COLLECTION DES TRAVAUX
LA FACULTÉ DE DROIT DE L'UNIVERSITÉ D'OTTAWA

TRAVAUX DU QUATRIÈME COLLOQUE INTERNATIONAL DE DROIT COMPARÉ

tenu à Ottawa (Canada)
du 5 au 7 septembre 1966
sous les auspices

DU CENTRE CANADIEN DE DROIT COMPARÉ

DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ D'OTTAWA

DE L'ASSOCIATION CANADIENNE DE DROIT COMPARÉ

PROCEEDINGS OF THE FOURTH INTERNATIONAL SYMPOSIUM ON COMPARATIVE LAW

held in Ottawa (Canada)
September 5 to 7, 1966
under the patronage of

THE CANADIAN AND FOREIGN LAW RESEARCH CENTRE

THE FACULTY OF LAW OF THE UNIVERSITY OF OTTAWA

THE CANADIAN ASSOCIATION OF COMPARATIVE LAW

ÉDITIONS DE L'UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA PRESS
OTTAWA 2, ONTARIO, CANADA
1967

The Doctrine of Mens Rea in Germany

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I. — INTRODUCTION.[1]

German legal science has a long and fine scholarly tradition; it is a highly systematic and thoroughly organized system. German criminal law, as a part of this system, reflects this tradition, and it is difficult to understand any of its doctrines without having some appreciation of some basic concepts.

The German Penal Code confines in its special part the description of particular crimes by naming the date which distinguishes one crime from another. The general part contains general principles which apply to all crimes. The principle of legality is implied in the special part; the principles respecting responsibility, justification, exemption, attempt and others are treated in the general part.

A conduct to be a crime must have the following qualities : 1) it must be *tatbestandmässig*, 2) *rechtswidrig* and 3) *schuldhaft*. Our maxim *actus non facit reum nisi mens sit rea* is not current in German criminal-law theory, and it is inaccurate and misleading to circumscribe the German concept *Verbrechen* within this maxim. Since we will repeatedly refer to the three qualities mentioned, I will attempt to explain them briefly. *Tatbestandsmässigkeit* is not the equivalent of *actus reus;* it means the correspondence of the data of the fact-situation with the data of the crime charged. The datum *(Tatbestand)* can be objective or subjective, descriptive or normative, or modalities of time and place of action, or of persons. For example, the concepts "person", "dangerous", "security of the state" in the definition of a crime are *Tatbestände.* The subjective facts "intent to . . . ," "for the purpose of . . . ," and "obscene design" are also *Tatbestände. Rechtswidrigkeit* means unlawfulness of the act, the inconsistency of the act with the legal order as a whole. As a rule, an act which is *tatbestandsmässig* is also unlawful; the unlawfulness of the act is only excluded by a permission of the legal order to do an otherwise unlawful act. If A kills *B* intentionally, he has satisfied the fact-situation defined as crime in the special parts of the code; his act is *tatbestandsmässig* because the law prohibits the intentional killing of any person. If, however, the

1. Citation to cases in this paper will follow the German style of citation in which only the volume and page where the material referred to are given. Two primary case reports will be referred, namely : 1) *Entscheidungen des Bundesgerichtshofs in Strafsachen* (Decisions of the Federal Supreme Court in Criminal Matters) (hereafter cited as *BGHSt*) followed by volume and page; 2) *Entscheidungen des Reichsgerichts in Strafsachen* (Decisions of the Imperial Supreme Court in Criminal Matters) (hereafter cited as *RGSt*) followed by volume and page.

legal order permits him to kill, for instance in self-defence, or orders him to kill, for instance in the execution of a convict, the killing which is otherwise unlawful is permitted by the legal order. In this case the unlawfulness of the act indicated in the special part of the code is set aside by the operation of the provision in the general part concerning self-defence or by any other special laws. The relationship between *Tatbestandsmässigkeit* and *Rechtswidrigkeit* can be explained by a rule-exception formula: You should not kill a man (rule in special part), but you may in situation *X* or *Y* (exception in general part or other law). *Schuldhaftigkeit* is the subject of this paper. But to complete the picture, I wish only to point out that *Schuldhaftigkeit* is not equivalent to *mens rea;* it means the reproach of blame made against the actor for bringing about the unlawful act which he could have otherwise omitted. The logical interrelationship of these concepts is as follows: a) only a *tatbestandsmässige* conduct can be *rechtswidrig* and b) only a *rechtswidrige* conduct can be the basis of *Schuld*.

II. — BRIEF HISTORY OF THE THEORY OF SCHULD.

German criminal law proceeds from the basic assumption that punishment presupposes guilt of the actor;[2] German criminal law is, in other-words, guilt criminal law *(Schuldstrafrecht)*. German criminal law accepts the classical theory of freedom of the will as axiom of liability.[3]

"Schuld ist Vorwerfbarkeit" — guilt is reproach — is a statement as often repeated in Germany as the *mens rea* maxim in our jurisdiction; it has also as checkered a career as its Anglo-American counterpart.[4] Before the turn of the past century, German criminal law was overwhelmed by the empiricism of scientific thought; crime has received a naturalistic tone. The concept "conduct" was interpreted in almost the same materialistic accent as Austin and Holmes have urged in our jurisdiction; it is simply a perceptible bodily movement. The Cartesian dichotomy found also its way into criminal-law theory; scholarship split the crime into external and internal components. All objective, external, perceptible components were classified as *Tatbestand*, the material elements of the wrong, whereas the subjective or internal components were categorized as *Schuld*. *Schuld* was defined as the mental or psychological connection of the actor to the harmful consequence; it is either "intention" or "negligence."

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2. *BGHSt*, 2, 200. See also *Entwurf eines Strafgesetzbuches mit Begründung 1958*, § 2; *Entwurf eines Strafgesetzbuches mit Begründung 1960*, § 60 (1); and *Entwurf eines Strafgesetzbuches mit Begründung 1962*, §§ 15, 23, 24. This basic assumption is universally supported in scholarly literature. See *e.g.* Arthur KAUFMANN, *Das Schuldprinzip*, 15-20 (1961); MAURACH, *Deutsches Strafrecht, Allgemeiner Teil*, 297-301 (3d ed. 1965); WELZEL, *Das deutsche Strafrecht*, 124-37 (9th ed. 1965). For a short summary consult BAUMAN, *Der Schuldgedanke im heutigen deutschen Strafrecht und vom Sinn staatlichen Strafens*, 1965 Juristische BLÄTTER, 113.
3. For details see ENGISCH, *Die Lehre von der Willensfreiheit in der strafrechtsphilosophischen, Doktrin der Gegenwart* (1963).
4. For details of the history of *Schuld* consult NASS, *Die Wandlungen des Schuldbegriffes im Laufe des Rechtsdenkens* (1963).

But this over-simplified and schematic analysis has been attacked for various reasons. It was first perceived that the concept "harmful consequence" cannot be satisfactionly developed along a materialistic, perceptible, premise. For instance, crimes against reputation cannot be explained adequately by material or perceptible changes in the world of experience. It is ridiculous to think that slander is a mere movement of the tongue and disturbance of the air as Liszt and Beling have maintained. The harm cannot simply be a material alteration of legal value, but a negation of legal values, concretely or ideally; a crime is an injury to the legal prescription or proscription rather than an injury to a physical object.[5] Secondly, the elements of the wrong are not only empirical data; the *Tatbestände* are not only descriptive but normative.[6] For instance, the *Tatbestände* "cruelty" of the killing as element in murder[7] or "good morals" which may disregard the defence of consent in battery,[8] are inconceivable without evaluation. Thirdly, the schema does not permit the subsumption of other subjective elements, such as the "intent to gain" in larceny[9] as *Schuld*. Hegler[10] and Mezger,[11] among others, have shown that this subjective element, as well as others, are *Tatbestände* rather than *Schuld*. Fourthly, if *Schuld* were a psychological connection between the actor and the harm, it is difficult to support this thesis in negligent offences, especially in the so-called "unconscious" negligent offences. Take the simple case of a taxi driver who, for one reason or another, had caused his car to swerve to the right, hitting and killing a child playing on the sidewalk. It is difficult to establish the psychological nexus between the actor and the death. As Exner maintained, it depends upon chance what consequence will be realized by the negligent act, and upon chance whether the actor will be found liable for death, destruction of property or for nothing. Even Radbruch's desperate attempt to rescue the thesis of his teacher, Liszt, from these criticisms

5. For an historical discussion, see SINA, *Die Dogmengeschichte des strafrechtlichen Begriffs des "Rechtsguts"* (1962). SCHAFFSTEIN, *Das Verbrechen als Pflichtverletzung* (1935) and his article "Der Streit um das Rechtsgutsverletzungsdogma, 1937 *Deutsches Strafrecht*, 335 are early formulation of this challenge. A short summary is given by GALLAS, "Zur Kritik vom Verbrechen als Rechtsgutsverletzung", *Festschrift für Gleispach*, 50 (1936).
6. Even this distinction appears to me arbitrary, since normative *Tatbestände* are also descriptive in the sense that they supply the indeces for the crime in as much the same way as descriptive *Tatbestände*. On the other hand, descriptive *Tatbestände* are not simply empirical; they connote also an especial objective meaning. For a discussion and criticism of this distinction see KÜNERT, *Die normative Merkmale der strafrechtlichen Tatbestände* (1958); SCHWEIKERT, *Die Wandlungen der Tatbestandslehre seit Beling* (1957); and ENGISCH, "Die normative Tatbestandselemente", *Festschrift für Mezger*, 127 (1954).
7. *Das Strafgesetzbuch* (Penal Code) § 211 (1871) (hereafter cited *StGB*).
8. *StGB* § 226a.
9. *StGB* § 242.
10. "Die Merkmale des Verbrechens", 36 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 19, 184 (hereafter cited *ZStW*); "Subjektive Rechtswidrigkeitselemente", 2 *Festagabe für Frank* 251 (1930).
11. "Die subjektive Unrechtselemente", 89 *Gerichtssaal*, 207.

failed.[12] Mittermaier's argument that in unconscious negligence there is an element of intention has been refuted by Binding; "intentional" in this sense is not the realization of the harm, but the doing of the act, thus confusing it with volition. By reason of these difficulties Kohlrausch advanced the theory — now often argued in Germany and in the United States — that unconscious negligence should not be punished because its punishment violates the ethical basis of penal liability.

The modern theory of *Schuld* was first developed by Frank[13] who formulated the statement *"Schuld ist Vorwerfbarkeit."*[14] Frank examined the theory that *Schuld* is a psychological concept on the basis of the defence of necessity (section 54) of the German Penal Code. If the actor is forced to kill another because of necessity, he is, according to Frank, committing the offence intentionally; the actor commands a psychological nexus between his act and the harm. *Schuld*, therefore, cannot be a psychological nexus, otherwise an actor whose act is *schuldaft* is being excused. The reason why the code imposes no penalty is that no reproach can be made against the actor unless he could have acted otherwise under the circumstances. The absence of reproach by the legal order, not the absence of the psychological connection between actor and harm, is decisive in *Schuld*. *Schuld*, Frank concludes, is therefore an evaluation, not a state of mind, it is normative not psychological.

But this theory appeared to many as ridiculous radicalism; it means the creation of an emptiness (*Entleerung*) in the concept of *Schuld*. Characteristically, Rosenfeld interjected this criticism with the gibe : the normative theory of *Schuld* has with violence extracted *Schuld* from the actor's head and with equal violence planted it in the head of the judge.[15] Although this statement appears more as irrelevance than a learned observation, many German scholars find the validity of this ear-catching phrase. The prevailing view, as we shall discuss later, wants to accommodate it by forging together psychological and evaluative elements in *Schuld*.

III. — GENERAL CONSIDERATIONS.

A. The Philosophical Problem.

The theory of *Schuld* has been studied at great length in German criminal law. The first general problem that scholars discuss is the philosophical analysis of *Schuld*.[16] The question which they seek to answer can be stated as follows : Is the concept *"Schuld"* a legal concept, a legislative creation, or does it exist *a priori* which the law can adopt but cannot create ?

12. "Über den Schuldbegriff", 24 *ZStW*, 344.
13. "Über den Aufbau des Schuldbegriffs", *Festschrift für die juristische Fakultät in Giessen zum Universitatsjubiläum*, 521 (1907).
14. *Ibid.*, at 529.
15. "Schuld und Vorsatz im v. Listschen Lehrbuch", 32 *ZStW*, 469 (1911).
16. For a short summary see Arthur Kaufmann, *Das Schuldprinzip*, 20-23, 28-32 (1961).

The problem appears important for if *Schuld* can be created by law, then it follows that it can also be freely fashioned or even abolished, whereas if it is an *a priori* concept, then its definition is mere approximation. The importance of the question becomes apparent in criminal law reform in that it determines whether it is desirable for the legislature to provide definitions of criminal-law concepts or to leave to scholarship the duty of theoretically elucidating such concepts.

Welzel and his finalistic school represent the thesis that seems to draw some lesson from the teachings of natural-law thought. But Welzel in his extensive study of natural law came to the conclusion that no normative order can be constructed on the basis of the "natural." [17] The preeminence of the value-content in law compels the positivistic conception of law itself. [18] Yet this is not equivalent to saying that the totality of the human legal order is a make-belief created by the state. In so far as the state has to create an order out of the affairs of human beings, it has to assume some "eternal truths" whose discovery has been the achievement of natural-law thought. "In the realm of the so-called theory of conduct, the natural law has, since Aristotle and the scholastics, reached its lasting achievement." [19]

> The lawgiver [says Welzel] is not only bound by the physical laws of nature, he must also consider the logical structure of the nature of things in his regulation otherwise his regulation would be erroneous. [20]

Among these *a priori* concepts which the legislature cannot arbitrarily change is the logical structure of *Schuld*. If the lawgiver has decided to base punishment on *Schuld*, then he must accept the logical structure of *Schuld*, otherwise his penal regulation is bound to be inconsistent. [21]

The opposite view still prevails in Germany. [22] "The concept of Schuld," says Baumann, "is (like the concept of conduct) a legal concept." [23] Mezger, a leading exponent of this view, asserts that *Schuld* as

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17. *Naturrecht und materiale Gerechtigkeit*, 240-42 (4th ed. 1962).
18. "Naturrecht und Rechtspositivismus", *Festschrift für Niedermeyer*, 279, at 287-88 (1954).
19. *Supra* note 17, at 244.
20. *Naturrecht und materiale Gerechtigkeit*, 198 (3d ed. 1960); see also STRATENWERTH, *Das rechtstheoritische Problem der "Natur der Sache"* (1957); Armin KAUFMANN, *Die Dogmatik der Unterlassungsdelikte*, 16-18 (1957).
21. WELZEL, *Naturrecht und materiale Gerechtigkeit*, 197 (3d ed. 1960); Armin KAUFMANN, *Das Lebindige und Tote in Bindings Normentheorie*, 190 (1954); also STRATENWERTH, *op. cit. supra* note 20, at 16. This thesis is identical with the theory which Radbruch calls *Natur der Sache* (nature of things). RADBRUCH, "Die Natur der Sache als juristische Denkform", *Festschrift für Laun*, 155 (1948). Cf. STRATENWERTH, *op. cit. supra* note 20, at 24. For a summary of the most recent discussion of the theory of *Natur der Sache*, see MAIHOFER, "Die Natur der Sache", 44 *Archiv für Rechts-und Sozialphilosophie*, 305 (1958); ENGISCH, "Zur Natur der Sache im Strafrecht, *Festschrift für Eberhard Schmidt*, 90 (1961).
22. For a critique of the theory of the finalistic school, see Arthur KAUFMANN, *Das Schuldprinzip, passim* (1961); ENGISCH, *op. cit. supra* note 21.
23. *Strafrecht, Allgemeiner Teil*, 326 (2d ed. 1964).

quality of a punishable conduct means personal accountability of the actor for his conduct. This is not an onfological quality but a normative relation. Hence *Schuld*, like conduct, is a legal concept; it is the primary and exclusive concern of positive law to determine the necessary assumptions on which reproach is dependent.[24] If the legal assumptions deviate from juristic-philosophic ideas, it remains valid without any doubt as to its authoritative sanctions and operations.[25]

B. The Theories of Schuld.

The theory of pure psychological *Schuld* is now universally abandoned in Germany. Intention and negligence as such alone are not *Schuld;* everybody agrees that *Schuld* contains, at least partly, a normative element. The major problem of current interest is whether *Schuld* should be purely normative in the sense that all psychological elements should be extracted from *Schuld* and assigned to the *Tatbestand*, or whether they, or at least some, still are components of *Schuld*.

1. *The Pure Normative Theory of Schuld.*

As a further development of the work of Frank, the finalistic school want sto see *Schuld* as a pure value-judgment. The precursor of the theory of the finalistic school, Graf zu Dohna, advanced an analysis that is still the center of the controversy on the theory of *Schuld*. He admonished that criminal-law theory must carefully distinguish between the object of evaluation and evaluation of the object (*Objekt der Wertung* and *Wertung des Objekts*).[26] Much of the disorganized thinking in criminal law can be eliminated, zu Dohna asserts, if these two dissimilar concepts are separated. In the theory of *Schuld*, the psychological elements are the object of evaluation, whereas the reproach directed to these elements is the evaluation.

The finalistic school found a valid insight in zu Dohna's thesis. But zu Dohna left a question unresolved. If intention and negligence do not belong to *Schuld*, to what part of the structure of crime should they be circumscribed? The finalistic school found that intention and negligence are the psychological aspects of the conduct, and since the primary material element of every wrong is a conduct, then negligence and intention are assignable to the *Tatbestand;* they are, like the other subjective elements, subjective *Tatbestände*. When an actor commits a wrong, the actor pursues a mode of behaviour which is inconsistent with the legal order: the will-realization is not such which the legal order in the realm of social life has expected of the actor. The inconsistency of the conduct with the legal order is not, however, the expression of *Schuld*, rather it sets the foundation

24. 1 *Leipziger Kommentar zum Strafgesetzbuch*, 15 (1957); *Moderne Wege der Strafrechtsdogmatik*, 12-13 (1950).
25. Lang-Hinrichsen, "Zur Problematik der Lehre vom Tatbestands — und Verbotsirrtum", 1952 *Juristische Rundschau*, 184, at 189; Bockelmann, *Strafrechtliche Untersuchungen*, 58 (1957).
26. *Aufbau der Verbrechenslehre* (1935).

for a judgment of reproach. In *Schuld*, the judge will form a reproach that the actor pursued an unlawful act which he could have omitted. The actor has the capacity to follow the norm but has voluntarily disregarded the norm.[27] Maurach pointedly sums up the thought of the pure normative theory as follows:

> When one speaks of the relation between *Schuld* and the psychological facts, so this concerns in reality not the psychological facts as such, but the value-relation which the judge establishes.[28]

A number of criticisms has been levelled against this theory,[29] but we need refer only to some in this paper. The finalistic school, it is alleged, arbitrarily separates the "is" and the "ought" *(Sein and Sollen)*, between "reality" and "value". What is decisive in the theory of *Schuld* is not the reproach as such, but that which is being reproached against. In the words of *Schröder*:

> The concept of reproach is unthinkable without at the same time determining what is being reproached against; reproach separated from its object is incomplete. One cannot simply reproach against in the abstract, one can only reproach against something.[30]

Furthermore, we make a reproach against the actor not merely because of a wrong appreciation of his act, but because of his unlawful conduct. For instance, we do not reproach an actor merely because he knows that robbery or murder is wrong, but because he committed robbery or murder inspite of his knowing them to be wrong. At any rate, the opponents assert, the finalistic school confuses *Schuld* with *Schuld*-judgment *(Schuld und Schuldurteil)*. *Schuld* is something real, something factual which must be in the head of the actor. *Schuld* as a fact is independent from the judgment over it. No judgment over it can add anything to *Schuld* as fact; this latter concept contains everything on the basis of which judgment is at all possible.[31] A logical-normative conception of *Schuld* is as equally one-sided as a psychological-natural conception.[32]

2. *The Psychological-Normative Theory of Schuld.*

These criticisms lead us to the theory of the prevailing view. There are a number of variations of the prevailing view but the common idea is that intention and negligence must be assigned to *Schuld* in the structure of crime. Nearest perhaps to the view of the finalistic school is the theory of Schröder. He agrees that intention and negligence, as such, cannot be identified with *Schuld*; but he maintains that they nevertheless belong to

27. WELZEL, *Das deutsche Strafrecht*, 124-25 (9th ed. 1965); for details consult WELZEL, "Persönlichkeit und Schuld", 60 *ZStW*, 428 (1041).
28. *Schuld und Verantwortung im Strafrecht*, 124 (1948).
29. See Arthur KAUFMANN, *Das Schuldprinzip*, 74-87 (1961).
30. "Vorsatz und Schuld", 1950 *Monatsschrift für Deutsches Recht*, 646.
31. *Supra note* 29, at 181.
32. SAUER, *Allegemeine Strafrechtslehre*, 149 (1955).

Schuld in the structure of crime. He reasons out that precisely because they are the objects of the value-judgment "reproach," they should systematically be analysed within *Schuld*.[33] *Schuld*, in this context, consist of the mental connection of the actor to his act which provides the foundation for the reproach.[34] Most authors consider intention and negligence as elements of *Schuld (Schuldtatbestand)*.[35] Reproach is merely a quality of the *Schuld*, in same manner — as the finalistic theory has convincingly shown — that *Rechtswidrigkeit* is a quality of the wrong. As the wrong is composed of *Tatbestände*, which are subjective or objective, normative or descriptive, so also is *Schuld* composed of *Schuldtatbestände*, which include, aside from intention and negligence, the personal responsibility of the accused and the exigibility *(Zumutbarkeit)* of a lawful conduct.[36]

The finalistic theory objects that this theory disregards the implications of the discovery of the subjective elements (other than intention and negligence) which are admittedly *Tatbestände*. If the subjective element "intent to gain" is a *Tatbestand* of larceny, it is inconsistent to maintain that intention and negligence are not *Tatbestände*. Furthermore, even the adherents of this theory admit that the "intention to commit" the principal offence in attempts is a subjective *Tatbestand*. Why transform "intention" into an element of *Schuld* when the offence is completed ?[37] To the finalistic school, to assign intention and negligence to *Schuld* is systematically unsound because these are objects of evaluation and as such cannot be lumped together with their own evaluation.

C. Elements of Schuld.

Aside from the above controversy, the other elements of *Schuld* are fairly undisputed. The code states requirements before reproach can be formulated. The code proceeds from the general premise that every person who commits a wrong can be reproached. It then provides for exceptional circumstances where reproach is not possible. The first is founded on those circumstances which affect the intellectual and voluntary assumptions of conduct because of the personal condition of the actor. To be able to appreciate a wrong and decide for it assumes that the actor is a responsible actor. Responsibility (Zurechnungsfähigkeit) is a personal presupposition;

33. *Supra* note 30, at 647.
34. Schönke-Schröder, *Kommentar zum Strafgesetzbuch*, 357 (12th ed. 1965). Akin to this view is Baumann, *Strafrecht, Allgemainer Teil*, 330-31 (4d ed. 1964).
35. Engisch, *Untersuchugen über Vorsatz und Fahrlässigkeit*, 450 (1930); Arthur Kaufmann, *Das Schuldprinzip*, 182-87 (1961); Schmidhäuser, *Gesinnungsmerkmale im Strafrecht*, 152-54 (1958); Gallas, "Zum gegenwärtigen Stand der Lehre vom Verbrechen", 67 *ZStW*, 1, at 29, 44 (1955); Maihofer, "Zur Systematik der Fahrlässigkeitstat; Die sog. vier Massstäbe der Fahrlässigkeit als Grundelemente einer personalen Zurechnugslehre", 70 *ZStW*, 159, at 186.
36. Arthur Kaufmann, *Das Schuldprinzip*, 186 (1961); Bockelmann, *Strafrechtliche Untersuchungen*, 124 (1957).
37. Welzel, *Das deutsche Strafrecht*, 55 (9th ed. 1965). *Das neue Bild des Strafrechtssystems*, 9 (1961). See also Niese, *Finalität, Vorsatz und Fahrlässigkeit*, 21 (1951).

it may be impaired for biological or psychological reasons. Non-age, for instance, is a biological qualification which may impair either the intellectual or voluntary assumption of accountability. German law considers a child until it reaches the age of fourteen incapable of committing a crime.[38] A child above fourteen but below eighteen is conditionally responsible, that is, he is to be considered responsible only if, because of his especial moral and intellectual development, he is capable to appreciate the unlawful character of the particular conduct and to act in accordance with this appreciation.[39] Responsibility may also be impaired for reasons of mental disease, such as insanity, whether temporary or permanent. It is relevant only if it impairs the capacity of the actor to appreciate the unlawfulness of his conduct and to act in accordance with such appreciation.[40] In these cases, the decisive time is the perpetration of the act, not the completion of the crime.

Generally, a person who is responsible can be reproached for his conduct. To this general rule, the code again names instances in which reproach against a responsible actor cannot be made because of absence of exigibility *(Unzumutbarkeit)*. The code provides under sections 52 and 54 that an actor who is responsible, appreciates that his act is wrong, and capable of acting in accordance with this appreciation will be exempt from punishment if he has acted under necessity or duress.[41] These two sections of the code are called circumstances that exclude the *Schuld (Schuldausschliezungsgründe)*.

IV. — SOME SUBJECTIVE ELEMENTS AND THEIR TREATMENT IN GERMAN CRIMINAL LAW.

A. Subjektive Unrechtselemente and Gesinnungsmerkmale.

The subjective elements which we group under the name "specific intent" are roughly equivalent to the subjective elements of the wrong *(subjektive Unrechtselemente)* in the German theory. The subjective elements "intent to rape" or "intent to gain" are classified in German criminal-law theory not under *Schuld*; they belong to the *Tatbestand*.[42] For this reason, we need not be detained by this question.

A question of another sort is presented by the concepts such as "cruelty" or "treachery" in section 211, "unconscionably" in section 170d, "roughly" or "wilfully" in section 223b. These concepts indicate a strong blameworthy character of the actor's subjective orientation; they are known

38. *Jugendgerichtgesetz*, § 1 (III) (1953).
39. *Jugendgerichtgesetz*, § II in relation to § 3 (1953).
40. *StGB*, §§ 51, 55.
41. Although it is generally accepted that §§ 52 and 54 are applications of the principle of exigibility, it is still disputed if the absence of exigibility can be considered as a general exempting circumstance.
42. For a detailed study of these subjective elements, consult Sieverts, *Beiträge zur Lehre von den subjektiven Unrechtselemente im Strafrecht*, (1934).

as *"Gesinnungsmerkmale"* in German criminal law. Their classification in the structure of crime is still the subject of controversy. Some scholars believe that they belong to the *Tatbestand* because they merely typify the wrong which the actor perpetrates; [43] another group consigns these factors to the *Schuld*. [44] An increasing number want to differentiate the nature of these elements; those elements which merely provide a description of the subjective fact belong to the *Tatbestand*, whereas those which connote a special category of reproach are assigned to *Schuld*. [45]

B. Intention (Vorsatz).

The components of intention in German criminal law is no longer debated. Intention is generally defined as the knowledge *(Wissen)* and will *(Wollen)* to realize the material elements of the wrong. [46] The knowledge must be actual and existing at the time of the commission of the crime; it must circumscribe all facts and the causal relationship that the special part of the code includes in defining the crime charged. For this reason, section 59(I) of the code provides that an actor who, at the time of committing the crime, does not know of the existence of circumstances which belong to the *Tatbestand* or which will aggravate the penalty, should not be accountable for such unknown circumstances. There is no distinction between error or ignorance; their significance in the structure of intention is the same in that both can exclude the existence of intention. The will must be directed to the realization of the crime itself. Knowledge is insufficient to constitute intention. For instance, if *A* is holding a heavy piece of iron, and because of its weight he is forced to release it, he knows that if he lets it fall *B*, who is below, will die. He cannot, however, be said to have willed — and therefore intended — *B*'s death. [47]

I wish to deal with specific problems that may involve these postulates.

Who are capable of committing a crime intentionally? Can an irresponsible person or an insane intend to commit a crime? This old question poses actually the difficulty of the psychological theory of *Schuld*. If intention is *Schuld*, then only responsible persons are capable of forming an intention; conversely, persons acting under necessity or coercion are equated with irresponsible persons. This problem is still actual in Anglo-

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43. Mezger-Blei, *Strafrecht, Allegimeiner Teil, ein Studienbuch*, 88 (10th ed. 1963); Noll, *Übergesetzliche Rechtsfertigungsgründe*, 31, 41 (1955); Schweikert, *Die Wandlung der Tatbestandslehre seit Beling*, 138 (1957).
44. Schmidhäuser, *Gesinnungsmerkmale im Strafrecht*, 217 (1958); Würtenberger, *Die geistige Situation der deutschen Strafrechtswissenschaft*, 56 (1957).
45. Maurach, *Deutsches Strafrecht, Allegemeiner Teil*, 230-31 (3d ed. 1965); Welzel, *Das deutsche Strafrecht*, 73 (9th ed. 1965).
46. Baumann, *Strafrecht, Allgemeiner Teil*, 306-07 (2d ed. 1961); Maurach, *Deutsches Strafrecht, Allgemeiner Teil*, 221-23 (3d ed. 1965); Schönke-Schröder, *Kommentar zum Strafgesetzbuch*, 366 (11th ed. 1963); Welzel, *Das deutsche Strafrecht*, 39 (9th ed. 1965). For a detailed study consult Engisch, *Untersuchungen über Vorsatz und Fahrlässigkeit*, 65-87 (1930).
47. See Baumann, *op. cit. supra* note 46, at 307.

American criminal law, but in Germany it is a settled question. That even irresponsible persons are capable of forming intention is amply demonstrated by youthful offenders. A child below fourteen does not only know and will the realization of the proscribed harm; he sometimes appreciates that his act is unlawful. If he is not punished, it is because of the presumption of the law that he lacks that capacity for rational self-determination and not because he cannot form an intention. Furthermore, to say that irresponsible persons are incapable of forming intention would mean that the norms of criminal law are only binding to responsible persons; hence, irresponsible persons are acting lawfully. This opinion is difficult to defend in cases of accessoryship; besides, it would mean that no self-defence can be available against the conduct of irresponsible persons. This view confuses the capacity of a person to act with his responsibility to be held answerable for the act done.[48] Intention is not conditioned by the fact that the actor will be held responsible for his act; every person capable of acting is also capable of forming intention, and every human being is capable of acting.

What should be circumscribed in knowledge for intention to exist? As illustration of this problem, we may take a case parallel to *McLeod*. Section 113 of the code punishes assault against a public officer who is in the discharge of his duties. Scholarship and case law in Germany demand that the actor must know that the person assaulted is a public officer.[49] An exception is provided by section 56 in reference to crimes qualified by a more harmful consequence. It is sufficient if the harmful consequence has been negligently realized. For instance, in the case of abandonment of children or helpless persons, the penalty may be aggravated if death ensues as a result;[50] the actor need not know that the death will result, but negligence in arriving to the conclusion that no death will result suffices.[51]

The normative *Tatbestände*, being value-concepts, present another problem. For these circumstances, it is not enough that the actor has perceived the physical object; he has to impute also upon it some social or legal qualification. The actor must not only perceived a certain instrument, he must qualify the instrument as "weapon";[52] or that a thing is movable, he must know that it "belongs to another";[53] or that he destroyed a paper, he must qualify this paper as "document."[54] The difficulty is real not only because the legal order uses normative concepts in different senses

48. *Cf.* GALLAS, "Zum gegenwärtigen Stand der Lehre vom Verbrechen", 67 *ZStW*, 1, at 36. For a full discussion see Arthur KAUFMANN, *Das Unrechtsbewusstsein in der Schuldlehre des Strafrechts*, 90-91 (1949).
49. SCHÖNKE-SCHRÖDER, *Kommentar zum Strafgesetbuch*, 598 (11th ed. 1963).
50. *StGB*, § 221 III.
51. For other cases see *StGB* §§ 178, 224, 226, 229 II, 239 II, III, 251, 307, 309, 312, 314.
52. *StGB*, § 223.
53. *StGB*, § 242.
54. *StGB*, § 274.

in different branches of law but also because the technical meaning of these concepts in unknown to the public at large. Case law and scholarship require that the actor must appreciate the normative *Tatbestände* in that significance which at least parallels the layman's understanding.[55]

It is also required that the actor must know the causal connection between his act and the harm. In cases where there is a deviation of the actual causal relationship, German criminal law helps itself by examining whether the actual causal relationship and the object of the crime are "analogous" to the causal relationship and object of the crime in the actor's mind. If the analogy is wanting, mistake is considered significant for the benefit of the actor. In judging the analogy, the concept of adequate cause (that cause in fact which by objective judgment is considered a socially relevant cause) is availed. As illustration, we may take the case of *aberratio ictus* where various solutions are proposed. If *A*, intending to kill *B*, hits instead *C* who is standing behind *B*, what crime or crimes has *A* committed? One view accentuates the actual subjective element and holds *A* guilty of attempted murder[56] as to *B* and negligent homicide[57] as to *C*.[58] A construction quite similar to our transferred-malice doctrine is advanced by asserting that *A* is guilty of completed murder of *C*.[59] The proponents of the latter view will find an attempted offence and completed negligent offence if the object in the plan of the actor and the actual object of the crime are not analogous. Thus, if *A*, with intention to kill a dog, shot at it, but instead killed *B*, *A* is liable for attempted destruction of property[60] and negligent homicide.[61] The so-called "*dolus generalis*" involves the question we have encountered in *Meli*, *Church* and *Popoff*; the prevailing view agrees with our solution though based on a different reasoning.[62] It is argued that the deviation of the causal connection is insignificant and therefore should be disregarded. There is, in my view, a merit in separating the two acts, because the basis of liability in the majority's view is a fiction, a transferred-malice doctrine, and there is no such thing as insignificant deviation of causality. An attempted murder and a negligent homicide must be found.[63] The actor should be given the benefit of voluntary desistance applicable to attempts if, before

55. MEZGER, *Strafrecht, ein Lehrbuch*, 328 (1949) MAURACH, *Deutsches Strafrecht, Allgemeiner Teil*, 230 (3d ed. 1965), *BGHSt* 3, 248.
56. *StGB*, § 211.
57. *StGB*, § 222.
58. SCHÖNKE-SCHRÖDER, *Kommentar zum Strafgesetzbuch*, 369 (11th ed. 1963); MAURACH, *Deutsches Strafrecht, Allgemeiner Teil*, 240-41 (3d ed. 1965); H. MAYER, *Strafrecht, Allgemeiner Teil*, 248 (1953); *RGSt*, 2, 336; *RGSt*, 3, 384; *RGSt*, 58, 28.
59. LISZT-SCHMIDT, *Lehrbuch des deutschen Strafrechts*, 268 (26th ed. 1932); WELZEL, *Das deutsche Strafrecht*, 67 (9th ed. 1965).
60. *StGB* § 303.
61. *StGB* § 222.
62. BAUMANN, *Strafrecht, Allgemeiner Teil*, 309-310 (2d ed. 1961); LISZT-SCHMIDT, *op. cit. supra* note 59; WELZEL, *op. cit. supra* note 59, at 67-68; *RGSt*, 67, 258; *BGHSt*, 7, 329; *BGHSt*, 193.
63. Cf. MAURACH, *Deutsches Strafrecht, Allgemeiner Teil*, 242 (3d ed. 1965); ENGISCH, *Untersuchung über Vorsatz und Fahrlässigkeit*, 72 (1930).

the actual completion of the death, he should discover that the victim is not dead.

Less disputed and not considered as a deviation of causality is the case of *error in persona*. *A* decides to kill *B*, and waiting in a dark alley, instead killed *C* whom he believed to be *B*. *A* is unquestionably "intentionally killing a person," and he is guilty of murder. An inverse problem is also thinkable. For instance, *A* pulls a gun to kill *B*, but while pulling the gun, he accidentally pressed on the trigger, thereby killing *B*. The act is generally considered a completed crime, and this view is again supported on the theory of adequate causation.

C. NEGLIGENCE.

Negligent offences remain a step-child in doctrinal studies in Germany. Since the work of Engisch in 1930, no significant systematic work has been attempted.

Prevailing theory believes that negligence is composed of two basically inseparable elements, a psychological element and a normative element. Psychologically, negligence consists of the absence of the necessary intellectual and volitional orientation of the actor that will allow him to foresee and will the harmful consequence of his conduct. It is also normative because the failure to foresee and will the harmful consequence is only relevant if he could have foreseen and willed the realization of the consequence. We can divide the ideas contained in these statements into four issues.

1. *The Conduct Problem in Negligence.*

In intentional offences, the conduct is relatively simple because the subjective aspects of conduct coincides with the basic structure of any action. Knowledge and volition as basic components of action are also the basic elements of intention. In negligent offences, this is different, since the actor has not resolved to realize the harmful consequence at all. The controversy between the so-called causal theory of conduct *(kausale Handlungslehre)* and finalistic theory *(finale Handlungslehre)* touches this issue. The causal theory maintains that any willed behaviour that causes a harm is a criminal conduct; psychological orientation of the actor is irrelevant. The finalistic theory asserts that conduct is fundamentally purposive; any behaviour in which this element of purposiveness is wanting cannot be characterized as criminal conduct in relation to the actual consequence. This dispute is exemplified by the following case: A nurse gives an injection to anaesthesize the patient without knowing that the vial given by the doctor contains a fatal amount of morphium. The causal theory thinks that the nurse has effectively acted and her conduct must be examined as a negligent homicide. If she is to be acquitted at all, it is only because the *Schuld* is lacking. There was a willed behaviour causing

a harmful consequence; therefore her conduct is unlawful. For the finalistic theory, the examination need not go that far; the existence of an act should be denied. There is no final conduct to kill, but to inject an anaesthesia; the behaviour cannot be relevant in criminal law. It believes that intentional and negligent offences differ, not in the stage of *Schuld*, but already in the conduct, and therefore in the *Tatbestand*.

2. *The Omission Problem in Negligence.*

Negligence parallels omission in the sense that the actor is only negligent if he failed to observe the standard of care. The standard of care *(Sorgfalt)* in negligence is generally conceived as the mode of behaviour which is required in the circumstances. As such it varies from one situation to another. If the circumstances require that the actor should act, then the care consists of a positive act; if the fact-situation demands that the actor refrains from doing a particular act, then care appears as an omission. At one time, care was conceived to be purely internal, a sort of intellectual effort by the actor. But Engisch, after a study of court decisions, found that care is a mode of behaviour. For instance, one says that the actor is negligent because he failed to extinguish the fire, to remove the explosives, to stop his car. But in dangerous activities, the care appears to be an omission: the actor should not light a match, should not have driven through a red light.

The criterion to determine the standard of care is still disputed. One view believes that it is subjective; since the standard of care is the frame of reference in making the reproach in *Schuld*, only the personal circumstances of the actor are relevant. In this way no privilege is created for the especially gifted actors since correspondingly the behaviour they have to perform will vary with their personal capacity. Objection to this view is generally directed to its method of classifying care as an element of the *Schuld* rather than as element of the wrong. Another view, which is now absolutely abandonned, proceeds from a *"homunculus normalis,"* — an equivalent to our "reasonable man." It has been pointed out that the reasonable man is purely an imaginary concept which is impossible to concretize in relevant situations.

The majority view seeks to relativize the objectivity of the reasonable man. The relevant *professio* and *conditio* of the actor, rather than the ideal man, is the starting point of formulating the standard. The standard is deemed to have an intellectual aspect; this is supplied by the theory of adequate causation. All consequences which can be characterized as adequately caused are intellectually contained in the standard. The intellectual element has its limitation in the so-called permissible risk *(erlaubtes Risiko)*. The risk which society must permit, especially in those activities which are significant and indispensable, like chemical experiments, airplane flights, excavation, and others, cannot be negligent. Although the consequences are objectively foreseeable in these activities, the standard cannot extend to this activities otherwise life of society will be at a stand still.

3. *The Error Problem in Negligence.*

Negligence is also considered as the negative side of intention, hence a case of mistake or ignorance. The actor, had he known the true circumstances of the fact-situation, would have committed the offence intentionally or would not have acted at all. For this reason, negligence, as a case of error *(Irrtum)*, is covered by section 59 of the code.

One distinguishes two kinds of negligence in Germany, namely a conscious negligence *(bewusste Fahrlässigkeit)* and unconscious negligence *(unbewusste Fahrlässigkeit)*. In conscious negligence, the actor has foreseen the realization of the harm through his action but has relied on the possibility that it will not be realized. His omission of the standard of care has prevented him to appreciate that his reliance on the possibility that the consequence will not be realized was not justified. In unconscious negligence, the actor has not foreseen the realization of the harmful consequence at all due to his omission of the standard of care.

The distinction between intention and negligence is not yet clear, and I wish only to summarize the theories that have been advanced. I have the feeling that much discussion in this area is an empty verbal dispute. There are two possible techniques to draw the distinction: either from the viewpoint of knowledge or from the viewpoint of will, the two elements of intention. The probability theory *(Wahrscheinlichkeitstheorie)* proceeds from the viewpoint of knowledge and seeks to ascertain the distinction on the degree of probability of the realization of the consequence.[64] The acquiescence theory *(Einwilligungstheorie)* proceeds from the viewpoint of the will. The actor must not only know the high probability of realizing the consequence; he must also have an emotional acquiescence with the realization of the consequence itself. In other words, the accused must unequivocally declare by his act that he agrees with the realization of the harm.

4. *The Chance Problem.*

Because negligence can only arise if the actor has not resolved to realize the harm, the opinion that negligence contains an element of chance is generally undisputed. It is argued that it depends upon chance whether *A*, who drove through a red light, will cause an accident, upon chance whether a manslaughter or simply destruction of property will arise. For this reason, it has been pointed out that negligence liability proceeds from the old consequence-theory of liability *(Erfolgshaftung)*. *B*, who drove through a red light but causing no accident, is no less negligent than *A*, yet he is not liable for any offence except for violating the traffic regulation.

There are several reasons to attack these various theses of German criminal law, but we cannot deal with them within the compass of this paper.

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64. For summary, see ENGISCH, *op. cit. supra* note 63, at 179.

V. — CRIMINAL-LAW DEFENCES AND SCHULD.

A. Schuld and Mistake.

The German criminal-law theory of defences proceeds from the assumption that there is a wrong, that the conduct is *tatbestandsmässig*. The definition of crime in the special part of the code must be satisfied before the defences in the general part operate. For this reason, German criminal law does not know a defence of mistake of fact. If the offence can only be committed intentionally, the conduct is not of any penal interest if there is mistake of fact. If, however, the offence can be committed negligently, one must determine whether the act can be subsumed under any of the definitions of negligent offence. If it cannot be subsumed, again the act is not *tatbestandsmässig*, and therefore of no penal interest. The question of defence, therefore, can only arise if the act is one which the law defines as offence, that is, if it satisfies the *Tatbestände* of any crimes defined in the special part.

Many cases which we examine under mistake of law are examined in German law under mistake of the fact. This is especially true in the case of normative *Tatbestände*. This doctrine is a recent development; the early doctrine announced by the *Reichsgericht* (Imperial Supreme Court of Germany) is similar to our mistake-of-law doctrine in many respects. Based on the Roman maxim "*error iuris nocet*," [65] the *Reichsgericht* held that the criminal law requires for its application no more than knowledge of the circumstances that circumscribe the crime. Specifically, it does not demand that the actor knows the unlawfulness of his conduct. [66] In applying the maxim, the *Reichsgericht* attempted to distinguish between a case of mistake concerning a criminal-law provision and a mistake concerning a non-criminal-law provision. The first mistake, said the *Reichsgericht*, is irrelevant in criminal liability: *error iuris criminalis nocet;* the second mistake is relevant and may operate in favor of the accused. The second kind of mistake is analogous to a mistake of fact which may exclude intention according to section 59 of the code. [67]

The position of the *Reichsgericht* has been criticized by scholarship for several reasons. The distinction between criminal and non-criminal-law provision is theoretically unsound and arbitrary, hence extremely difficult to apply. The legal order is a unity, and a legal provision in one branch of law can be determinative in criminal law, as for instance the question of ownership or the official qualification of certain persons. For this reason, the *Reichsgericht* has never been able to say definitely whether a mistake on the legal qualification of a person as "public officer" refers to a mistake on a criminal or non-criminal-law provision. Secondly, the code uses in

65. *Digest*, 22.6. For a detailed study consult 3 Binding, *Die Normen und ihre Übertretung*, 30-79 (1918).
66. *RGSt*, 2, 269.
67. *RGSt*, 50, 335; *RGSt*, 54, 162; *RGSt*, 62, 41.

the definition of some crimes the term "unlawfully." If the view of the *Reichsgericht* is accepted, then the code is self-contradictory since unlawfulness is a general character of a crime.[68] Third, the view violates the fundamental principle of German criminal law that the basis of liability is guilt. A person who does not know his act is unlawful forms no decision to violate the norms of the legal order, and no reproach can be made against him if his mistake is honest. Because of these criticisms, the *Bundesgerichtshof* (Federal Supreme Court) and some lower courts have abandoned the position of the *Reichsgericht*.[69] Mistake of law as defence is unknown in German criminal law. The defence known does not involve mistake of law, but rather mistake on the unlawfulness of the act.

This insight posed, however, a new problem. The *Reichsgericht*, when it considered mistake on non-penal provision a defence, was actually analyzing the role of the normative *Tatbestände;* hence, it was correct to hold that intention can be excluded by applying section 59 of the code by analogy. The concept of "unlawfulness," however, is a general character of a crime. Does mistake on unlawfulness of the act exclude intention or does it exclude *Schuld*? Formulated differently, is an actor acting under mistake of unlawfulness committing a crime intentionally or negligently if his mistake is avoidable? The question is illustrated by the following cases: *A*, a foreigner (Swiss or Japanese) lives in a country where homosexuality is not punished. He comes to Germany and commits homosexual conduct, believing that in Germany, as in his home country, homosexuality is not a crime.[70] *A* steals a property from *B*, also a thief. *A* believes that to steal stolen property from a thief is no crime. Assuming that the mistakes in these cases are avoidable, should *A* be punished? If knowledge of unlawfulness is a part of intention, then *A* cannot be punished since negligent homosexuality and theft are not punishable. If knowledge of unlawfulness is considered not as an element of intention but an assumption in making the reproach in *Schuld*, then *A* can be punished for intentional homosexuality or theft. His mistake would have the effect only of alleviating the blameworthiness of his act, and therefore of mitigating his punishment.

These diametrically opposed solutions are supported by the so-called intention theory (*Vorsatztheorie*) and guilt theory (*Schuldtheorie*). The intention theory maintains that knowledge of unlawfulness is an element of intention because the essence of intention is the decision to violate the law. One should not separate *Tatbestand* from unlawfulness because the *Tatbestand* precisely circumscribes the unlawfulness of the conduct. Mistake of unlawfulness is therefore not different from mistake on *Tatbestand;* both are simply cases of negligence.[71] For the guilt theory, intention refers only

68. See e.g. *StGB* § 240.
69. See *StGB*, 2, 194.
70. See *StGB*, § 175.
71. The *Vorsatztheorie* has two schools of thought, depending as to the intensity of the knowledge required. The so-called *strenge Vorsatztheorie* demands actual knowledge of unlawfulness for intention. Absent actual knowledge, only negligence comes into

to the *Tatbestand;* one who kills another can kill intentionally without realizing that to kill another in this case is unlawful. One may take a property which he knows is a) movable, b) belonging to another, c) and with intent to gain, yet he may not know that this act is unlawful. *Tatbestand* and *Rechtswidrigkeit* (unlawfulness) are therefore distinguishable and separable concepts. *A*, in our case, intentionally realized the *Tatbestände* of the offence and the effect of his mistake is merely to mitigate the blameworthiness of his conduct.

B. Schuld and Necessity.

In German criminal-law theory, a justified act is a lawful act because the state provides a legal permission to perpetrate the act which is ordinarily unlawful. An excused act, on the other hand, is an unlawful act, but for which the actor cannot be reproached for doing. In excuse, the *Schuld* is excluded by the excusing circumstance; in justification, the *Rechtswidrigkeit* or unlawfulness is set aside by the operation of a permissive norm. Before 1927, all necessity cases were classified as justifying circumstances, with the same legal character as self-defence for example.[72] Thus, the cases of defensive necessity (section 228) and aggressive necessity (section 904) of the German Civil Code were theoretically equated with the criminal-law cases of necessity under sections 52 and 54 of the code. The like treatment of civil and criminal law necessity, however, presented a problem because of the limitations imposed by sections 52 and 54 of the code. The excuse from punishment is extended to the actor only if the danger concerns life or limb of the actor himself or certain relatives. If the danger created refers not to life or limb or against other persons, absurd consequences emerge compelling the extention of the benefit of excuse beyond those contemplated by the code. As a further refinement in the study of *Schuld*, it was later discovered that section 54 is a perfect example for the exclusion of the *Schuld* as reproach.[73] It was clear that the basis of section 54 of the code was the absence of exigibility; the actor could not have acted otherwise

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question. See e.g. Schönke-Schröder, *Kommentar zum Strafgesetzbuch*, 392-00 (11th ed. 1963); Schröder, "Der Irrtum über Rechtfertigungsgründe nach dem BGH", 1953 *Monatsschrift für Deutsches Recht*, 70; "Die Irrtumsrechtsprechung des BGH", 65 *ZStW*, 178; Lang-Hinrichsen, "Zur Frage des Unrechtsbewusstseins", 65 *ZStW*, 332; "Tatbestandslehre und Verbotsirrtum, 1952 *Juristische Rundschau*, 302, 356; "Die irrtumliche Annahme eines Rechtfertigungsgrundes in der Rechtsprechung des BGH", 1953 *Juristenzeitung*, 362. The *eingeschränkte Vorsatztheorie* does not demand actual knowledge; potential knowledge suffices. It is enough that the actor could have known that his act is unlawful. See Mezger, *Moderne Wege der Strafrechtsdogmatik*, 43 (1950); "Rechtsirrtum und Rechtsblindheit", *Probleme der Strafrechtserneurung, Festschrift für Kohlrausch*, 180 (1944); "Unrechtbewusstsein im Strafrecht", 1951 *Neue juristische Wochenschrift*, 500.

72. This is called the *Einheitstheorie*. For proponents of this view, see e.g. 2 v. Hippel, *Deutsches Strafrecht*, 231 (1930); H. Mayer, *Deutsches Strafrecht, Allgemeiner Teil*, 191 (1953); Welzel, *Das deutsche Strafrecht in seinem Grundzügen*, 40 (1947).

73. Goldschmidt, "Der Notstand, ein Schuldproblem", 1913 *Österreichische Zeitschrift für Strafrecht*, 129, 224; Freudenthal, *Schuld und Vorwurf*, (1922).

under the circumstances. On the other hand, the civil-law necessity concerns a collision of legal values in which the legal order actually decides for the preservation of a greater value and the sacrifice of the lesser. The psychological compulsion that is the characteristic of criminal-law necessity is secondary. From this insight, the criminal-law necessity developed as excuse, whereas the civil-law necessity remained as justification.[74]

For the defence of necessity to exist, the person under necessity must not be under an obligation to suffer the danger to his life or limb. For instance, a seaman, fireman, constable or soldier cannot claim necessity as a defence; the dangers upon their life or limb when dischanging cannot be the basis of defence of necessity. Further, the danger must be present, rather than merely speculative. It is considered present when, according to human experience, the natural development of the situation will result to the harmful consequence unless the action to avoid the necessity is immediately resorted to.[75] Under section 54, the creation of necessity must not be attributed to the fault of the person under necessity. For instance, *A* commits a crime, and because of the danger of being trapped by the authorities, he commits the act to save his life. Lastly, the necessity must not be possible of avoidance except by the act done by the actor, and that the act must be done purposely to save the person under necessity. Putative necessity, that is the honest but erroneous belief of the presence of necessity, is treated in same manner as actual necessity. The reason is, the psychological compulsion in putative necessity is as real and present in the actor's mind as in actual necessity.

C. SCHULD AND COERCION.

Coercion under section 52 of the code has the same legal character as necessity under section 54 of the code. Coercion is, in other words, an especial form of psychological necessity, the general nature of which is regulated by section 54. The difference refers only to the manner necessity is created. Under section 52, the psychological compulsion is created by the irresistible force or threat of another person, whereas under section 54 the psychological compulsion is created by a situation, traceable to a natural or human intervention. For this reason, the Draft Penal Code 1962 has merged these defences in a single provision.[76] Another difference, which scholarship developed, is that under section 54 the situation creating the necessity must not be attributed to the fault of the person under necessity, whereas under section 52 this fault is irrelevant. For instance, *A* threatens

74. This is called *Differenzierungstheorie* and is now the majority view. See e.g. HENKEL, *Der Notstand nach gegenwärtigem und zukunftigem Recht* (1932); MEZGER, *Strafrecht, ein Lehrbuch*, 369 (1949); SCHÖNKE-SCHRÖDER, *Kommentar zum Strafgesetzbuch*, 357 (11th ed. 1963); WELZEL, *Das deutsche Strafrecht*, 160-61 (9th ed. 1965).

75. Cf. *RGSt*, 66, 225, MAURACH, *Deutsches Strafrecht, Allgemeiner Teil*, 333 (3d ed. 1965).

76. *Entwurf eines Strafgesetzbuch mit Begrundung 1962*, § 40.

to commit suicide by jumping out of the window in *B*'s eleventh floor apartment, and *C*, *A*'s father, breaks his way forcibly into *B*'s apartment to prevent the suicide. Of course, the doctrine of *actio libera in causa* might apply in such situation. *A*, for example, steals *B*'s clothes and, being pursued by *B*, deposits the clothes in *C*'s car locking it. If after apprehension, *B* applies irresistible force on *A* to recover the clothes, and in doing so *A* breaks the window of the car, *A* cannot defend himself against the charge of destruction of property by pleading coercion. He knows that the destruction of the car might be necessary to recover *B*'s clothes when he deposited them in the car.

VI. — SCHULD AND STRICT LIABILITY.

The development of the so-called *Verwaltungsstrafrecht*, the administrative and petty regulations for which our courts are inclined to impose strict liability, was originally motivated by procedural convenience. It was felt that the courts should be relieved from the mounting pressure of these "trifles." The administrative process was merely intended as substitute for judicial proceedings. The separation of *Verwaltungsstrafrecht* from *Kriminalstrafrecht* was not necessitated by any qualitative distinction. Indeed, it was precisely in mistake of unlawfulness in *Verwaltungsstrafrecht* that the position of the *Reichsgricht* was found most vulnerable to attack that it violates the guilt axiom of criminal liability.

After the separation has become a part of the German criminal law, attempts to provide qualitative distinction have been pursued with more serious intensity. One saw the distinction on the nature of the injury that is involved. Already in Fauerbach's Penal Code of Bavaria of 1813, it was believed that administrative crimes do not represent any injury to the rights of individuals or the state, but to the totality of the social order and its security. From distinction, the other German states have issued separate police criminal laws. But this effort was not wholly successful; when the present code of Germany was adopted in 1851 and 1871 some of the admittedly administrative offences were included.[77] Nevertheless, efforts to provide a distinction has not relented; the old distinction was refined. Some scholars maintain that the challenge to the legal values in administrative offences are not concrete nor concretizable; it is simply a disobedience to a time and situation conditioned command which intends to protect the efficiency and security of the state. In the realm of *Schuld*, another distinction was advanced. The reproach in traditional crimes signifies a social-ethical disvalue-judgment; in administrative crimes, the reproach is simply directed to the failure to obey an order of the state without necessarily implying an ethical disvalue-judgment.[78] These distinctions are illusory and irrelevant. Any crime, whether administrative or traditional,

77. See e.g. *StGB*, §§ 360-70.
78. Erik Wolf, "Die Stellung der Verwaltungsdelikte im Strafrechtssystem, 2 *Festgabe für Frank*, 516 (1930); Goldschmidt, *Das Verwaltungsstrafrecht* (1902).

to commit suicide by jumping out of the window in *B*'s eleventh floor apartment, and *C*, *A*'s father, breaks his way forcibly into *B*'s apartment to prevent the suicide. Of course, the doctrine of *actio libera in causa* might apply in such situation. *A*, for example, steals *B*'s clothes and, being pursued by *B*, deposits the clothes in *C*'s car locking it. If after apprehension, *B* applies irresistible force on *A* to recover the clothes, and in doing so *A* breaks the window of the car, *A* cannot defend himself against the charge of destruction of property by pleading coercion. He knows that the destruction of the car might be necessary to recover *B*'s clothes when he deposited them in the car.

VI. — SCHULD AND STRICT LIABILITY.

The development of the so-called *Verwaltungsstrafrecht*, the administrative and petty regulations for which our courts are inclined to impose strict liability, was originally motivated by procedural convenience. It was felt that the courts should be relieved from the mounting pressure of these "trifles." The administrative process was merely intended as substitute for judicial proceedings. The separation of *Verwaltungsstrafrecht* from *Kriminalstrafrecht* was not necessitated by any qualitative distinction. Indeed, it was precisely in mistake of unlawfulness in *Verwaltungsstrafrecht* that the position of the *Reichsgricht* was found most vulnerable to attack that it violates the guilt axiom of criminal liability.

After the separation has become a part of the German criminal law, attempts to provide qualitative distinction have been pursued with more serious intensity. One saw the distinction on the nature of the injury that is involved. Already in Fauerbach's Penal Code of Bavaria of 1813, it was believed that administrative crimes do not represent any injury to the rights of individuals or the state, but to the totality of the social order and its security. From distinction, the other German states have issued separate police criminal laws. But this effort was not wholly successful; when the present code of Germany was adopted in 1851 and 1871 some of the admittedly administrative offences were included.[77] Nevertheless, efforts to provide a distinction has not relented; the old distinction was refined. Some scholars maintain that the challenge to the legal values in administrative offences are not concrete nor concretizable; it is simply a disobedience to a time and situation conditioned command which intends to protect the efficiency and security of the state. In the realm of *Schuld*, another distinction was advanced. The reproach in traditional crimes signifies a social-ethical disvalue-judgment; in administrative crimes, the reproach is simply directed to the failure to obey an order of the state without necessarily implying an ethical disvalue-judgment.[78] These distinctions are illusory and irrelevant. Any crime, whether administrative or traditional,

77. See e.g. *StGB*, §§ 360-70.
78. Erik Wolf, "Die Stellung der Verwaltungsdelikte im Strafrechtssystem, 2 *Festgabe für Frank*, 516 (1930); Goldschmidt, *Das Verwaltungsstrafrecht* (1902).

represents a challenge to the legal values, and reproach is always a social-ethical disvalue-judgment. The criminal law is a positive ethics of society, and although it usually reflects accepted social ethical notions, it is also legitimate for criminal law, as a pedagogical instrument, to establish new ethical notions of behaviour. Administrative crimes largely represent the desire of the state to develop a valid ethical insight in society which may seem novel and disconnected in the minds of many men. But this does not mean that society does not subscribe to this ethics; the law itself represents the subscription of the state. For this reason, any reproach grounded on the violation of these laws must also be social-ethical judgment. [79]

In conclusion, it must be underlined that our theory of strict liability is unknown in Germany; it cannot be equated with *Verwaltungsstrafrecht*. [80]

79. Cf. BAUMANN, *Strafrecht, Allgemeiner Teil*, 28 (2d ed. 1961); H. MAYER, *Strafrecht, Allgemeiner Teil*, 47 (1953); WELZEL, "Der Verbotsirrtum und Nebenstrafrecht", 1956 *Juristenzeitung*, 238.

80. See BENAVINCE, "The Ethical Foundation of Criminal Liability", 33 *Fordham L. Rev.*, 30, at n.154 (1964).