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On The Concept of Causality in the Current Criminal Law

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1 Introduction: Law and Psychology

The question of the connection between law and psychology can be answered in the most varied of ways. It can be approached from the point of view that the existence of the law presupposes specific psychological makeups and human relationships in whose context the originated, and that it is undoubtedly a task of psychology to explain the psychological pre-conditions that inform the origin of the law at all. It should also be noted that, in addition to the pre-conditions for law itself, there are also specific psychological pre-conditions for particular legal systems. Moral values, prejudices, and religious beliefs would be examples of such particular psychological conditions. The task of psychology is therefore also to explain those psychological conditions present in the foundation of each particular legal system.

We could also begin from an entirely different standpoint and take a particular legal system as a given. Thus understood, the law has a bearing on human beings and to human relations, and it is to those that judges apply the law. In criminal law, for example, the judge must condemn and punish human beings. It is up to him thereby to establish the extent of the punishment they deserve, in connection with possible extenuating circumstances. In order to do this, the judge must be able to evaluate people, and this presupposes a familiarity with the labyrinth of human tendencies, motives, and passions. Furthermore, the judge must know how to select the appropriate type of punishment. He must consider whether a fine or imprisonment would better serve the purpose of punishing a particular individual. Or to look at it from another, related, point of view, in order to establish the guilt of the accused, the judge depends primarily on the testimony of other people. It is his task to evaluate the quality of their statements. He must be informed about how to handlemisleading memory, assimilations, and other factors that can reduce the quality of a testimony. He is further in need of the very same proficiency when a particular witness on the witness stand deliberately gives false testimony, thereby committing perjury. Here it important to be aware of how much we unconsciously alter our accounts of what we perceive, and of how many objectively false explanations the witness provides provides without realizing it. So much else comes into play, all of which requires that the judge, in applying the law, be familiar with certain psychological rules and patternsif he is to fulfill his duty as a judge. We need not mention that it is only psychology, which has to do precisely wit hpsychological patterns and regularities, that can provide him with this familiarity.

But we shall not discuss these issues any further. Here we are not interested in figuring out the ways in which psychological investigations must be applied in order, on the one hand, to explain theoretically the origin of the law in general and the individual legal systems in particular, and, on the other, to make practical application of legal determinations [Rechtsbestimmungen] possible. Instead we have something quite different in mind. We aim to establish whether and in what way the legal system is related to the theory of law, which forms the precondition for all of the abovementioned investigations. Whether I want to explain the origin of a legal system or to apply it practically, a theoretical knowledge of the law is always a necessary prerequisite. This prerequisite, however, is not as easily fulfilled as one might hope. For, indeed, a legal system is not immediately given to us in the same sense that a color or sound is given to us. Rather, all that we have before us as given are signs, symbols for what we really mean when we speak of legal systems. And these symbols are in and of themselves not always clear, but rather are often ambiguous in relation to what they symbolize. Their interpretation requires a special theoretical enterprise, namely the enterprise that makes up a large part of that which we wish to term 'jurisprudence'. The task, or at least a main task, of jurisprudence is the explanation of signs in their various arrangements, and specifically those arrangements of signs that correspond to the legal system. Without clarifying our reasons here, instead of ‘jurisprudence’ we will use the term the interpretive theory of law. Now we shall briefly discussthe connections between psychology and the interpretative theory of law. [FN1, p.3: The fact that our examination is only interested in considering criminal law does not alter the validity of our considerations for other juristic disciplines.]

When we say that the task of the interpretive theory of law is to explain sign relations, it is then presumed that individual signs are explained as well. Signs are given as written or printed words. Yet this need not always be the case. This is not the case when a legal system to be accounted for is not written down, or when its written code is lost. We shall not consider such cases, but shall concern ourselves only with the current law, thus with law which is written down or printed. What is given in the form of written or printed signs is what we will interpret [FN1: We herein disregard common law. However this also can only be established – if in other, mostly complicated ways – through

signs.]. This, however, needs elaboration. Signs of this sort can be, as such, ambiguous. If the jurist only considered the signs as they were given for him, then, like a lexicographer does, he would be looking for multiple meanings for a particular sign. This is, of course, not so. The jurist considers the signs not merely as symbols as such; rather, he understands the signs as something very determinate, created by very specific people whom he tends to call "legislators" or "law-makers", in order to express not this and that, but something very specific. Thus, the sign, which has manifold inherent meanings, actually only means one thing which is determined by the legislator. The task of the jurist is to lay out this one determinate meaning. It is the task of the legal theory of method to provide the ways and means by which the jurist achieves his goal of investigating that one determinate meaning, although here we shall be concerned only with the goal itself. The goal is, however, not to gain some new truth; rather, it is merely to reproduce to reproduce one that has already been established. In this respect Stammler's view is enlightening: [FN2, p 3: The theory of the correct law, page 4.] that which Boeckh called the concept-determination of philology, 'to re-cognize the already cognized', holds for the law.

However, we cannot assert this sentence quite so unconditionally. The knowledge of the law researcher can be, and often is, the very same as that of the legislator. However, this knowledge need not be the same and indeed, sometimes it is not. We can only consider this distinction, which is wholly significant, very briefly, but we must consider it if we are to achieve the goal of our considerations.

In ordinary life we employ utterances and mean something determinate thereby. We express something by these utterances, comparing them with other utterances and so forth. Thus, for example, if we characterize something as an act of wanting [Wollen], we say of it that it is weak or strong, and we distinguish it from other, less unequivocal, kinds of striving, perhaps from an instance of wishing.

But it is not thereby clear that we know how the one differs from the other. We employ a simple test: every person will be fully capable of distinguishing between these two kinds of mental capacitieswe are referring to; he will be capable of distinguishing unequivocally an act of wanting from the act of wishing. But it is usually in vain to ask what it is precisely that distinguishes the one from the other; which features can be attributed to the one in contrast to the other. The contrast that concerns us here is characterized accordingly: the meaning of an object [Gegenstand] – the striking features [Ins-Auge-Fassen] that make it possible to compare one object with another – does not contain essentially any knowledge about the peculiarities of that object.

It is up to the interpretive theory of law, says Stammler, to obtain knowledge about the already known. However, as we have pointed out, the act of knowing can be different at different times. We explore this point further: the legislator speaks of all sorts of things [allerlei], he means all sorts of things, yet he does not need to be conscious about the distinct traits of these things of which he speaks. The theory of law 'knows' [erkennt], on the other hand, in the sense that it makes visible the essential traits distinguishing that which the legislator meant. The task of the theory of law is to know that which what was perhaps known, perhaps was only meant. In this way the work of the jurist transcends that of the legislator in this way. In establishing the essential traits of what the legislator meant, and in separating it from other meanings, especially related ones, the jurist simultaneously determines it and [weist ihm für immer seine Stellung an, p. 4, l 15] We began from the premise that the jurist first of all has to interpret individual signs, that it is by means of signs that he arrives at what is meant. We now see that this grasping at meaning is not a blind grasping. Rather it is an insightful grasping, or understanding, of the signified object that includes an awareness of its distinctive traits. Now, each specific in the legal system cannot be interpreted in this way; rather, only those that are relevant to the jurist's goal. It cannot be our task here to establish what sort of meanings these are. Nevertheless, for our purpose, a broad characterization is required and sufficient.

What in fact dosystems of criminal law consist in? Obviously, rules for punishment; that is, information about the special conditions for punishment. It is therefore the primary task of the jurist doing the interpretation to establish all that may be applied as such a condition for punishment according to the current law. Conditions for punishment can themselves be divided into (i) outcomes (i.e., bodily injury), (ii) actions (i.e., the movement of an arm), (iii) psychological state of the perpetrator (i.e., intention [Vorsatz] and (iv) the causal connections between these (i.e., a causal connection between an action and an outcome). We can then divide the outcomes into (i) physical (such as bodily injury) and psychological (i.e., personal offence). "Psychological" refers not only to conscious mental phenomena [Bewusstseinerscheinungen], but also to the phenomena underlying them [Bewußtseinserscheinigungen zugrunde Gelegte]. Examples of psychological states that are punishable in a perpetrator are: intention, negligence, deliberation, intent, malice, wilfulness, awareness of the law, infamy, sanity, and so forth. It is the same in the case of outcomes: indignation, insult, humiliation, and so forth. The jurist must, as follows from what we have considered so far, "establish" that some or any of these conditions apply. That is, he must grasp the particular traits of a psychological state; he must state its essential characteristics. Yet such psychological investigation is obviously a task of psychology. We have thus uncovered a connection between psychology and the interpretive theory of law: a jurist who intends to

describe psychological conditions unambiguously needs psychology or, to be more precise, he is a psychologist insofar as he does this.

Above we avoided the question of what methods the jurist uses of in order to establish the meaning of signs and how they are related to other signs. We must now briefly discuss one of these methods. We do not here refer to the cases where meaning results unambiguously from the signs themselves, or at least from their connections with already established signs; instead what we have in mind are those cases – which are not even infrequent – in which the signified meaning does not clearly appear from the signs themselves, in which doubt prevails about the words' true meaning, or in which the signs vaguely refer to a meaning that seems unusual and self-contradictory. It is part of the nature of the interpretive theory of law that certain results cannot be achieved, and that we must rest content with saying: it is probably so; or even: it is possibly so but possibly different. In the cases where the signs themselves leave their interpretation up to us, there are possibilities for obtaining results that are fairly trustworthy. We shall consider here one of these possibilities.

We have already emphasized that the jurist does not consider the signs and the arrangement of signs as such; rather, he considers them as set in place by a figure generally referred to as the legislator. Accordingly, the meanings and the connections between them are not given "as such"; rather, they are linked to the figure of the legislator; they are his particular meanings and his acts of will. We shall now consider this fact further. The consequences of this link go in two directions. For instance, to draw right away on a concrete example, it can seem doubtful whether the legislator, when using a sign or an arrangement of signs, has meant what is usually expressed by them; or whether he had another meaning in mind, which seems in some way as if it must result from the entire sign-sequence. Thus, whenthe jurist bears in mind that it is here a matter of an act of meaning on the part of a figure, then he will perhaps be able to discover find psychological patterns that make it explainable that this figure has meant exactly such-and-such with a sign that is normally interpreted differently. Or that the legislator signified in exactly this way a meaning that is generally expressed differently. The jurist will perhaps discover, following general rules of psychology, that confusion could easily occur here. And he can thereby make the second of the two possible interpretations, which at first sight seemed unlikely, understandable and perhaps show it to be the more probable.

Secondly, there are the cases where what is signified by the legislator seems unlikely from the beginning. Here, it is not, as it was before, the manner of expression which seems unusual, but the meaning itself. The initial consideration that we are dealing with a particular figure's acts of judgment and of will will agaiin uncover patterns of human nature which will enable us to understand them better – perhaps even more so than in the previous case. A legal provision[Bestimmung] that from the very beginning appeared absurd would, of course, be as absurd as ever, but will at least be explained psychologically. Whereas before it seemed unlikely that the legislator could even have menat such and such, it now seems probable. Both – cases that of a problematic mode of expression and that of a problematic meaning – become more intelligible when certain psychological patterns are explained. The opposite is of course also possible: the jurist's awareness of certain psychological patterns may make a problematic expression or meaning appear even more unintelligible.

The fact that meaning is for the jurist linked to the legislator has an additional kind of consequence. Until now we have only spoken of a figure, but we shall not let it stand at that. The more successful the jurist is in establishing the provisions of the legal system, the more individuated the legislator becomes to him. The legislator goes from being a figure to being a figure with certain particular ways of expressing himself, with these or those particular opinions and inclinations. The clearer and more explicit the particular nature of a legislator becomes, the more fruitful our method proves to be. For it is then no longer a matter of psychological rules, but of the rules of a particular individual. And such rules, of course, can be determined both more subtly and more decisively than can general psychological rules. Problematic expressions and meanings can be determined as intelligible or unintelligible more frequently and more precisely through knowledge about the nature of the legislator.

We can no longer concern ourselves with further specifications of this method that of course can and must be examined. We shall only say that this method is not entirely novel but that it is frequently employed, though certainly unconsciously and in different naïve versions. To give a simple example, when weinfer from the fact that the legislator has somewhere expressed a determinate intention that he in another place – where the same circumstances are given – does not intend the same thing with an obscure arrangement of signs, then our inference is based upon the psychological rule that: when the same circumstances are given, the intention is the same. And this rule is itself merely a special case of the general psychological maxim that can be called 'the tendency of faithfulness toward oneself'. [FN 1, p 7: Cf. Lipps, Basic Ethical Questions, p. 134ff.] If we know that the legislator has remained consistent in other cases, and if we can determine with still greater certainty that under the same circumstances he would maintain the same intention, then we have established the rule that: the more often the same mental phenomena take place under the same circumstances, the more effective this tendency will prove to be.

We have thereby identified a second connection between psychology and the interpretive theory of law: the jurist is a psychologist in that he determines through psychological patterns the legislator's meanings and modes of expressionas either likely or unlikely. Two fundamental differences appear simultaneously between this second connection between psychology and the theory of law on the one hand, and the one previously mentioned on the other. The previously discussed connection was grounded in relation the nature of legal theory: the jurist must unambiguously determine particularities of the legislator, including his psychological ones. Here this connection is a direct result of the means by which the jurist accomplishes this task: in order to determine what the legislator means, the jurist must make use of psychologicalpatterns. Moreover, in the first case it was a matter of describing psychological characteristics; in the other a matter of seeking out psychological patterns. The one case is handled by the jurist in a descriptive way; the other using a causal-explanatory psychology. [FN2, p. 7: Cf. on this contrast Pfänder, Introduction to Psychology, 1904, page 181ff]

This outline of the connection between psychology and the tentative theory of law is not intended to be exhaustive;; rather, we would like to underline the key points, in which the following considerations are described. These considerations shall at the same time serve as a clarification and justification for that which above remains recondite and doubtful.

A. Three Essential Solutions to these Problems, employed until now

2 The Theory of the Equality of Conditions

We understand by criminal law a sum of institutional provisions, through which particular requisites for punishment can be linked as consequences. We shall call these requisites, which follow particular justifications, conditions for punishment. A condition for punishment entails that the certain content of a crime (outcome) is brought about by the actions [FN 1, p8: By 'action' we are referring in this context only to those of the agents' bodily movements that – corresponding to his intentions or his negligence – bring about the unlawful outcome.] of a sane human being [compos mentis]. Thus, the precondition for the death sentence is that the death of one human being was caused by an action. However, the causing [Verursachung] of a given (unlawful) outcome is never the only condition for punishment. To return to our example: a human being can bring about the death of another human being through his action without being sentenced to death, and sometimes even without being punished at all. He is a murderer in the sense of our criminal law only if he brought about the outcome intentionally [vors„tzlich] and with deliberation [šberlegung]. In addition to the causing there must also be intention and deliberation, or premeditation.

If, in addition to causing a crime, there is intent without deliberation, then we speak of 'manslaughter' [Totschlag]. The conditions for punishment for manslaughter are thus causing someone's death, as well as intent without deliberation. Finally, intent may be completely lacking. That is, an outcome may be caused, but this causing may be unintentional. There are two ways in which this is possible: either the perpetrator failed to pay the legally required 'attention', in which case he is blamed for negligence; or, this is not the case. If the perpetrator has brought about the death of another person, but not through negligence, then he is not punished at all. From this we can infer the following: if the situation involves the death of another person, then it is not sufficient that a given outcome was brought about by an action of a sane human being; rather, additional conditions for punishment are that the action must be either intentional with deliberation, intentional without deliberation or negligent, or what we could refer to as liable. Similarly, we may express this more generally: the conditions for punishment are the always the causing of an outcome and culpability [Schuld]. Culpability is always required, although not this culpability need not always have to do with the unlawfully caused outcome. . Culpability is sufficient in some cases, where only one cause is responsible for a given outcome (and where this cause always, in and of itself, results in an illegal outcome). To return to our example: suppose again that one person has brought about the death of another. The perpetrator's intention was only to injure his victim, but instead the "desired" outcome caused the victim's death. In this case our law determines: 'If the death of the injured person is caused by (intentional) injury, then the sentence is no less than three years' imprisonment.' This is obviously a new and much more peculiar case. The outcome is caused, but a milder outcome was intended than the one which occurred. The law declares a stronger punishment, although the stronger outcome was neither intended nor brought about by negligence. This is called 'the crime qualified by the outcome' [durch den Erfolg qualifizierten Delikten]. It is now understandable for us to say: the condition for punishment is always a the causing of an unlawful outcome, on the one hand, and responsibility for the [Ursache] of the outcome, on the other.

The task of the theory of the criminal law insofar as it is a hermeneutic theory is to spell out clearly what conditions for punishment mean in our law. As far as we can see, there are no deep disagreements about what we understand by culpability and its various forms. It is not as if the concept of 'purpose' contained no difficult problems. Yet more elaborate investigations – which, as was pointed out in the introduction, must belong to the field of psychology – are entirely lacking. Likewise we shall here be concerned with the forms of culpability only insofar as they are required for the second question, that of causing a crime.. Though there may be no noteworthy disagreements about the nature of

culpability, what is in fact meant by the causing of an outcome though an action, especially through another outcome, is part of what is much debated about criminal law itself. The investigations of this go very far back and are of course much older than our current law.

The theory which would represent the current common law in Germany, according to which an action is to be called a cause which necessarily results in an outcome, is antiquated and in every respect recognized as untenable. The outcome is caused with 'necessity' only from the sum of its conditions. Strictly speaking, only the complete complex of conditions can be called the cause of an event. But what we understand in the strictest sense by cause is to us entirely irrelevant. Our problem is to establish what criminal law means when it says that an outcome must be caused by an action. What can then be said is this: it cannot mean that an outcome must necessarily be brought about by an action, for the simple reason that an action will never be a cause in this sense. Rather, in order for the outcome to result necessarily, there must be a series of additional causal factors. An action alone never brings about an unlawful outcome necessarily, but an action can be necessary for the achievement of a certain outcome. To call such an action 'a single cause' [Einzelursache] or simply a 'cause', is in agreement with ordinary speech. It is also assumed that, when criminal law calls an action a 'cause', it means nothing more than that it is one of the many conditions that together bring about an outcome; that this action is something such that if it does not occur, then neither can the outcome. Such considerations lead to the following principle: causal connection between action and outcome in the sense of criminal law exists when an action is a condition for the outcome; not this or that particular condition, but simply a condition. All conditions, then, are equal in relation to the outcome.

This view, already represented in Berner, Hälschner, as well as Köstlin, was first established by von Buri [FN 1 p. 10: Among other writings, see especially On Causation and its Liability, 1873.] and can be considered to be the currently dominant view [FN 2 p. 10: Cf Birkmeyer, On the Concept of Causality and the Causal Connection in Criminal Law, 1885, page 12.] among the three main solutions to the causal problem. We find the clearest presentation of this view and, since the 10th edition of his textbook, the most consequential, in von Liszt [FN 3, p 10: von Liszt, Textbook of German Criminal Law, 13th Edition, 1903.]. In what follows, we shall present his theory and attempt to test it [FN 4, p 10: In the following discussion of the three ways to solve the problem of causation, perfection is not our aim; rather we are mainly interested in theories for our own treatment of the problem.].

Presentation

Causal connection, says von Liszt, 'exists when an outcome would not have occurred without bodily movement (i.e., an action), thus when the outcomecould not occur if the bodily movement does not occur.[…] If the link between bodily movement and outcome is necessary in this way, then we call the bodily movement the cause of the outcome, and the outcome the effect of the bodily movement…. t iIt is thereby taken for granted that according to the criminalistic view of causing and instigation, , the cause and the condition merge together. More precisely, where the instigation is always sufficient, its causing (for which the activity of the will in itself would bring about nothing) is never required. Each condition of an outcome is equal in value to each other condition. The cause that contributes only partially, too, is a cause according to the law. The notion of "cause" is not excluded from the simultaneous or sequential occurrence of contributory causes.'

Two important dicta follow directly from this concept analysis:

1. 'The outcome can be traced back to a bodily movement as its cause when the outcome would not have occurred outside of the particular circumstances under which the action was carried out.'2. 'The outcome can then also be traced back to the bodily movement as a cause, when the outcome would not have occurred without the simultaneous or successive interplay of other human actions.'

Causal connection then is excluded only 'when, had the bodily movement not occurred, the occurrence of the outcome would not have changed. This holds true especially when the outcome upon which the act of will intention was directed, would have been brought about by a new, independently caused causal series; that is to say, not caused by the act of will.'

However, our current law makes an exception to this rule: 'The free and intentional action of the sane always means, according to the law, the occurrence of a new independent causal series; it thereby excludes the assumption that there is a causal connection between the first act of will and the given outcome.' If, for example, A prompts B to murder C, then A is not – as we should in fact expect – punished for willful murder [vors„tzlicher T"tung]; rather, he is punished for instigation. We need not here expound upon the further consequences of this principle. According to von Liszt, it constitutes the sole deviation from the otherwise consistently implemented concept of causality. 'The general concept of causality is to be employed beyond the limits demonstrated by the presented principle.'

Critique

Manifold doubts have been raised against this theory. According to the theory, a cause in the sense of the criminal law includes every condition of an outcome; an objection is that such a concept of causality leads to infinite regress [FN 1,

p 11: See Birkmeyer's abovementioned work, page 15]. There was, of course, a 'regulator' available in the concept of culpability [Schuldbegriff]: culpability must extend to causing in order for the perpetrator to be held responsible. But it was incorrectly believed that this corrective, when available, was not sufficient, and it was correctly objected that it is entirely lacking fromthe crime qualified by the outcome [die durch den Erfolg qualifizierten Delikten].

Let us consider both objections in more detail. The first one claims that absurd consequences result if we, like von Liszt, were to accord responsibility in every situation where culpability (intention, more or less) and causing are the case in von Liszt's sense. Something like the following example is given: A would like to do away with B. He sends him into the forest in the hopes that lightning will strike him. What he wished for occurs. In this case, it is argued, if A undoubtedly caused B's death, then according to opponents of von Liszt, his action is a necessary condition for the outcome; the outcome would not have occurred without it. Because A in this case also had the intention to kill B through his action, then according to the above theory, he must be sentenced to death for intentional willful murder. There is no doubt that such a judgment opposes the the meaning of the law. Thus, it is concluded, the theory of the equality of all conditions leads to incorrect consequences and must therefore be rejected. Many similar cases, of course, would and do occur. This even turns up in the example that Feuerbach came up with 100 years ago : A wants to kill B by praying for his death. B hears about this; he dies of fright. A desired and caused B's death. If Liszt's theory were applied, then A would have to be punished as a murderer.

We cannot agree with this line of argument. We believe, in contrast, that the von Liszt's theory of culpable causation is thoroughly appropriate; however, we will wait until later to defend our view against these objections [FN 1, page 12: See page 47ff[the Original publication]]. Yet Liszt's concept of causality also seems untenable to us in austere way that it treats causation 'If the injury causes the death of the injured,, then the sentence is at least three years imprisonment.' If one here wanted to identify causing and 'bringing about a condition of an outcome' (as it is required by von Liszt), then the administration of justice [Rechtssprechung] would obviously give rise to the most impossible consequences. B is slightly injured by A; he is taken to a hospital that is demolished by lightning a couple of days later, whereupon B dies. According to Liszt's view, the slight injury of B would have 'caused' his death, because the death would not have occurred without the injury.

Or: A, who is harmed by B, goes to the Riviera for convalescence. There he is run over by a train. A has again 'caused' the death of B and must be punished accordingly. This example too can of course be multiplied and extended. Liszt's concept of causality, if it is not modified, here actually does lead to an infinite regress. However it hardly needs to be mentionedthat the absurd consequences of von Liszt's view do not follow the legislator's meaningr. Liszt's theory falters in each of the cases where the legislator punishes the mere causing without considering culpability [Verschuldung].

As it happens, earlier von Liszt himself had added a restriction to his concept of causality: The ninth edition of his text reads: 'In every situation where the occurrence of a given outcome is understood by the law as a condition for punishment or as a condition for more severe punishment, causal connection between an outcome and an action is not to be considered the case according to the dominant view when the outcome is brought about only by an extremely exceptional chain of events.' However, in the next edition von Liszt dropped this restriction. The twelfth edition of his text reads: 'This view contains a change of the law to which only the legislator himself is entitled. The view requires predictability of the outcome, although the legislator has disregarded this requirement.'

Liszt is thus accutely aware of the difficulties to which his concept of causality gives rise. He orginally sought to eliminate the worst problems by indicating, in the case of the crime qualified by the outcome, that only the predictible outcome counted as being caused. But he later believed that he must once again give up this restriction becausethe legislator explicitly speaks of causing and not of predictability. Later we will also have to consider this line of argument. [FN 1 page 13: See page 40 of the original publication]

3 The Theory of the Most Effective Cause

As a result of its absurd consequences, The theory that claims that all conditions are equal with respect tothe outcome fails in relation to the qualified crime. Because on the one hand, it insisted on that the 'indisputable and undisputed principle' that cause in the broadest sense, as the result of the total complex of conditions of an outcome, is unusable in criminal law. On the other hand, however, cause in the narrowest sense, as each individual condition of an outcome, is also unusable. It became imperative to seek out a middle course. Language usage already seemd to indicate that in the series of conditions of an occurrence,, there would be one or more especially important conditions. We almost always signify one or more conditions as the 'cause' of an outcome, while the others must rest content being called 'conditions'. Thus when a train crash, is brought about by a mistake in operating the train controls , this is what we designate as the cause of the accident, while the momentum of the train is not; although the momentum of the train is no less required for the occurrence of the accident. If we want to signify the relationship between the train's momentum and the accident, then we call it a condition of the accident. Such considerations make it seem probable that not all conditions

are equal in relation to the outcome. The establishment of “special” conditions has been sought, which can be considered to be causes in the sense of the criminal law. Sometimes it is the most active, sometimes the primary, sometimes the most weighty, sometimes the most effective condition, which was taken to be the main cause (((Greek) [according to the greatest])). We shall here restrict ourselves to a discussion of the last view, which Birkmeyer laid out in his rectoral speechon "The Concept of Causation and Causal Connection in the Criminal Law" [Ursachenbegriff und Kausalzusammenhang im Strafrecht].

22.35

Presentation

After Birkmeyer drew a sharp separation between the question of causality and culpability, he established that the philosophical concept of causality (cause in the broadest possible sense) is useless for criminal law, and that the only useful principle it gives rise to is 'that nothing can be designated the cause of an outcome, which is not a condition for this outcome'. This "poor" result is not sufficient for criminal law. As opposed to von Buri, who (like von Liszt) takes every condition to be a cause, Birkmeyer supports each of the previously mentioned objections and then continues: 'While it is settled on the one hand that we are permitted to seek the cause only among the group of conditions, which establishes that what is not a condition cannot be a cause; on the other hand it is clear that the definition of a cause as a sum of conditions is useless for criminal law and that the definition: "a cause is every condition of an outcome" is no less useless, as well as incorrect and contrary to the law. Only one thing is left: a cause in the sense of the criminal law must be that particular condition of an outcome that contributed more than the rest of the conditions to the bringing about of the outcome. It need not and it cannot be ignored that the other conditions also contribute to the outcome; but practicality demands that one of them, above and beyond the rest, be distinguished as the cause. The nature of the matter prohibits that another condition be distinguished as the cause apart from that condition that is the most effective for an outcome.'

However, the proposition that one condition is more effective than the others in bringing about anoutcome cannot, according to Birkmeyer, be disputed. One dose of poison can just as easily as another contribute to the outcome of someone’s death , even though neither of the two doses by itself would have caused this outcome. 'It can, of course, under certain circumstances be very extraordinarily difficult, and mostly impossible for weak human forces to recognize with absolute certainty the various degrees of effectiveness of particular conditions of an outcome. But this does not change the correctness of the concept; rather it has to do only with the subsumption of particular cases under the concept.'

'In the hand of a judge with healthy rationality and common sense, this concept of causation is thoroughly sufficient for the needs of criminal law, and will protect us from the kinds of decisions that contradict our sense of the law, such as those that Buri's theory makes necessary.'

Critique

Talk about more and less effective conditions doubtless makes sense in certain cases. Suppose that the combined efforts of two horses set a hundredweight [Zentner] in motion. Neither of the horses is capable of drawing the weight alone. But we know that one horse works twice as hard as the other. We can then say: its pulling is the more effective condition for the outcome; it contributes twice as much to the outcome as the other horse. The pulling of the horses is however not the only condition for the movement of the load. In order for the outcome to occur, it is for instance, a particular degree of strength of the chain by which the animals are pulling is necessary. A comparison of both of these conditions in relation to their effectiveness, however, clearly makes no sense. The pulling of the horses and the particular strength of the chains are both necessary conditions for the outcome; that is, if we think away one of these conditions, then we must think of the outcome as impossible. Yet we cannot say that one condition contributes more to the outcome than the others. It is indeed doubtful whether this kind of talk makes any sense, and whether it can make any sense in and of itself. To talk of the 'effectiveness' of a condition, or of its 'activity' in and of itself naturally makes no sense, because the concepts of effect and activity originate exclusively from inner perception. There is no justification for imposing our subjective experience onto the world of things, however understandable and difficult to avoid this anthropomorphism might be [FN 1 page 15: On this matter cf Lipps, Main Features of Logic, page 80ff]. Rather, we know nothing more thanis the complex of conditions, the outcome, and the necessary connection between the two. That condition a is more effective in relation to an outcome than condition b cannot mean anything but this: the outcome of a complex of conditions without a would be smaller than the outcome of complex of conditions with a but without b. That the pulling of one horse is a more effective condition for the movement of the load than the other is shows, when we assume that both horses together draw hundredweight u, only this: that one horse alone would draw two-thirds of hundredweight u, the other horse only one-third of hundredweight u.

We can see under what presuppositions it might make sense to compare conditions with respect to their effectiveness: when, on the one hand, the outcome can in some way be quantitatively graduated and on the other hand, it can be established what part of the outcome a particular condition would accomplish without the others with which it is compared. It is evident that in most cases neither one of these presuppositions is the case. One of these, for example, is not the case if we want to compare the pulling of the horses with the strength of the chain. Neither of these two conditions produces, without the other, a part of the outcome; or, in other words, to use a convenient expression, they are not relative conditions for the outcome. Rather, were one of the conditions not to be the case, the entire outcome [FN 2, page 15: Indeed, no anthropomorphism can be excluded anymore from the commonly used term (condition, effect, outcome, etc.)] would not occur; they are absolute conditions.

These considerations help us towards a further insight. Since, in a complex of conditions, there are always one or several absolute conditions,it is inadmissible to talk about a 'most effective' cause in and of itself. It is certainly possible— under the indicated presuppositions, speak of conditions that are more effective than others; but we cannot call them the most effective, since a comparison with absolute conditions, although they always exist, is impossible.

If we examine Birkmeyer's theory based on these considerations, then the following results: it seems from the above considerations excluded for us to speak at all of a most effective condition. Even so, it is admissible, when there are relative conditions in a complex of conditions, to compare their effectiveness. For our problem of criminal law this means the following: we can never say, as Birkmeyer thinks, that a human being has brought about the most effective condition of all for an outcome. Rather, it is possible only in very specific cases to say: the condition brought about by the human being is more effective for an outcome than certain other conditions. Birkmeyer's principle must thus say: if a human being brings about a (relative) condition for an outcome, and if this condition is more effective for an outcome than other (relative) conditions for the same outcome, then this condition can be designated a 'cause' in the sense of criminal law. Moreover: if a human being brings about a (relative) condition for an outcome, and if this condition is less effectivefor an outcome than other (relative) conditions for the same outcome, then this condition cannot be designated a 'cause' in the sense of criminal law.

The first objection to this principle is that, in the overwhelming majority of the cases under consideration,it cannot be applied. It is obvious at first glance that only in the rarest cases are the presuppositions present according to which we can speak of more or less effective conditions.. Only in the rarest cases would part of an outcome have occurred without the condition brought about by a human being. This objection alone would suffice to show that criminal law cannot use this this concept of causality. However, the criterion suggested by Birkmeyer for establishing the cause in the sense of the criminal law is not merely almost always useless; rather, it turns out to be inappropriate also in the minority of cases where an application is possible. This is evident even from the example put forward by Birkmeyer himself, which we will here formulated in more detail: A has accidentally taken 10 grams of poison, which does not kill him, but brings him close to death. B knows this; he knows also that an additional gram of the same poison would be sufficient to kill A. He succeeds in giving A this poison. A dies.

According to Birkmeyer's clearly expressed view, B has here brought about the less effective condition[FN 1, page 17: We are here referring to the more effective condition in a wider sense than what we focused on above. The quantity of poison is, directly, a more effective condition only for the injury of an organ; death itself is first only linked to this condition. But since the poison itself is referred to as a condition for the death, we can call it the most effective condition for death, even though it not the direct condition for it.]; the 10 grams which A previously consumed were more effective. Thus B has not 'caused' the death of B and would according to Birkmeyer's theory be acquitted of willful murder [vors„tzlichen T”tung]. That such an acquittal would thoroughly conflict with the will of the legislator, and that in this case every law court would have to convict A for willful murder, hardly needs to be mentioned. However, Birkmeyer has, in a note on his text, protected himself against such a consequence of his theory. Here it says [FN 2, p 17: Page 58, Note 90.]: 'In order to avoid misunderstandings, it should here be pointed out that this formulation (i.e., a cause is the most effective condition) does not exclude the possibility of several causes with the same outcome. This allowance is then necessary when both conditions a and b of an outcome are more effective than every other condition, but each has contributed the same as the other to the outcome. This allowance is then already permissible when the conditions a and b contribute in differing degrees to the outcome, but each of them more than the leftoverconditions.'

At this point Birkmeyer would at any rate say that in the abovementioned case, B would admittedly constitute a less effective cause than A, but that this cause constituted by B would be more effective than all the other contributing conditions, perhaps even than the physical constitution of A. We do not need to repeat that a comparison of these conditions with respect to their effectiveness is impossible. Of those conditions which it makes any sense at all to compare, the dose which A consumed by accident is the more effective and the one which B gave him the less effective. So either the impossible juristic consequence which we have just identified results, or the theory is also useless here. Birkmeyer's theory has thus turned out to be useless in every respect.

We shall linger over this no longer. Since on the one hand, Birkmeyer believes that his concept of causality entirely fulfills 'the needs of the law', and on the other hand we have pointed out that only in the rarest cases is it possible to speak of conditions which contribute more to an outcome than others, the question thus arises of how Birkmeyer arrives at this concept of the most effective cause. We have already mentioned above that ordinary language tends to put forth one of the conditions of an outcome be as its 'cause'. The 'cause' of a train collision, we say, is the mistake in operating the controls; the momentum of the train, without which the accident would not have taken place anyway, is on the other hand called a condition. Something analogous applies inthe examples we used above. Most people would there call the physical constitution of B the 'condition' of the outcome and the consumption of the poison the 'cause' of the death. So here Birkmeyer is entirely right. There are special 'distinguished' conditions for an outcome which would generally be called its 'causes' . It further appears to us as if the naive person who speaks of causation in this way would hold that this cause has certain importance as compared to the other conditions. To be sure, these conditions also seem to him to be necessary in order for the outcome to occur. But the cause brings the outcome about 'essentially'; the cause is to the greatest degree active, effective; it contributes more than the other conditions; it is, following Birkmeyer, 'more effective' than they are; and it 'contributes more to the outcome'. The question now arises when and why the naïve man speaks of causes in this way. The answer to this is firstly: an occurrence is called a 'cause' if it must be present within a complex of conditions in order to bring about a specific effect. The cause in our second example is not the physical constitution, but rather the consumption of the poison. This is so is not surprising [wunderbar] when we recall what we already said above: there is in us a tendency to transfer the concept of activity, which we derived from our inner perception, from the relationship between the cause and the effect. We consider the complex of conditions as something that creates the effect. This transference becomes simplified naturally when the conditions are given as an occurrence. We cannot of course exclude the view that the other tacit conditions take part; but the occurrence is what appears to us to be the actual occurrence of the effect. Further, an outcome belongs to the activity , and not just an outcome that is somehow secondary to the activity, but an outcome which the activity leads, which is “created by” the activity. If on the one hand the fact that we ascribe an activity to a cause makes it explainable that we consider the occurrence to a certain extent to be a cause, it is explainable on the other hand that, because an occurrence results directly from each activity, we regard every activity which immediately precedes an outcome in this way. The tacit conditions, of course, border temporally on the effect, but these were also already there before the effect came about. That which actually lead tothe outcome, that which once it appears has led to the outcome without further consequences, is the appearing occurrence [Geschehen]. Two reasons can thus be distinguishedwhich permit us to take the occurrence preceding the effect as the 'cause'. First, the fact that it is an occurrence and as such appears to us as more productive and effective than the tacit conditions. Secondly, the fact that the occurrence immediately entails the effect and that it therefore seems to be that thing that actually brings about the outcome, or at least, as opposed to the other conditions, stands in a close relationship with the outcome.

These two reasons alone do not seem to be enough. We clearly call conditions a 'cause', which neither present an occurrence nor immediately entail the effect. This is already clear from our first example: It is not the momentum of the train that we call the cause, although it precedes the accident; rather, the mistake in operating the controlsis the cause, although on the one hand it need not be considered an occurrence, and on the other hand does not immediately bring about the accident in the abovementioned way. Even the second example needs only to be changed slightly in order to completely change the situation. There we said that the consumption of the poison would be regarded by most people to be the cause, and not the (somewhat weaker) physical constitution of the victim. That will in fact be the case, perhaps with him who has known B for a long time and knows that despite his bodily weakness, he lives and enjoys his life. Suppose that a chemist is intimately acquainted with the relevant poison. He knows that it does not inflict severe damage on a powerfulperson, for he has perhaps tried it out on himself. Now he learns that another person has died from the poison. He would then consider the weakness of this person’s body as the 'cause' of death. This rule can be established from all these cases: We call something a 'cause' that condition(a) of an outcome (e); (a) must be applied to a member (b) of a certain unit [Zusammen] (b not e), such that the outcome (e) in the place of a second part (not e) could be thought of as real. In our first example the momentum of the train and its driving towards another train are thought of as a unit [Zusammen].. The wrong move of the switch is the 'cause', because it must contribute to the momentum of the train in order to lead to a collision. In our second example, either the consumption of the poison or then the weakness of the body is called a “cause,” depending upon whether the bodily weakness and the life, or the consumption of the poison and the life, are thought of as a unit. If we here again ask for the motives behind these usages of language, it turns out that there is nothing novel: that which must be thought to belong to a complex of conditions in order for the outcome can be thought to occur, appears to us thereby to exist in close relation to this outcome; it seems to be more of a cause than the other conditions. As before, the immediate emerging of the outcome creates the impression of an inherent connection, in that we think of the relevant partial cause together with the outcome,, creating the motive for its persistance in language usage.The connection was only a recent temporal one,

and we had assured ourselves of it in our perception and in our memory, respectively. We cannot talk about this any more: we do not see or think of the 'cause' as something directly preceding the outcome; rather, we think of the outcome as connected with the 'cause' in the way it is in other cases, in which the cause as well as a complex of conditions, which is thought of in and of itself in other connections, are present.

In short we can now say: a 'cause' is, on the one hand, the condition which presents itself as an occurrence;On the other hand, the condition which to a certain extent is thought as connected with the outcome, be it this connection a temporal one and thus given through perception, or a non-temporal one and thus brought about through custom or similar subjective factors [FN 1, page 20: On this see page 63f. [of the original publication]]. The motivation that drives us to speak of "cause" need not yet be thereby exhausted. There may be given so many points of origin for an outcome that a justification is not available. What se said above applies here:: we do not find any such effect or manifestationin the objects themselves; rather we attribute it to them. The anthropomorphic approach turns out to be convenient; we must separate it from scientific research insofar as the objects themselves do not require it.

Although we have from the very beginning objected to justifying this approach, we have here allowed ourselves to come somewhat closer to an explanation of it. This has happened because we will later – although from a completely different standpoint –encounter the same fact again [FN 2 page 20: See page 64F [the original publication]].

4 The Theory of Adequate Causing

Birkmeyer's theory has turned out not to be appropriate for eliminating the problems that caused the failure of Liszt's theoryof the crime qualified by the outcome. We could also say that theories which operate with a 'most effective cause', 'primary cause', etc., are today nearly surmounted [FN 3 page 20: See Radbruch, The Theory of Adequte Causing]. By way of contrast, a new, third way of solving the problem of causation has lately won numerous supporters. This is the theory of the 'adequate' causing which was founded by J. von Kries, and has been adopted with various modifications especially by A. Merkel, Thon, Helmer, M. Rümelin and Liepman that has thrived. 'Cause' in the sense of the criminal law is, according to this view, the only action conditioned by the outcome which is 'capable' of leading to the outcome, of course not only in the single cases, but in general. The conditioned action is not to be called a cause when it is only capable in a single case, when it only 'accidentally' or 'coincidentally' leads to the outcome, but is not capable of doing this in general.

We shall present and discuss this theory in a form that seems only at first glance to be significantly modified,as it is given by Moritz Liepmann in his 1900 introduction to criminal law .

Presentation

First of all, Liepmann asks whether we can justifiably isolate indiviudal conditions from a complex of conditions and call them the 'cause' of a concrete event.

He believes that he can answer this question positively: to ascertain the cause of an event is nothing more than to explain this event. An explanation, however, cannot be supported by reference to the infinite series of complexes of conditions; rather, we must stop at particular conditions. But not at arbitrary ones, rather at those which "fill a deficit in our knowledge'. 'This thus identifies, on the one hand, those conditions which appear to be obvious for a particular state of knowledge for the duration of the occurrence. On the other hand, it identifies those conditions which are unable to satisfy a given occurrence's need for explanation. Only those conditions that are essential to the viewpoint under which we consider the process can be considered 'causes'.

The task of the theory of criminal law is to 'establish which of the single conditions is essential and necessary from a criminalistic viewpoint.' We can as a matter of course establish the following: 'conditions in the sense of criminal law are those created by sane human beings, and those whose absence would not only change the concrete effect considerably, but which would also influence its criminal relevance.' But there is still another selection to be made from among these conditions. The causal quality must be established for every condition, which only as a result of an accidental connection has led from the incidence to a particular kind of outcome. 'An individual may never be singled out or held responsible as the cause of outcomes which completely escape their control because they are unavoidable. It is therefore not an individual but rather, as we say, an unfortunate incident which is to be held responsible.'

If we disregard abnormal positive determinations which of course could violate this basic principle, but which in light ofthe presented content are criminal norms that do not have a principal meaning [FN 1 page 22: This qualification however does not, as follows from page 71, apply to our current law], the following basic principle can be established: 'An outcome in the sense of criminal law is only caused by an action if there is a calculable connection between this action and the outcome such that, with theactuality of the action, the becoming actual of the outcome appears in a calculable way to be necessary.'

The outcome is not caused, in contrast, when its occurrence is 'accidental', that is, 'escapeshuman calculation.'

Critique

We must first of all object to Liepmann's position that the becoming actual of the outcome never appears necessarily linked with the actuality of an action. We already emphasized above that other conditions must alwaysbe present together with the action in order for the outcome to result. Not therefore with the action alone, but also with the complete sum of conditions one of whichconstitutes the action, can the outcome be calculated as necessarily occurring. Nor can we take each principle as it appears, if Liepmann's account is to make any sense at all. The question now arises with even greater urgency: what does it mean anyway for an outcome to be 'calculable' on the basis of its conditions? It cannot mean that it follows with certainty from the conditions; we have already seen that. Nor can it mean that its occurrence is 'possible'; that it is compatible with natural principles. For the calculable outcome is then contrasted with the incalculable, accidental outcome. If calculability were possible, then incalculability would be impossible, that is, it would be incompatible with natural principles. But the accidentally occurring outcome does not contradict natural principles; this is proved by its occurrence. There is only one thing left that Liepmann could have meant and which judging from his other points, he did mean: an outcome is calculable when it results from the action with a certain probability. We can in fact establish from the action, although not always with utter clarity, a contrast between the conditions which normally lead to an outcome and those which only rarely do so. Or less vulgarly expressed: we can distinguish between conditions which according to experience lead to an effect with a certain probability, and those which lead to an effect with a certain improbability. In this way we have here spoken of adequate and inadequate causation [FN 1 page 23: These distinctions need of course a more thorough examination of the sort that von Kries undertook in his valuable essays ‘On the Concept of Objective Possibility.’ We can disregard it here, because we do not agree that it can be applied to the problem we are dealing with in criminal law; see the following.]. The fact that concern us here can in a subjective way be expressed in this way:There are conditions from which an outcome can be expected or calculated with a certain probability, and those from which an outcome can be expected or calculated with a cartain improbability. That Liepmann had these in mind is clear from the fact that he agrees with von Kries's distinction between adequate and inadequate causing. Even so the expressions 'calculable' and 'incalculable' do not seem to be quite correct. It would be better to say: 'calculable with probability and calculable with improbability'. If we now consider this distinction in relation to its application in criminal law, then we encounter difficulties in relation to intentional causing. Take the following example which Liepmann himself gives us: 'if someone gives another a harmless wound, but knows that the village doctor whom the harmed person ought to consult without hesitation would be careless about the antiseptic he prescribesand thereby brings about a deathly infection, then the agent would be punished for intentional murder'.

Liepmann believes that his theory is validated with this example. If the outcome is not accidental, then it does not escape human calculation. The fact that the death would be calculated is sufficient proof for its calculability. This surely cannot be denied. But is it then a matter of whether the outcome is at all calculable? We shall thoroughly object to this on the basis of Liepmann's account, which clearly emphasizes that the outcome should be calculable from the action. Now what Liepmann understands by action in this context cannot be established with any certainty, although this will ultimately turn out to be moot for us. If he takes action as we do to be acting, then we can naturally object that from the punch, which can be what occurs in our example, the death of the victim was calculable only as a great unlikelihood. On the other hand if, which is possible with the ambiguity of the word with the end '-ion' [-ung] he means by action not the act, but rather a consequence of the act, in our case perhaps the victim’s injury, then we can respond that the problem is merely postponed, which is not permissible. It is both in its first and second meanings that an action must be the cause of an outcome in the sense of criminal law, and we must examine when the action in possesses the attributes of a cause not in the second sense, but in the first one.However, the outcome is thereby not 'calculable' from the action in the second sense either, as is clear from the example. Rather, the agent has taken into consideration further factors that might serve as conditions, for example the doctor’s clumsiness. The theory achieves a completely new meaning in each case. Calculability from the action, which Liepmann required in the beginning is tacitly replaced by calculability from the action and from the factors which the agent was aware of.. If Liepmann's theory is to be tenable, then instead of 'calculable from the action,' we must say 'calculable from the action and from the factors that the agent is aware of, or, which is now permitted by this addition, `calculable with certainty' [our italics]. And by action we must understand bodily movement. In this form, the theory is doubtless appropriate for intentional and negligent causing; it is likewise, however, surely superfluous. For if somebody has brought about an outcome 'intentionally,' he has already calculated that the probability is high that the outcome will occur as a result of his action and the relevant factors that he is aware of. [FN1 page 24: For details see 48ff. [original publication]] The 'really calculated', however, belongs according to Liepmann 'to the area of the calculable'. And similarly, that someone has brought about an outcome by negligence entails that, from the circumstances he was already aware of, he should have calculated the occurrence of the outcome with a certain probability. That which should have been calculated, however, belongs anyway to the realm of the calculable.

While Liepmann's theory – when applied precisely – is untenable in relation to culpable causing, and when it is changed in relevant ways proves merely superfluous, it seems to eliminate these problems in relation to the 'crime qualified by the outcome'. We have seen with Liepmann's theory that if, to absurd extremes, we consider each condition for an outcome to be a cause in the sense of criminal law, then we eventually fall into an infinite regress. Liepmann's theory seems to offer us the corrective of 'calculability' which was lacking there. As soon as we say, for example, that a bodily injury has 'caused' the death of the injured person only when the outcome is calculable from the factors the agent is aware of, the desired restriction of the criteria for punishabilityis achieved. The following has just now been objected: as soon as such a calculable connection exists, then the negligence of the agent is established. Thus when, in the case of a more severe outcome, there is no negligence, the outcome was likewise not calculable. Since we now possess a particular section on negligent killing, then § 226 StGB, which punishes an injury leading to death, would be superfluous. Thus the theory of what the law means would be incorrect..

To this objection Liepmann could respond, first of all, that a qualified bodily injury, even when it happens negligently, differs importantly from negligent killing in that the former was committed with intention (which in and of itself is punishable) to injure the victim. Second of all he could say that it there could certainly be 'calculability' of an outcome, and no negligence. In that, with intentional and negligent causing no set level of probability of the occurrence of the outcome is or should be calculated, and that instead the probability can sometimes be larger and sometimes smaller, a relevant distinction could be made between negligent and “hapless” causing. The outcome would in both cases be 'calculable'. But only in the first case would it be calculable with a probability such that the law makes the calculation obligatory. The objection, that negligence must always exist in Liepmann’s account of the crime qualified by the outcome, would thus be countered.

However, neither would this construction be able to rescue the theory: Someone returns to his house which he has not occupied for a long time, and which in the time of his absence was locked. Convinced that the house is empty, he sets it on fire in order to collect on the insurance claim. Yet a homeless person, who during the homeowner’s absence has made himself at home, dies in the fire. The agent must here without doubt be punished for intentional arson which 'caused' a person’s death, although this outcome was certainly not 'calculable'.

Thus, we must agree with von Liszt who has himself, in the context of the crime qualified by the outcome, earlier represented the theory of the adequate causing , when he indicates that this theory supports an interpretation of the law which is not to be found in it and must therefore be rejected.

If we summarize the results of our critique, what is to be said about Liepmann's theory is this: should a meaningful usage of its concepts be at all possible, instead of saying ‘calculable from the action,’ we must say ‘calculable from the action and from the factors of which the agent is aware;’ and we must replace 'calculable' and 'incalculable' with 'calculable with certain probability or certainty' and 'calculable with certain improbability'. If we do this, then the theory proves superfluous in the case of culpable causation, and and incorrect in the case of causation in general.

This is not to deny that there is something to the theory of the 'adequate causing' which, first of all, illuminates and which is probably responsible for the fact that this theory, especially when it comes to the crime qualified by the outcome, has won so many supporters. It is intolerable to the more finely sense of justice that the law here, focusing on the outcome, accepts an innocent causing as a sufficient condition for punishment; we consider it unjust to make someone responsible for something he has not brought about intentionally. This theory complies splendidly with these considerations. According to this theory, only that person shall be punished for whom the outcome was calculable, who could have calculated the outcome, and – it will certainly almost always come down to this – who also should have calculated it. In this case there is thus no innocent cause, rather a negligent one, , and the sense of justice is satisfied. We can see that the advocates of adequate causing often refer to this advantage to their theory. But – so we must object – is the goal to establish a concept of causation which corresponds to the sense of justice? Surely not. Rather, the only goal is to understand what the legal code means when it speaks of causation. It would be a completely inadmissible presupposition to assume that all legal determinations correspond to a sense of justice. That this is not the case is of course sufficiently proved by the stream of critiques and suggestions for reform regarding criminal law with which are presently being flooded. Thus it is by no means advantageous that the results of a theory of causation correspond with a sense of justice. It is the exclusive task of the interpretive theory of criminal law to examine, independently of such considerations, the meaning of the current legal provisions.

The simpler and more obvious such considerations are, the more astonishing it appears how often we encounter the line of argumentation described here, and similar ones. We thereby take it to be appropriate once again to precisify the issuewhich we shall discuss in the following.

B. The Solution to the Problem

5 Specifying the Issue

The task is, as we heard from Liepmann, 'to establish which selection from among the single conditions for an outcome is essential and required from a criminalistic viewpoint.' Such a question can be fully justified. It is, however, not the question we seek to answer, nor that for which Liepmann attempts to give an answer. We can surely examine which conditions for an outcome criminal law 'requires',or should correctly establish as such. But this is not at all what theoreticians of causal connections want to know. Rather, the question they seek to answer is this: what does the law mean when it says that a person can only be punished for bringing about an unlawful outcome if he has caused it? So it is not what the criminal law should have meant by causation that we must examine, but rather what it in fact means thereby.

It therefore makes no sense when a a legal theory refers to the theory of some logician and uses it to back up his concept of causation. It makes, for example, no sense when von Liszt claims that the theory of the equality of conditions 'finds a solid foundation in Mill's system of logic'. It is of course possible that a correct theory of causation corresponds to Mill's concept of causation. The legislator, then, has understood causation in the same way as Mill. But since such a correspondence between the legislator and Mill must evidently not be presupposed,it is clear that it is proof neither for nor against a theory thatits concept of causation is backed by Mill's. What the law means by causation, without taking him or any others into consideration, is what ought to be examined. This principle, however, must be expanded: the law itself does not speak of causation with respect to the intentional crime; rather, it simply says: he who kills, who harms, or who forces someone to commit a crime, [n”tigt] and so forth. It was the interpretive theory that first replacedall these action –words with the expression ‘to cause an outcome.’ This is certainly fully correct and in agreement with the use of language. Only it must not be forgotten that the law does not use this expression in relation to intentional crimes. In contrast, when it comes to negligence and to the crime qualified by the outcome, the legislator himself does speak of causing. It is of course possible that this word is used both times in the same way. Because however such an agreement may not be presupposed between what is ascribed to the law and what is found within it, it is necessary that intentional crimes be treated separately. But when it comes to the crime qualified by the outcome, it will be good to consider causation in itself. With respect to unintentional crimes, as well as negligent ones,the law itself speaks of causing the unlawful outcome via another outcome or via an action. But since it happens that the criminal law uses the same word at different places with different meanings, the same expressions can also be ambiguous here. At least one of the experiences that we had in the critique pointed toward problem. The same concept of causation, which seemed to us to apply (von Liszt) or not to apply (Liepmann) to culpable causing, turns out simply to be false. On the basis of these considerations, our problem can be precisified as follows:

(a) A condition for punishment with respect to intentional crime is that the outcome is brought about by the one who is to be punished, and it is brought about through his action. It is to be examined when, relative to the intentional crime, there is such a causal connection between action and outcome; that is to say, when an action is the cause of an outcome in the sense of the law.

(b) A condition for punishment with respect to negligent crime is that the outcome is brought about by the one who is to be punished. It is to be examined when an action relative to the negligent crime is the cause of an unlawful outcome in the sense of the law.

(c) A condition for punishment with respect to the crime qualified by the outcome is that the severe outcome is caused by a less severe one. It must be examined when the less severe outcome relative to the crime qualified by the outcome is a cause of the more severe outcome in the sense of the law.

This investigation must be carried out without taking into consideration the concept of causation presented perhaps by philosophy, and without taking into consideration whether the result is 'useful in practice' for the judge, whether corresponds to the 'common' or to the 'educated' sense of justice or not, but rather only with a concern for the meaning of the law.

It is now time to address an objection which could easily be made to our account. We have several times argued against a theory on the grounds that it would lead to 'impossible' consequences; for example, we argued against von Liszt's concept of causation that, with respect to the crime qualified by the outcome, it leads to impossible results. What does 'impossible' mean anyway? Might it mean unfeasible? Certainly not. Why should it not be feasible that A, who has given B a slight injury, be punished with death when B in convalescence at the Riviera is run over by a train? Rather, such a punishment would be unjust; it would conflict in the highest degree with a sense of justice; this is what is meant here by'impossible'. Thus, we have ourselves made use of the line of argumentation we just now indicated iscompletely inadmissible. We have indicated that a theory is incorrect because its consequences conflict with a sense of justice.

This objection does not apply to us, however. It must of course be admitted that 'impossible' does not ultimately mean anything other than 'unjust' or 'contrary to the sense of justice'. But we did not mean that these consequences appeared to us to be unjust, or that they contradicted our sense of justice; rather, they are impossible in the sense of the law; that they conflict with the principles or sense of justice which dominate criminal law. By ‘impossible’ we meant nothing more than this: such consequences conflict with what the law elsewhere holds as just, to such an extent that it

must certainly be assumed that they are not what the law wanted Surely, only with great care can we make use of this line of argumentation. However it cannot be doubted that we were justifed in using it where we did [FN 1 page 29: It is clear that here, if not also generally, the psychological methods referred to in the second section of the introduction are applied.].

6 The Cause in Relation to the Punishable Offense

(a) The Intentional Causing

Every action which is a condition for an outcome is, with respect to the intentional crime, a cause of this outcome in the sense of the criminal law. It is neither required that condition be the most effective nor the primary condition. Nor that a condition is generally well-suited to bring about the outcome; rather it must simply be a condition as such; that is, it must be something that cannot fall away without the outcome, insofar as it comes into legal consideration, also falling away. Disregarding exceptional cases of the law, the principle just characterized is thoroughly valid. It is then also to be said: if the action of a sane person is a condition for an unlawful outcome, and if there is at the same time an intention for this outcome to occur, then the agent is customarily punished. We have already spoken of the objection that was here raised against the Buri-Lisztian theory (which we in relation to the intentional crime in principle could accept). A – so it goes – sends B into the forest in the hopes that he will be struck by lightning. His hope is fulfilled. There is intention here; causation as well, according to the theory. A would thus have to be punished as a murderer, which however would surely contradict the will of the law; this is certainBut does this show this theory's concept of causation to be incorrect? We deny that completely. Suppose first of all that A is capable of calculating exactly when lightning will strike a particular tree, and that he sends B under this particular tree at this time, now with the certainty that he will be killed. No one would then hesitate to punish A as a murderer. His action is, by all accounts, a cause of the outcome in the sense of the criminal law. Now, we shall ask, is there another kind of causation here as there is in the first case? Of course not. A's action and its consequences are exactly the same in the two cases, or they at least could be. This objection, accordingly, does not apply to our concept of causation: A's action is in the first as well as in the second case a cause in the sense of the criminal law. Because there is no punishability in the first case whereas there is in the other one, the condition for punishment – intention – must be lacking in the first case. The example does indeed refers to a difference between the two cases when it comes to the psychological state of the agent. He acts in the one case 'in the hopes' that the outcome will occur and in the other case 'with the certainty' Thus, there is no intention if the outcome is only hoped for, but there is intention if the outcome is expected with certainty. It is then to be explained why A is not punished in the first case while he is in the second.

However, an objection tothis principle can easily be found. Suppose that A has dreamt that if he sends B under this particular tree, then B would surely be struck by lightning. Since he is very superstitious, he sends him to that place, this time with the certainty that B will here be struck. In the first case there is now intention.. Even so A cannot be punished as a murderer. It is clear that, in order to explain the situation fully, we must examine the question more closely, and establish more exactly what intention really means in the sense of the law. That the investigation must essentially be a psychological one does not, after the account presented in our introduction, have to be mentioned.

To cause an outcome means torealize, through an action, a condition for the outcome; to cause it intentionally means to realize, through an action, a condition in order to bring about the outcome. Intention, then, is the striving for an outcome through an action, or by means of an action. This outcome itself can of course be a means to another outcome. The death of a human being can be striven for in order to obtain the inheritance to which the murderer subsequently is entitled. But the outcome is 'striven' for, even when it is not a final goal, it is 'striven' for as a means towards a final goal[FN 1, page 30: We will not enter into the question of eventual intention here. Intention here should only be treated at all insofar as it is necessary to show wherein the difficulties lie in the objections that we have addressed repeated ad nauseum, such as the one that refers to just discussed example of praying that someone dies, etc.; as well as to show the only way in which these difficulties can be solved. This is also where problems come from such as: whether consciousness of unlawfulness belongs to the intention, rather than to the retrospective consideration]. There are however several kinds of strivings: one can hope for, desire [ersehnen], or fear [bef chten] an event. These are all 'strivings' for an event, but not a striving in our sense. It is a striving 'in relation to that to which it is applied' [FN 2 page 30: On this and the following cf. Lipps, On Feeling, Wanting, and Thinking, Leipzig 1902, and the Manual of Psychology, Leipzig 1903.]; for us on the contrary it is a matter of striving for an outcome with the awareness of contributing something to its occurrence. Such a striving is called an act of will [Wollen]. Accordingly, to cause something intentionally means to realize a condition for an outcome through an action, wantingfor this condition – of course in combination with other conditions – to bring about the outcome.

Intention is the willing of outcome. This is not sufficient, however, for not every act of will is an intention in the sense of the law. In order to show this, it is first necessary briefly to consider a prerequisite for striving as such.

Only that which does not exist can be striven for. This much is evident, but not everything that does not exist can be striven for. I cannot strive to be four years younger or for the sun to set in the morning. In short, I cannot strive for the impossible. This needs a correction, however, for even the impossible isstriven for. We seek to build a perpetual motion machine; we also wish, after all, to be four years younger. But he who wants to build a perpetual motion machine does not know that his plan is impossible, and he who wishes to befour years younger knows well that this cannot be, but he abstracts the wish away for a moment from his experience, which would otherwise show him that this is impossible. He takes becoming younger to be possible, even if only 'experimentally.' We express this linguistically when we say: I wish that I 'were' younger, not as when we express a wish which is known to be possible such as when we say: I wish ‘to become’ younger. Thus nothing can be striven for, according to our principle, whose impossibility we are aware of at the moment of our striving.

This is true of every striving, and thus to every act of will.

An act of will can thus take place under two conditions. The agent must, as we have previously seen, be aware that he can contribute something to the occurrence of the willed outcome, and he must further, as we can now see, be aware that the occurrence of the outcome is possible from his 'contribution' as well as from the other factors of which he is aware. The latter, however, needs further specification. An act of will is most often not an act of will in which the agent is aware of the possibility. Closely related to this is another kind of act of will where the agent is aware of the greater or lesser probability, of the balance between probability and improbability, of the lesser or greater improbability of success. But an awareness of the possibility of the condition is also contained in all these cases. This prerequisite for this is the following: that the occurrence of an outcome not seem to conflict with experience is also presupposed what is certain is, as such, simultaneously possible. But here further knowledge is necessary. In order to maintainthe awareness of the certainty or probability of an outcome, I must not only know that noexperience contradicts it, I must also be familiar with the circumstances which speak for or against its occurrence.. Here however we should consider somewhat more closely the question of how the awareness of certainty and so forth is brought about. It can of course be brought about through the sheer memory of previous experiences, through learning of other people’s experiences, and so on. However we will disregard these considerations. Such an awareness, then, presupposes prior reflection [FN 1 page 32: It should be noted that ‘reflection’ here is not entirely covered by the juristic concept of reflection.]. The act of will must be preceded by a consideration of the reasons that speak for or against the occurrence of what is willed, and by a decision which results from this about whether and with what probability or improbability it will occur.

Let us take the easiest possible example: in a box there are twelve balls: six white and six black. I want,, with my eyes closed, to pull out a white ball. Equally important reasons, then, speak for and against the occurrence of the outcome: the fact that there are six white balls in the box suggests or 'makes' me think that the outcome will occur; the fact that there are six black balls in the box makes me think that it will not occur. Both suggestions have the same weight. If I weigh one suggestion against the other, I become aware that the outcome could just as well occur as not occur. My act of will is thus an willing with the awareness that the outcome could just as well occur or not occur. It is different when more white than black balls are in the box. In this case the suggestion that the outcome will occur outweighs the suggestion that it will not, and it outweighs it by ever more the greater the number of the white balls, and less the number of the black balls there are. The awareness of the probability of the occurrence of the outcome results from weighing the possibilities. The probability grows with the increase of white balls and with the decrease of black balls. If the number of white balls reaches twelve and the number of the black balls reaches zero, what results is the awarenessthat the outcome will certainly occur. And thus my act of will is accordingly an act with awareness of the increasing probability, until finally it is an act of will with absolute certainty.

Orsuppose that there are more black balls than white ones. Then the suggestion that the outcome will not occur has the greatest weight. Of course, the greater the number of black balls and the lesser the number of white balls, the greater weight this suggestion has. What results is an awareness of the improbability that the outcome will occur. This improbability grows with the increase of black balls and a decrease of the white. And accordingly, my act of will is one of increasing improbability. If the number of the black balls reaches twelve and the number of the white balls finally reaches zero, then I become aware that the outcome cannot occur. It does not even need to be mentioned that an act of will is then impossible.

Our example is particularly convenient, first because of its simplicity and second because it enables us to establish numerically degrees of probability or improbability. In general, the situation is more complicated. If an event takes place under the conditions a, b, c, d, then the presence or the occurrence of a, b, c, d can be more or less probable or improbable. It is then, similarly, more difficult to weigh out the reasons for and against the occurrence of the outcome and to make a successful judgment. In addition, the 'weight' of the reasons for and against the occurrences of the outcome, unlike the above casse, cannot be established numerically. We can thus, by weighing the reasons, achieve only approximate results; we can only be aware that a probability is 'considerably low', the improbability 'very high,' and so forth. This does not prevent that judgments can be and indeed are made.

We have until now presupposed that we determine the likelihood of the occurrence of an outcome only through objective reasons and counter-reasons; thatwe weigh the facts which support that the outcome will occur against the facts which that do not support it, and decide accordingly. This need not be the case.The judgment reached objectively can be replaced by one that is reached subjectively, or that is influenced by subjectivity.. There is within us an inclination to believe, on the one hand, in the occurrence of the accustomed and known and, on the other hand, in the new, strange and miraculous. We are inclined to consider as certainthe occurrence of what we wish for or fear. And so forth. Such a subjective inclination to believe in the certainty of something can allow something that ought objectively to appear impossible seem subjectively possible.; this inclination can turn our awareness of the probability of something into an awareness of the improbability of something and so forth. In the previous example there could turn out perhaps to be eleven black balls. Then objective awareness ought to suggest that it is unlikely that I will pull out a white ball. But I am nonetheless convinced that I will succeed. I have always been lucky and will also be lucky today. 'The wish is the father of thought.' There is then also an act of will a according to certainty. But this certainty is not objectively required as it was before, but rather subjectively conditioned. And similarly there is an act of will with the subjectively conditioned awareness of probability, improbability, etc.

These considerations put us in a position to answer the questions that arose above. When A sends B into the forest in the hope that he will be struck by lightning, then it is objectively required that his act of will be accompanied by the awareness that the outcome is improbable. Even if a thunderstorm discharges over the forest, it is still very unlikely, out of the thousand of trees in the forest, that lightning will strike the exact one under which B is located. As we have seen: A is not to be punished in this case, not even if B really is struck by lightning. Hence, an act of will accompanied by the objectively required awareness of the improbability of the outcome is not an intentionin the sense of the law. We assumed that A could calculate with certainty when and where lightning would strike. When he then sends B into the forest, there is an act of will based oncertainty – provided that B would follow A's orders unconditionally. As we have seen, A would, in this case, be punished. So an act of will accompanied by objectively based awareness of the certainty of an outcome is an intention in the sense of the law. We will leave behind the fictional situation in which A could calculate the exact time and place that lightning will strike, and will now suppose that he is convinced, as a result of a dream, that lightning will strike B. In this case also there is an act of will based on certainty. And we asked ourselves why no punishment is here given. This question can now be answered by pointing out that whether dreams become real is not a fact based on experience; it is, rather, a somewhat belief that A holds on the basis of some mystical inclination or other. His act of will based on certainty is not, as in the second case, objectively based, but rather subjectively conditioned. From the fact that there is no punishment in this case, what results is the following: An act of will accompanied by the subjectively conditioned awareness of the certainty of an outcome, as opposed to objectively based awareness, not an intentionin the sense of the law.

With this – after the objection to our concept of causation has been countered from the very beginning – we have shown where its mistake lies. The objection asserted that there was intention in cases where there actually is not.. The objection produces the peculiar claim that, insofar as no punishment is administered in these cases, there is no causing in the sense of criminal law. A similar mistake underlies the other objection mentioned above, which we can now do away with in short order:

A wants to kill B by praying for his death. B dies of fright. Since A acts intentionally and, according to the theory, has also caused B's death, then according to the theory he must be punished as a murderer. Since this consequence is absurd, the theory's concept of causation is incorrect. Once again we can counter that this objection does not apply to our concept of causation. There is no punishment not because A's action does not cause the outcome,, but rather because the second condition for punishment, the intention, is not met. There is no doubt that A causes the fright and thereby B's death, but he did not have intention: there is no act of willing the outcome with the awareness that there is a probability that the outcome will result from this chain of events. A does not think at all of such a causal connection. Rather he wills to kill B through his prayer; that is, he wills something impossible, which he can only will because he does not know it is impossible. Juristically put, there is merely an attempt by ineffective means is given.

It is different, of course, if B is very sick and A knows that any agitation can be dangerous for him. Negligent manslaughter, under particular circumstances, is then given. It is again different if – as von Buri has applied this example –the agent knew all this and thought to take advantage of it for his own purpose. In other words, when he prayed with substantiated awareness that the severely sick and superstitious B would most probably die from the agitation. Then there is really intention, and A is punished as a murderer. Our concept of causation triumphs in every case over this objection.

We have seen previously that we need briefly to look at the concept of intention. We were only to do this insofar as our concept of causation demanded defense against attack. These accounts, although brief, is perhaps sufficient to show what kinds of fruitful investigations it can, from our viewpoint, lead to about intention

b) Negligent causing

The outcome in relation to the negligent 'bringing about' is, as in relation to the intentional 'bringing about', brought about or caused through the action, when the action presents a condition for the outcome. Here as well, every condition is a cause in the sense of the law. The following example, similarly to above, can serve as an objection to this principle: A traveller travels by wagon through the countryside. The negligent driver falls asleep. The wagon, as a result of this, goes the wrong way. Along the way the traveller is struck by lightning. This is a case of negligence. The outcome is – according to the theory – caused by the driver's action. He must therefore be punished for negligent killing. Since this obviously conflicts with the will of the legislator, the concept of causation is incorrect. The response to this objection is easy. The objection does not apply to the theory. If the driver had known that lightning would strike the traveller, then according to everyone's opinion he would be responsible for negligent killing, although the causal connection between the action and the outcome would not be different. Just as we were operating before with an incorrect concept of intention, here we are operating with an incorrect concept of negligence is used. It is completely meaningless to say here that the driver is negligent. The law does not speak of sheer negligence as the condition for punishment, but rather of negligence with respect to the outcome caused. That this, however, is not the case here, i.e., that the driver, even with 'sufficient attention' could not have foreseen the outcome, is evident. All of the difficulties which can and have been found relative to the negligent offense rely on difficulties with the concept of negligence. But that is not what we are concerned with here. For us it suffices to establish that here, as well as in relation to the culpable offense, each action which is conditioned by the outcome is a cause of this outcome in the sense of criminal law.

The meaning of the word 'cause', which is referred to in the law in the case of the intentional offense, while it is used by the legislator in the case of the negligent offense, is the same in both cases.

7 The Causing with respect to the Crime Qualified by the Outcome

The crime qualified by the outcome is the stumbling block for many theories of causation. The fatal blow for many theorists seems to come from the fact that they think that there could could only be one concept of causation in criminal law, and that what applies to culpable offenses would also turn out to be correct for the crime qualified by the outcome. It seems to us perfectly reasonable, on the contrary, that that the legislator, as elsewhere, did not always mean the same thing by 'cause.' And the experience that we had in criticizing other theories supports us in treating the concept of causation differently relative to different types of crimes. When we now examine what the criminal law means when it speaks of outcomes that are brought about by other outcomes, the following can be said: a cause can here be something different and more specialized than a condition, but it must always at least be a condition. It is therefore also relevant that the connection between the two outcomes whose natures we shall now examine, cannot be a connection of similarity or difference or anything of the sort. If someone should be punished here, then his negligent act (the first outcome) must at least be a condition for the second outcome. Now the onlyquestion is whether – as in the culpable crime – it siffices that it is condition. In our discussion of von Liszt's theory we already answered this question in the negative. What else must be the case in order for an outcome to be the called the cause of another outcome in the sense of criminal law?

The only method, we believe, by which this question can be answered is a very simple one: we take two cases in which an outcome brought about by negligence is a condition for a more severe outcome, and we then formulate these cases such that the agent in one case must certainly be punished , while in the other he can just as certainly not be punished. This means then that in the first case the first outcome is a 'cause' of the second outcome, while in the second case it is not.. If we compare the two cases, it can be established to what extent, inthe first case, the first outcome is a different kind of condition for the second outcome, than it is in the other case.. The problem is then solved.

We will return to some well known examples:

1. A negligently sets his house on fire. Without A knowing it or being able to know it, B is in the house and burns to death. According to § 309,2 StGB A must here doubtless be punished. The death of a human being is 'caused' by the fire.

2. A injures B. B recovers and goes to convalesce on the Riviera. There he is run over by a train and killed. Everyone would hold that A cannot here by punished for injury leading to death according to § 226 StGB.. The death of B is here not 'caused' by the injury.

What is the difference between the causal connections in these two cases? We can perhaps first of all reply that in the first example the death follows directly and chronologicallyfrom the fire. This is not the case, in contrast, in the second example. The injury is no longer present at the moment when B is run over. However we have not yet encountered the essential difference. B can go to the Riviera, not yet healed. If he is there run over, his death follows his injury directly and chronologically.. But we would still not be able to punish him. The first outcome still exists when the second one occurs, but this cannot be what elevatesa mere condition to the level of a 'cause'. But another difference here makes

itself apparent. In the first example, the fire must be present before the death. The injury of course can be present, but it need not be. We have thus encountered the essential difference upon which this distinction depends: we must distinguish between direct [unmittenbaren] conditions for an outcome, that is, conditions which must necessarily and directly precede the outcome; and indirect [mittelbaren] conditions, that is, conditions which of course can directly precede the outcome, but not directly, but rather only through one or more conditions with which it stands in a necessary connection.The fire is a direct condition of B's death. (More correctly: it is a direct condition for the injury on which what we call the death is dependent in a way which we will not not further examine here.) The injury in the second example, by contrast, is only a indirect condition of the death. It becomes a condition through the journey to the Riviera and so on. It thus appears as if criminal law, as far as the crime qualified by the outcome is concerned, considers the direct condition to be the cause, not the indirect one.. Here however we must stop ourselves from making an overly hasty generalization. There are certainly cases in which an outcome is a 'cause' of another outcome, even without being its direct condition. If the fire deals A severe wounds from which he later dies, the fire is an direct condition only for the injury, but not for the death, for which it is a indirect condition. B must nevertheless be punished. It is not difficult to see, however, that the situation here differs significantly from the previous one, since the bodily injury was because of the journey a condition for the death

When fire, by means of the injury (and the subsequently obtaining conditions), leads to death, then the injury constitutes a precursor for the final outcome. Then when the injury, by means of some event, is increased or dilated up to a certain level, then as we have seen it is of course not death but is, connected with the death. So when the fire directly forms a condition for an injury that is only non-deadly, it does indeed form the condition for something which, when other conditions are exacerbated, leads to death. It forms the condition, we could say, for a precursor of the final outcome. The second example obviously has nothing to do with this sort of step-by-step forming of conditions, when an injury forms a condition for the death by means of a journey, etc. This difference makes it explainable that causing in the sense of criminal law applies in the first case but not in the second. It is now reasonable for us to say: one outcome is the 'cause' of another when it directly forms the condition for the other outcome, or for a precursor to the other outcome. Thus, 'directly' thereby means – it will be explicitly noted – perhaps not the temporally latest condition that occurred, rather that condition which must necessarily already have existed by the time the second outcome occurred. By 'precursor' [Vorstufe] of an outcome – in our criminal law it comes under consideration in this case alone – we mean an injury that is related to death because if it is increased or dilated, it is something that is directly connected with death. This is how the concept of the cause related to the crime qualified by the outcome is characterized. It is sufficient for us to establish it in very general terms, and will reserve it for a later occasion to develop individual juristic implementations .

One could perhaps object that this concept of causation is not logically justified. We need not emphasize after our earlier considerations that it is not a matter here of logical justification. After our earlier account we need emphasize no more than that this is not a matter of logical justification. The only objection that could really apply to us is this: it is hard to believe that, by 'cause,' the legislator means exactly what we have attributed to him. To this we could first of all refer to our methodological procedure which appears to us to be unshakeable. If we have two cases in which the outcome in the first case is without doubt a 'cause' of the second outcome, while in the second case it is only a condition, then the comparison of the two must show which are the distinguishing features. And this distinguishing feature is precisely the directness with which the condition is formed. Anything else in our two cases that distinguishes the conditions from one another is inessential. Any such thing can be excluded through modification of the example, without the outcomes ceasing to be a 'cause' of or a 'condition' for another outcome.

In addition, this objection clearly employs a silent premise which, as we shall now show, is thoroughly unfounded. It assumes that it is unfathomable and strange for the legislator to use the expression 'cause' in this sense. In truth it is fully reasonable, and this reasonableness is suitable to make our interpretation fully plausible. We have already thoroughly discussed the consideration that shows this, though admittedly with another intention than here. Then it was just a matter of making it understandable for us to call certain conditions 'causes'. But there we wanted to show, contrary to Birkmeyer, that despite all subjective motives there is no logical right to do so; we shall now claim that, although there logical right to refer to certain conditions as causes, , we are always driven to use this appellation. The cause of an outcome (among other things) is what we callthat particular condition which must be thought of as being a member of a certain unit so that the second member of this unit can be thought of as occurring. We have explained this use of language by noting that this condition stands in closer relation than the other conditions to the outcome. Furthermore, we saw that we can mentally link sometimes this and sometimes that as a unit, and that we thus consider sometimes this and sometimes that condition as a 'cause'.

By what, so we ask, is this difference in the means of consideration determined? Only the most varied of answers are possible here. That condition that, for whatever reasons occur to us particularly interests us or, in short, possesses a particular psychical energy, will, as we can say first of all quite generally, be thought of as obtaining and thereby be

thought of as a ‘cause.’ (More correctly: the condition whose representation possesses for us a particular psychical energy.) And on the other hand we will consider those conditions which do not particularly draw our attention to be part of a unit along with those facts with whichthey seem to have a connection. One representation of a condition, among a manifold of conditions, can possess psychical energy or the ability to acquire psychicalenergy [FN 1 page 39: On psychical energy and conditions for it, cf. Lipps, Manual of Psychology, page 36f. and 41f.]. There is a quantitatively conditioned energy: the energy of the large and intensive; further, there is an affective energy: the energy of the most pleasurable or unpleasureable; and the contrast-energy, that is, the energy of the new, the strange and the miraculous. But this does not interest us any further. There is still another particular energy belonging to that for which there is in the soul a certain willingness. This willingness may consist in a talent or disposition; it may rest in having had a great deal to do with the particular object [Gegenstande]; it may consist only in a temporary expectation. We can speak here of a dispositioanl energy. In this way tones will possess a certain psychical energy for musicians, and colors for painters. It will, furthermore, be of particular interest for the aesthete when it comes to the beautiful and the ugly, and the ethicist when it comes to the good and the bad. And i in the same way – which is what concerns us here –for the legislator, who seeks to establish the infringment of rights as a condition for punishment, it will possess this particular psychical energy when it presents itself to him as the infringement of a right.

Seen in this light it appears fully reasonable that the legislator, when referring to the crime qualified by the outcome, calls the first outcome a 'cause' of the second and the other contributing conditions in contrast simply 'conditions'. For the first outcome is, as we have already seen, regularly an unlawful one; as such it is what most interests the legislator. He therefore considers it as what leads to the second outcome, and thereby as entailing the second unlawful outcome: A intentionally injures the already weak B. B dies as a result of the injury and his weakness. Even so, the weakness is in any case less significant to the legislator, to him it is only a condition. He has a greater interest in the unlawful outcome, the injury. It is this which for him that which 'actually' leads to the death; it is for him its 'cause.' This is the case when the first outcome forms a direct condition for the second; it is also the case when the first outcome only directly leads to a precursor of the second.. Here as well, the second outcome thus follows from the first, even when it is only in multiple additional steps: for the legislator the fire 'causes' the death, the injury which is connected with the death – although not directly, but even so brings it about in multiple steps.

It is completely different when the first outcome is only an indirect condition of the second: we cannot speak here of ‘leading to’ the second outcome in the same sense as we did previously. For if something is an indirect condition, this means precisely that the outcome does not follow directly from it. When the injured A goes abroad on convalescence where he is run over by a train, his death is not brought about by his injury; rather – depending on how we view it – it is brought about perhaps by the momentom of the train, perhaps from the journey. Accordingly, perhaps the momentum of the train or the journey will be called a 'cause' of his death. The injury however will, like each indirect condition, be viewed merely as a 'condition'.

We have thus refuted the objection with which we introduced these considerations: the concept of causation, which we have in mind according to the criminal law with respect to the crime qualified by the outcome, is by no means strange and therefore improbable. On the contrary! We have shown that it is fully reasonable for the legislator – despite all logical hesitations – to characterize the unlawful outcome on the one hand, when it leads directly to another, as a 'cause' of the second; and on the other hand, for him to consider it merely as an indirect condition when that is all it is.

We have at the same time applied that method which we referred to in the second part of the introduction. We have sought to the meaning of the sign ‘cause’, which we found in the legal system itself, more probable in that we considered the sign to be something by which the legislator means something – the not the legislator as merely a figure, but as a figure for whom unlawful outcomes possess a particular psychical energy. We thus found that it is thoroughly reasonable according to psychological patterns for such a figure to characterize an unlawful event which is a direct condition for another as a ‘cause’ of the other, and as simply a condition when it is merely indirect. Yet there is still reason to fear that not all doubts have been silenced. If we must admit, on the one hand, that it seems to follow unmistakably from criminal law itself that, by ‘cause,’ the legislator understands the direct condition; and, on the other hand, that this mode of expression is psychologically reasonable, another objection will crop up: According to our theory, someone should be made responsible for an unlawful outcome when it is the direct result of another unlawful outcome, but not, on the contrary, when it is an indirectresult. Does such a decision on the part of the legislator not appear absolutely inexplicable and unreasonable? And is it therebynot more probable that the legislator by 'cause' has understood something other than a direct condition? This objection deserves a brief discussion. Once more we must refer to our psychological method – as earlier we explicated what is meant by an expression, now we must explain a determination of the legislator.. We must first of all establish, on the basis of the indubitable decision of the legislator, on what principles he tends to base punishment, and we must then examine whether it is truly psychologically inexplicable for such a figure to declare responsibility only for the directly conditioned outcome. Each person can only be punished for ‘his own’ deeds. There is no legal system in which anyone is held responsible for outcomes that

do not 'belong' to him. All that has constantly changed over time is the ways in which this 'belonging' is spelled out It would be an interesting task in the psychology of law to examine the development of the basic principles of the criminal law from this perspective, but we are only concerned here with our present criminal law. And concerning it we have already established the following: it is never sufficient for our present crimimal law – as it was for the most primitive beginnings of legal thought – for a person to form the condition for, or ‘cause’ an outcome; rather, an act is truly only his act when the relevant person is also responsible for committing it. A person is first of all held responsible for a caused outcome if he in a certain sense desired the outcome. This is easy to understand: the deed which I will is dependent on me; I possess power over its existence and non-existence; it is an event 'by my grace.' What depends on me is considered however as belonging to meto a very certain extent; to a very certain extent it is considered to be ‘mine’ [Cf. Lippy, The Consciousness of Self: Sensation and Feeling, 1901, page 37f.] [FN 1 page 42: A. Löffler, Forms of Guilt in Criminal Law, Volume 1, Part 1, 1895.] It is similar in the case of responsibility for an instance of negligence. In this case the outcome is not desired by me, but I could and should have avoided it. In this respect it is indeed something whose existence depended on me: it is also to a certain extent ‘mine.’

But our criminal law, as we have seen, does not rest at this: What is acribed to me is not only what I have brought about intentionally or negligently, but also in particular cases that which bears a certain relation with that for which I am responsible. The question now arises what kind of relation this is. From the legal system itself we can draw two things with complete certainty: first, the first outcome must at least be a condition for the second; and second, it is not sufficient that the first outcome be merely a condition. It must then be asked in which way one outcome must form a condition for the other in order for there to be responsibility. The answer to this is not difficult: when, on the one hand, it is clear that the agent is being punished only for that which to a certain extent 'belongs' to him, and when, on the other hand, the legislator in many cases punishes not only on the basis of the outcome for which the agent is culpable,, but also on the basis of another outcome which stands in connection with this one, then it is evident that this connection must be a particularly close one. However, when an unlawful outcome that forms the condition for another is considered to have a particularly tight connection with it, then we have firmly established the following: precisely when it is an direct condition for the other. We achieved in this way the same result that we had obtained through purely juristic methods: There is responsibility for the crime qualified by the outcome when the outcome for which the agent is culpable forms a direct condition for the second outcome, and the second outcome appears thereby to belong to the first outcome to a particularly great degree, and thus to belong to the agent himself. There is no responsibility when the first outcome formy only an indirect cause for the second one, and the second outcome thereby stands in no particularly tight relation with the agent. In view of these considerations, 'cause' in the sense of criminal law is adirect condition as opposed to an indirect one.

It is not only reasonable that it is so, indeed, it would be bizarre if it were not. We will not, of course, be able to recognize this sort of basic legal principle 'correct.' But whether it is correct or not is not the question here. We have thus once more reached the point at which we must once again emphasize that it is not up to the interpretive jurist to establish what the law should mean according to logical, ethical, or other norms, but rather what it actually does mean. Both questions are certainly justified: because close to the investigation of the present law stands the theory of the objectively valid, the right, law. Arguing against the justification of the latter,von Bergholm [FN 1 page 43: Bergbohm, Jurisprudence and the Philosophy of Law, 1892] did, can then come from misunderstanding. [FN 2 page 43: Against Bergbohm, compare Stammler’s account in Economy and Law according to the Materialistic View of History, page 172ff.] But at the same time it cannot be overemphasized how important it is to avoid confusing these two questions. This kind of confusion is common enough. It occurs, for example, when anyone simultaneously examines the concept of causation in the current law, and demands that this concept correspond to the sense of justice, and so forth.

Throughout these considerations, we have learned about four juristic disciplines –if we take the word 'juristic' in the broadest sense possible. There is the theoretic psychology of law, that is, the science of the psychological conditions for the origin of the law in general and for individual legal systems in particular. Next to this is the practical psychology of law, whose task is to lay out the psychological facts and patternsthat one must know about in order to apply the law in a knowledgeable way. The question of the right law, which we have so often encountered, we must characterized in its essential and narrowest sense as the task of the philosophy of law. The most difficult of these to distinguishis finally the plain and unostentatious legal theory most important task is to interpret the connections of signs that are given by a legal system and which constitute its meaning. This latter has many connections to psychology. We have sought to show this, as well as the extent to which it is the case, by discussing a problem of the sort this theory deals with.