (1938).

in licensing the distribution of any pamphlet. In *Eidge v. City of Bessemer*,²⁸² the court invalidated a city ordinance which prohibited the keeping of intoxicating liquors and beverages in any quantity and for any purpose, however innocent; nor did California's attempt to prevent racial tension and unhappy offspring through a miscegenation statute find judicial approval. In *Perez v. Lippold*,²⁸³ a statute which penalized marriages of white persons to Negroes, Mongolians and Malaysians was invalidated on the ground that it deprived citizens of the liberty of marriage "without serving any proper end," thus refusing the prevention of racial tension and unhappy offspring recognition as an interest worth criminal protection. Whereas, in all the cases listed, the interests put forward for protection were not illegal *per se*, this survey will be concluded with an example in which the respective statute would have served illegal purposes, namely, the promotion of a monopoly. In *State v. Ballance*,²⁸⁴ a criminal command requiring any photographer for hire to have a license was held invalid since it tended "to promote a monopoly in what is essentially a private business."

Whereas the foregoing cases reflect interests sanctioned by statute but refused legal recognition by the reviewing courts because they were held not worthy of criminal protection, the following cases are those in which interests, though recognizable as such, were denied recognition because their protection would be detrimental to other higher constitutional interests or rights. Most cases of this kind appear in connection with the right to equal protection, the principle of due process, freedom of religion, and other civil rights.

As to freedom of religion, the government's interest in reverence towards the flag was forced to give way to religious beliefs. In *West Virginia State Board of Education v. Barnette*,²⁸⁵ a state statute requiring school children to salute the flag on pain of criminal punishment of the parents was not enforced against Jehovah's Witnesses who refused to do so on religious grounds. Again, in *Hennington v. Georgia*,²⁸⁶ the interests of interstate commerce were held inferior to the protection of rest on Sundays. On the other hand, in *Henderson v. Antonacci*,²⁸⁷ general freedom of activity was considered superior to religious beliefs which forbade Sunday labor. In this case, the court held that religious tenets, precepts, or beliefs may be considered only "in so far as they furnish a guide for good public morals or health." In *Reynolds v. United States*,²⁸⁸ religious

282. 164 Ala. 599, 51 So. 246 (1909).

283. 32 Cal.2d 711, 198 P.2d 17 (1948).

284. 229 N.C. 764, 51 S.E.2d 731 (1949).

285. 319 U.S. 624 (1943).

286. 163 U.S. 299 (1896).

287. *Supra* note 272.

288. 98 U.S. 145 (1878).

convictions also failed to succeed. There the defendant, a Mormon, had married twice on the religious belief that it was the duty of the male members of the Mormon Church to practice polygamy even though it was criminally prohibited. Since marriage, in a monogamous form, is a fundamental social institution and a most important feature of social life, the court held that it must be protected even against opposing religious demands.

Turning to civil liberties and property rights, we find some cases where these rights were protected even against liquor prohibition interests, when the latter were excessive or amounted to a complete disregard of basic civil rights.²⁸⁹ That the statute violated the guaranteed right to liberty, the enjoyment of the fruits of one's own labor, and the pursuit of happiness was, as previously mentioned, one of the grounds for invalidation in *State v. Ballance*.²⁹⁰ In other cases, the state's interests in self-preservation were not recognized when they were repugnant to civil rights, such as freedom of speech. Thus in *Stromberg v. California*,²⁹¹ a statute forbidding the display of a red flag as a sign of opposition to the organized government was held inconsistent with freedom of speech.²⁹²

Finally, there are cases where statutes, although protecting interests which were legal *per se*, were invalidated because of violation of the equal protection clause. In *People v. Bowen*,²⁹³ a statute required sightseeing guides for New York City to have a license which was granted only to those who had been residents of New York for two years prior to the application. The court found that this discrimination between residents and non-residents had no reasonable basis, and was not, therefore, reconcilable with the principle of equality.²⁹⁴ In *State v. Blackburn*,²⁹⁵ a statute requiring gasoline price signs to be of a certain size and at a certain distance from the road was held void because it was discriminatorily imposed upon one specific class of retailers. Also, the previously mentioned miscegenation statute in *Perez v. Lippold*²⁹⁶ was declared unconstitutional, not only because it did not serve any proper end, but also because it unduly discriminated against certain races. These cases are adequate proof of

289. Cf. *State v. Williams*, 146 N.C. 618, 61 S.E. 61 (1908); *Eidge v. City of Bessemer*, *supra* note 282; *State v. Gilman*, *supra* note 261; in these cases general reference to the privileges and immunities of the citizens. But see also *Mugler v. Kansas*, *supra* note 260, where a liquor prohibition law was held consistent with the 14th amendment.

290. See *supra* note 284. Another ground of its invalidation was the observation that it promoted illegal interests. Cf. also *Town of Miami Springs v. Scoville*, 81 So. 2d 188 (Fla. 1955).

291. 283 U.S. 359 (1931).

292. Cf. also *De Jonge v. Oregon*, *supra* note 244.

293. 175 N.Y.S.2d 125 (1958).

294. See also *Wormsen v. Moss*, 177 Misc. 19, 29 N.Y.S.2d 798 (1941); *Schrager v. City of Albany*, 197 Misc. 903, 99 N.Y.S.2d 697 (1950).

295. *Supra* note 267.

296. See *supra* note 283.

the fact that the existence of a social harm, likely to be caused by certain activities, does not necessarily suffice to justify criminal sanctions. Individual and social interests must be constitutionally evaluated; if they are not repugnant to any higher interests, they can obtain criminal protection.

As mentioned earlier, the traditional law of crimes in the last century was enveloped by a steadily increasing number of public welfare offenses. This resulted from the fact that the sociological structure and the social aims of the modern state, society, and economy required sanctions for the protection of public health, safety, and general welfare. As is quite natural for hasty developments, the legislature occasionally exceeded its limits and virtually prohibited activities which were not harmful at all or it passed measures which were ineffective to prevent the harm. In the face of such circumstances, the courts finally interceded; the principle they generally employed for controlling the efficiency and reasonableness of such statutes was that of utility and necessity. Professor Scott seems to have been the first to call attention to it.²⁹⁷ A likewise intensive consideration was given it by Mueller, who appraised it in connection with Hall's general principles of criminal law.²⁹⁸

To be sure, not all courts accept this principle. Some take the position that it is not the function of the judiciary to eliminate unnecessary and inefficient criminal provisions. In *United States v. Kissinger*,²⁹⁹ the Third Circuit Court held: "... whether a particular statutory enactment under the commerce clause is reasonably necessary is not for the court to determine." Also, in *People v. Adler*,³⁰⁰ the court denied its jurisdiction to inquire into the wisdom, need, or appropriateness of legislation which is the sole affair of the legislature; the court, nevertheless, determined whether there was "any rational basis" for the conclusion that the regulations in question served a health purpose.³⁰¹

On the whole, courts seem increasingly inclined to invalidate criminal regulations if they are completely unnecessary or useless. However, there are various considerations on which the utility scrutiny is based. In *Nebbia v. New York*, the United States Supreme Court stated that "the means selected shall have a real and substantial relation to the object sought to be obtained."³⁰² The New Jersey Superior Court demands a "reasonable

297. Scott, *Constitutional Limitations on Substantive Criminal Law*, 29 ROCKY MT. L. REV. 275, 280-83 (1957).

298. 34 IND. L.J. 206, 224 (1959).

299. 250 F.2d 940 (3d Cir. 1958).

300. 177 N.Y.S.2d 361 (1958). See also *Defiance Milk Product Co. v. Du Mond*, 309 N.Y. 537, 540, 132 N.E.2d 829, 830 (1956).

301. Mueller, too, seems to have doubts if a judicial utility scrutiny should be generally recognized. But in face of the present practice of the lawmakers he would not deny the courts the right to doublecheck on legislative wisdom; see *supra* note 298, at 225.

302. 291 U.S. 502, 525 (1934).

relation to one of the needs which gives rise to the exercise of police power."³⁰³ Other courts speak of "rational relation"³⁰⁴ or that the regulation must be "necessary to the common good"³⁰⁵ or "reasonably necessary to promote the public health, safety, morals or general welfare of the people of a community."³⁰⁶ Likewise, the references which are made to certain constitutional provisions are divergent. Some cases simply do not refer to the Constitution at all,³⁰⁷ or in general reference they rely on "the privileges and immunities of the citizens."³⁰⁸ Other cases resort to the equal protection clause.³⁰⁹ Nonetheless, in most cases, the lack of utility or reasonable necessity of a regulation was held inconsistent with the due process clause.³¹⁰ This, indeed, seems to be the best ground for invalidating unnecessary and inefficient criminal provisions. If the conduct prohibited is practically harmless or if the provision cannot prevent the harm in any event, it makes little sense to deprive the violator of his life or property. The imposition of a sanction in such a case is not consistent with the principle of due process.³¹¹

Perhaps we should also consider the utility and necessity principle from the standpoint of criminal jurisprudence. Our contention, that criminal law and punishment should be engaged only where it is useful and efficient, is a conviction almost as old as criminal law itself, although it must be conceded that powerful rulers have found it hard to resist the natural temptation to exaggerate their fight against real or imagined evils. Cesare Beccaria, in particular, demanded the sparing of penalties as much as possible.³¹² In recent years, the Canadian scholar, R. S. Mackay,³¹³ and the German criminalist, Walter Sax,³¹⁴ have emphasized that criminal measures are only justified if the conduct to be prevented can and ought to be deterred by penal sanctions.³¹⁵ Also, Professor Million deems stat-

303. *State v. Western Union*, 13 N.J. Super. 172, 80 A.2d 342 (1951).

304. *State v. Blackburn*, *supra* note 267.

305. *City of Miami Beach v. Ocean & Inland Co.*, *supra* note 274.

306. *Miller v. Board of Public Works*, *supra* note 263.

307. *Wisniewski v. United States*, *supra* note 279; *State v. Varsalona*, *supra* note 280.

308. *State v. Gilman*, *supra* note 261.

309. *People v. Bowen*, *supra* note 293; *Henderson v. Antonacci*, *supra* note 272.

310. *State v. Blackburn*, *supra* note 267; *State v. Williams*, *supra* note 289; *Town of Miami Springs v. Scoville*, *supra* note 290; *People v. Arlen Service Stations*, 284 N.Y. 340, 31 N.E.2d 184 (1940); *Nebbia v. New York*, *supra* note 302; see also *Mugler v. Kansas*, *supra* note 260; *Hagar v. Reclamation District*, 111 U.S. 701 (1884).

311. Cf. the interpretation of the due process clause in 16A C.J.S. *Constitutional Law* § 567 (1956): the due process clause "is interpreted to mean that the government is without right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power."

312. Cf. VON BAR, 1 HANDBUCH DES DEUTSCHEN STRAFRECHTS 332 (1882).

313. In his reflections on the New Canadian Criminal Code, 12 TORONTO U.L.J. 206, 210 (1957/58).

314. SAX, *op. cit. supra* note 246, at 924-26.

315. See also ESER, *op. cit. supra* note 237, at 149-51.

utes which seem unnecessary or which do not bear a definite relationship to an object the law might be directed against as not being worth criminal enforcement.³¹⁶ In view of these authorities, it is to be hoped that more and more courts will have the courage to invalidate criminal regulations, the enforcement of which would be either useless or unnecessary.

Even though courts do not usually adjudicate on the basis of this distinction, it seems both possible and helpful to divide the utility and necessity principle into two main doctrines. According to this distinction, a criminal provision is not in harmony with the requirements of utility and necessity if:

1. the conduct prohibited does not have any real or substantial relation to one of the purposes of public welfare legislation, or
2. the criminal provision employed to prevent a harm to one of those interests is, in effect, not capable of accomplishing the protection for which it was enacted.

A case in which the supposed effect of a prohibited behavior on public morals was denied was *St. Louis v. Fitz*.³¹⁷ Here, a statute made it criminal "to knowingly associate with persons having the reputation of being thieves and prostitutes." The court, however, did not find a harm substantial enough to be criminally sanctioned. In *Meyer v. Nebraska*,³¹⁸ where a teacher was forbidden to teach modern languages, the court denied the contention that public welfare interests would necessarily be harmed by the teaching of modern languages. In *State v. Williams*,³¹⁹ all persons were prohibited "from carrying into the County of Burke, in any day, more than one-half gallon of vinous, spiritous, or malt liquor." The court found that this provision had no reasonable, substantial relation to the sale of liquor as prohibited by law.³²⁰ Cases in which restrictions upon advertising signs were held unconstitutional since they had no detrimental effect upon and bore no reasonable relation to public safety, health, morals, or welfare are those of *Levy v. City of Pontiac*,³²¹ *State v. Miller*³²² and *Serve Yourself Gasoline Stations' Ass'n v. Brock*.³²³

We turn now to a discussion of cases wherein criminal provisions, though directed against harmful activities, were not efficient means of preventing the harm. For that reason, an ordinance aimed at curbing

316. Million, *supra* note 251, at 477, 480.

317. 53 Mo. 582 (1873).

318. 262 U.S. 390 (1923).

319. *Supra* note 289.

320. *Simlar Eidge v. City of Bessemer*, *supra* note 282; *State v. Gilman*, *supra* note 261.

321. 331 Mich. 100, 49 N.W.2d 80 (1951).

322. 126 Conn. 373, 12 A.2d 192 (1940). *But see* *Slome v. Godley*, 304 Mass. 187, 23 N.E.2d 133 (1939), and *Merit Oil Co. v. Director of Division of Necessaries of Life*, 319 Mass. 301, 65 N.E.2d 529 (1946) where similar restrictions were upheld.

323. 109 Cal. App. 2d 698, 241 P.2d 597 (1952).

juvenile delinquency was held invalid in *Alves v. Justice's Court*,³²⁴ since it punished minors for violation of curfew laws even if they were innocently engaged. In Illinois, a statute aimed at the protection of public safety, which made it a crime for a person to have the reputation of carrying concealed weapons or of being a habitual law violator, was held void in *People v. Belcastro*.³²⁵ In *Regal Oil Co. v. State*,³²⁶ a statute required gasoline price signs of a certain size to be placed on the pump and prohibited display of such signs on any other portion of the property. It was held unconstitutional since there was no proof that signs of this size in fact prevented fraud, dishonesty, or deceit of the public.³²⁷ In *State v. Ballance*,³²⁸ all professional photographers were required to have a license which was in part conditioned on good moral character. The court denied the statute's efficiency to promote the ends proposed and declared that it was neither necessary nor useful to investigate a photographer's mental or moral capacity before granting the license.

At first sight, it may not have been clearly understood why the principle of utility was dealt with in connection with and in relation to the value aspect of legal interests. Is there a real relationship between them? Is not the utility idea a purely constitutional concept? It is, to be sure; precisely because of its constitutional character, however, it is also of significance for the normative evaluation of legal interests. It has been shown that legal interests are, at first, individual or social goods and they must then be constitutionally evaluated. Thus, they can only be legally recognized (and in this way criminally protected) if they are in harmony with the constitutional system of values. In this process of constitutional scrutiny, the utility principle is just one of the means employed to secure the integrity and functioning of the value order. It must safeguard the constitutional values from abuse by criminal provisions which in reality have no reasonable relation to those values. Thus, the utility principle is indeed capable of preventing the protection of interests which actually are not worthy of being protected. In this way, it is one of the guarantees of a proper constitutional evaluation of legal interests.

IV. THE FINAL DETERMINATION OF HARM: THE CONSEQUENCES

The Definition of the "Legal Interest" and of "Harm"

After having analyzed the nature and structure of harm from its different aspects, an attempt can be made to achieve a compact but comprehensive definition of the concept and its component parts. Remembering

324. 148 Cal. App. 2d 419, 306 P.2d 601 (1957).

325. 356 Ill. 144, 190 N.E. 301 (1934).

326. 123 N.J.L. 456, 10 A.2d 495 (1939).

327. Similar *State v. Blackburn*, *supra* note 267.

328. 229 N.C. 764, 51 S.E.2d 731 (1949).

the various misunderstandings and misconceptions to which the notion of penal harm has been exposed, we must keep in mind some *caveats*.

On the one hand, the definition of harm must be made broad enough to comprise all types of criminal harms, the harms of larceny and murder as well as the harms of tax crimes or welfare offenses. Although the gravity and significance of various harms may be different, they are similar as far as their nature and structure are concerned. This is also true with regard to crimes *mala in se* and crimes *mala prohibita*. Though the degree of their social impact may be essentially different, the nature of their harm is alike: all contain an element of danger to or destruction of some legal interest.

On the other hand, harm must not be defined too generally. As we have demonstrated, harm is more than the mere formal breach of the law; likewise, it is more than the subjective ethical disvalue of the actor. Harm, as such, has only a negative meaning. It expresses the risk of destruction or the destruction itself of something valuable. It must, therefore, be related to the material objects which are impaired by the unlawful conduct. Only if considered in connection with the material objects it injures can harm be described in a more positive way.

The material objects against which penal harm is directed are found in legally protected interests. Hence, criminal harm can be characterized as the negation, endangering, or destruction of the legal interests of the respective criminal provisions. Because of this close interdependence of the notion of harm and the legal interest, the definition of harm finally depends on the determination of the legal interest.

At this point the main problems are clear. There is always the danger that legal interests, through over-abstraction, become comprehended as fundamental values or ideals. In particular, Jerome Hall, by emphasizing the intangible nature of penal harm, neared the point at which legal interests are nothing more than general values of purely idealistic subsistence. By overemphasizing the incorporeality of penal harm, one overlooks the realistic, sociological fundament of legal interests. It is also important to note the fact that interests and values of a more general nature, such as that of the government in the functioning of its administrative machinery, often can be broken down into many smaller interests: the incorruptibility of the civil servants, the obedience to administrative measures, the inviolability of public institutions, etc. This necessary process of reconciliation by which a more fundamental interest is reconciled by and protected through more specific interests³²⁹ is only one of many signs that the concept of legal interests is rooted in the sociological basis of the values to be protected. If the concept of legal interest is, however, oriented

329. Cf. SAX, *op. cit. supra* note 246.

strictly to the intangibility of generally conceived universal values, the weapons of criminal law are in danger of overlooking the real needs of the society.

However, the other extreme, that of overstressing the sociological side of legal interests, is equally incorrect. This mistake was made by Beutel in that he failed to recognize the normative, selective function of the law, with the result that any social demand, desire, or need would have to be legally protected.

In our opinion, the correct approach to a determination of the nature of legal interests is the integrative combination of both the sociological basis and the normative constitutional value. The requirement of a sociological basis demands that a certain sociologically grounded interest of an individual, a social group, or the state must exist before the legislature may provide any criminal measures.

Such interests need not necessarily be physically tangible elements or goods of an external nature such as the body, a house, money, or water. Goods, conditions, and relationships of more psychic or intellectual character may also be the substrata of protectable interests, *e.g.*, the confidence between trustee and beneficiary, cultural and religious institutions, or interests such as the advancement of the aesthetic architectural standards of a city, the citizens' rest on Sundays, or other valuable fact situations and combinations such as the preservation of free competition or the reputation of certain professions. However, as expressed by the value aspect of legal interests, mere sociological existence alone does not justify criminal protection. It must also be evaluated in terms of the order of values established by the Constitution. Only those interests in harmony with the spirit and the principles of the Constitution can be legally recognized, or, negatively phrased, all interests that do not have a normative relationship to a certain constitutional value or that lie outside the constitutional order of values cannot achieve criminal protection, however firm their sociological basis may be.

In this rather schematic summary, we have neglected one aspect of the legal interests which divides their factual foundation and their legal evaluation, namely, the state of social recognition. That is to say that factual interests do not immediately advance to legal evaluation; rather, they must pass through the filter of social recognition. The consequence demands that only those interests which are so valuable and so significant as to deserve social cognizance can finally obtain legal recognition and criminal protection.³³⁰

330. "Social recognition," however, does not infer the requirement of cognizance and recognition of the whole society. This is, of course, the case with the traditional common law crimes the interests of which are certainly universally recognized. But that is not so with the modern public welfare offenses the purposes of which are often so technical that their

Thus, the route which a certain social or individual want or need takes in the process of becoming criminally sanctioned follows three steps: first, there must be a socially founded factual interest; second, this interest must be socially recognized; and third, its consistency with the constitutional value order must be demonstrated. Only then may it be criminally protected.

Based on the dualistic, integrative structure of legal interests and the three-step process of their sociological recognition, harm and legal interest can be defined as follows. A "legal interest" worthy of criminal protection may be any factual interest or good of an individual, of a social group, or of the state if it is socially recognized and in harmony with the spirit and value order as established by the Constitution. Consequently, "criminal harm," in its most general sense, is the negation, endangering, or destruction of an individual, group, or state interest which was deemed socially valuable, in harmony with the Constitution and, therefore, protected by a criminal sanction. In shorthand, "criminal harm" is the actual or potential prejudice to socially and constitutionally recognized and criminally sanctioned factual interests.

Consequences for Criminal Legislation

Although the theoretical analysis of harm as one of the fundamental elements of crime was the primary objective of this study, it was not the only purpose. We also intended to discover the principles according to which the legislature may declare certain conduct unlawful and, therefore, punishable.

Since harm is the objective, material substance of the crime as distinct from the subjective requirement of *mens rea*, the starting point for our inquiry must be that certain conduct cannot truly be called criminal unless it causes certain criminal harm. This means that the legislature, before it may outlaw certain acts or omissions by establishing criminal sanctions, must first prove the likelihood of the harm potentially resulting from the conduct to be outlawed. Since penal harm is the impairment of some legal interest, conduct is only harmful if it is prejudicial to a legal interest. Therefore, legislators must examine whether the objective they wish to protect is in fact a legally protectable interest.

According to the dualistic nature of legal interests and with respect to the three-step process of their recognition, legislators must establish proof of these three points. First, they must determine that the objective to be protected is a real interest and not merely an asserted, imagined, or pre-

value is not intelligible for the average citizen. But here it suffices that the interests to be protected are objectively of social relevance. In these cases the general social recognition is substituted for by expert administrators of the branch of public welfare matters concerned. Cf. ESER, *op. cit. supra* note 237, at 173-76.

tended one. At a time when everyone is inclined to call for the strong arm of government to protect his purely private wants, it is more important than ever to examine whether there really is a need for criminal sanctions. Too often the power of punishment is nothing more than a means of self-assertion without serving any real public or private need. In these cases, the legislature should abstain from criminal measures for lack of a sociologically factual need or want. Equally important is the examination of the social recognition of an asserted interest. That an interest must be socially recognized as valuable to society as a whole or to some of its members does not necessarily mean that only the interests of the whole society or the state deserve protection. On the contrary, completely individual rights, such as property interests, can well merit criminal concern. However, any interests (those the state as well as those of its subjects) may be protected only if they are of social relevance. Sanctions equal in social impact to criminal punishments are justified only if the interests in favor of which punishment is created can be deemed socially valuable and significant.³³¹ Therefore, individual interests must also gain social attention and recognition before they are worthy of criminal protection. Still a third step must be taken: the claimed interest, though found to be socially protectable, must finally be measured against the Constitution. This is the normative step of constitutional evaluation. Needs or desires of the highest social concern may not be criminally sanctioned if they are not in accord with a value of the constitutional order. Concordance with the constitutional spirit gives the interest its legal-constitutional value.

It is our understanding that the legislature may not penalize acts unless the object against which these acts are directed is a legal interest. What practical effects does this have on the applicability of the criminal provision if the object to be protected fails to meet these three criteria of a legal interest? As to the factual-sociological side, if a criminal provision does not serve a socially recognized and protectable interest, a criminal sanction is unjustifiable. It must be held void since it deprives the "perpetrator" of life, liberty or property without due process or just cause. As to the value aspect of the legal interest, *i.e.*, its legal-constitutional evaluation, the legislature must examine the protection of the claimed socially recognized interest in harmony with the Constitution. If they are not in harmony, the criminal sanction is unconstitutional.

Judicial Review of the Harm Requirement

Our proposition that the legislature may provide criminal sanctions only for such conduct which is, in fact, harmful to some legal interest would remain a mere phrase, an empty caveat, if it were left exclusively to lawmakers for application. If the harm requirement as an element of the crime concept is to be given practical effect (and why should we establish

331. But compare note 330 *supra*.

it as a principle of criminal liability if we are not willing to take it seriously?), we must look for the most effective means by which application can be factually controlled and enforced. Although legislators may be quite willing to restrict penal sanctions to acts which are likely to cause some punishable harm, it is not impossible that in one case or another the legislature may fail to recognize the factual harmlessness of the acts at stake. Punishment in such a case, however, would mean that the "perpetrator" is punished for an act which injures no legal interest. In order to avoid such unjust results, penal statutes must be reviewable by the courts. Since, despite the most sincere legislative efforts, the harm is constantly in danger of being neglected, judicial review is the only way to ensure compliance with the principle of harm by the legislature.

A discussion of the practical application of judicial review must consider two distinct categories of cases:

- (a) the situation in which the outlawed conduct is essentially not capable or likely to do any harm to legal interests, and
- (b) the situation in which the proscribed conduct is generally capable of doing harm, but in the specific case at bar the proscribed harm was in fact not accomplished.

The situation in which a criminal provision is essentially not even capable of preventing a criminal harm arises in these three ways:

1. either the criminal statute serves a purpose which does not represent a real need or interest; or
2. its purpose, though serving a sociologically factual interest, is not recognized by the community to be of such social and general significance as to be legally protected; or
3. an interest, though recognized by the society, is included in the Constitution because it is repugnant to higher ranking constitutional values or principles, or because it is inconsistent with the utility and necessity principle.

In these cases, since a legal interest is not actually present, the proscribed conduct would, in fact, do no unlawful harm. Consequently, there would be no just cause to punish. For that reason, the courts should have the right to declare such criminal proscriptions invalid.

It is particularly in the field of public welfare offenses that provisions are found which, as such, are perhaps quite capable of preventing a certain criminal harm but where, under special circumstances, the formal breach of those provisions does not cause the harm to be prevented.³³²

The problem involved is a result of modern life. In the early days of criminal law, when only the basic rights and interests of the community

332. For details to these cases see *supra* III.

and its members were objects of public protection, it would rarely happen that the breach of a criminal provision did not involve the injury of interests for whose protection the provision was made. Modern technology and legislation, however, have rendered life more refined and complicated. Often it is extremely difficult to determine the real cause of a harmful effect; without ascertaining this, how can one discern "harm-less" for "harm-ful" activities? Therefore, the law can only prohibit a whole agglomeration of supposedly dangerous acts by means of a general clause.

In so wholesale a method of outlawing conducts of a certain kind, it is possible that completely harmless acts may also be prohibited. For example, in a statute which proscribes driving on the left side of the road, the interest to be protected is the security of traffic. Is this public interest really harmed if someone drives on the left side while the road is totally free of traffic? What is the harm in crossing an intersection against a red light at a time when the streets are completely empty? In these and in many similar situations, we are faced with the startling observation that, even though the proscribed conduct is present, the harm which the sanction is intended to prevent does not in fact occur. Here, the crucial question arises whether the perpetrator, although not causing the proscribed harm, is nevertheless to be punished for breach of the law.

Against punishment on the one hand, one could raise the argument that the state, having suffered no substantial harm, does not have a just cause to punish. May the government sanction pure disobedience at all? Would it not, in fact, be the same sort of injustice as that of Gessler, who ordered Wilhelm Tell to salute his hat? Is this not inconsistent with the concept of due process? On the other hand, on behalf of punishment, was not the breach of the law at least a defiance of the legislative purpose? Is not the law also placed in jeopardy by formally unlawful acts?

Within the limited scope of this study, it is impossible to attempt a complete answer. This would require a more detailed investigation not only into the problem of the state's right to punish but also into the general relationship between the state and the individual. Therefore, only a solution in principle may be attempted. It certainly would be unjust to punish one for a harm he did not actually cause. However, it is also incorrect to deny or to disregard the breach of the law completely. This would be the socialist view of unlawfulness: no social dangerousness—no unlawfulness—no crime. According to our own theory, however, a breach of law results in unlawfulness, even if this be but a formal unlawfulness. In our system of criminal justice, the material element of harm is not the only element of the crime. Substance and form together constitute criminal conduct. Hence, even if certain prohibited conduct does not produce the prohibited end, it nevertheless violates the law. Therefore, it would be a mistake to consider the formally unlawful act as not having occurred at all.

The answer, of course, cannot be found in an invalidation of the statute since the statute, as such, serves a proper purpose. There are two other possible solutions to this dilemma: either the perpetrator might be punished for his contempt of the law according to a special contempt provision, thus disregarding the prohibition he had formally but, for lack of harm, not materially violated, or the offender might be acquitted by means of a procedural rule similar to § 153 of the German Criminal Procedure Code.³³³ By an analogous application of this procedural rule, the government would not prosecute acts which, though formally within the language of the crime definition, did not cause the harm for which the criminal sanction was designed. Thus, the state would waive its right to punish the formal disobedience and acquit for lack of an appreciable harm. By this procedural device, the formal breach of the law would not be denied, while the perpetrator, on the other hand, would not be treated as a criminal.

CONCLUSION

The problems, with which we have just briefly dealt, demonstrated that the harm requirement is not a question of theory alone but is a principle of highly practical concern. Beyond that, it is of considerable value for the elucidation and determination of various other elements of the crime. The crucial borderline between punishable attempt and non-punishable preparation, for example, could be found much easier if more attention were paid to the legal interests involved. The same holds true for the difficult determination of "wrongdoing" as it is essential for the "awareness of wrongdoing" in the *mens rea* concept. Nor can the problem of the consent of the victim be satisfactorily solved without considering the legal interest the perpetrator has impaired. It would be interesting to inquire into the close relationship which exists between legal interests and the problems of merger and double jeopardy.

To investigate all of these implications of the harm principle would probably necessitate a voluminous study. The limited purpose of this analysis, however, has been achieved if it has made plain the eminent importance of harm as the substance of the criminal wrong, as a fulcrum of the substantive unlawfulness, thus, as the objective *ratio essendi* of the crime in addition to the subjective personal elements of *mens rea*.

333. The full text of this provision is reproduced in note 85 *supra*. According to this rule the perpetrator is acquitted if his guilt and the consequences of his act are insignificant.