

## ON THE CONCEPT OF CAUSALITY IN THE 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 different of ways. It should be emphasized that the existence of the law presupposes specific psychological conditions and human relationships within which the law arose, and that it is undoubtedly a task of psychology to explain the psychological pre-conditions informing law's emergence at all. It is also worth noticing that within every legal system, particular psychological conditions exist besides those presupposed by the law as such. Moral intuitions, prejudices, and religious beliefs would be examples of such particular psychological conditions. The task of psychology

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is therefore also to explain those psychological conditions present in the foundation of every particular legal system.

We could just as easily begin from an entirely different viewpoint wherein the particular legal system is taken as a given. Thus understood every law refers to human beings and to human relations, and judges consult the law with human beings in mind. In criminal law, for example, the judge must pass sentence on and punish human beings. He thereby establishes the weight of the punishment they deserve in conjunction with possible extenuating circumstances. In order to do this, the judge must be able to evaluate people, and this presupposes a familiarity with various human tendencies, motives and passions. Furthermore, the judge should know how to select the appropriate type of punishment. He must consider whether a fine or ordinary imprisonment would better serve the purpose of punishing a particular individual. In other words, in order to establish the guilt of the accused, the judge depends primarily on the testimony of witnesses. It is his task to judge the value of their explanations. He should be aware of misleading memories, the incomplete retention of events [*Assimilationen*] and other factors which can reduce the value of an explanation. He is furthermore in need of the very same proficiency when a particular witness purposefully gives false testimony, thereby committing perjury. Here it is a matter of being aware of how much we unconsciously alter our accounts of what we perceive, of how much we really have perceived, and how many objectively false explanations are unconsciously provided by the witness. Other duties should be mentioned to demonstrate that when the judge uses the law he must know certain psychological rules and laws (if he is to fulfill his duty as a judge). We need not mention that only psychology, understood as a matter of psychological laws, can afford him this knowledge.

We shall not discuss these issues any further. Nor shall we focus on the psychological investigations which must be carried out if we are, on the one hand, to explain the foundation of the law in general and the individual legal systems in particular, and, on the other, to make the use of legal determinations [*Rechtsbestimmungen*] possible. Instead we have something quite different in mind. We aim to establish if and how the legal system is related to the theory of law, and on what presumptions all the above mentioned investigations are founded. If I wish to explain a legal system or to carry it out in practice, a theoretical knowledge of the law is then a necessary pre-condition. This pre-condition, however, is not as easily realized as one might think. For, indeed, a legal system is not immediately given as a color or sound is given to the mind; rather, it is given as signs symbols for what we really mean when we speak of a legal system. In themselves, however, these signs are not always clear, but are rather ambiguous in relation to what they

symbolize. Their interpretation demands a special theoretical enterprise, namely that which we wish to term “jurisprudence.” The task, or at least a principle task, of jurisprudence is the explanation of signs in their various arrangements, and specifically those arrangements of signs that correspond to the legal system. This we prefer to call, without clarifying our reasons here, the interpretive theory of law. We shall be concerned here only briefly with the connections between psychology and the interpretative theory of law.

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. It 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 present [*geltendem*] law, law which is written down or printed. What is given in the form of written or printed signs is what we must interpret. This, however, needs explanation. Signs of this sort can be seen as merely ambivalent. If the jurist considered the signs as merely ambivalent, then as a lexicographer he would be looking for mere meanings. This is, of course, not so. The jurist considers the signs not as mere ambivalent symbols; rather, he understands the signs as something very determinate, created by the “legislator” or “law-maker” in order to express something specific. Thus, signs whose meaning is manifold, are not ambivalent when they express the one meaning determined by the legislator. The task of the jurist is to discover this one determinate meaning. Investigating the ways and means by which the jurist achieves his goal is the task of the legal theory of method, 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 what has already been established. From this viewpoint what Stammler means is now obvious: that which Boeckh called the concept-determination of philosophy, “to re-cognize the already cognized,” holds for the law.

However, we cannot unconditionally agree with this sentence. 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 shall consider this possible difference only very briefly, as it merits our attention 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, too, combining them with other utterances and so forth. Thus, for example, if we characterize something as an act of wanting [*Wollen*], then we speak either in a weak or in

a strong sense of a kind of striving and distinguish it definitely from other kinds of striving, possibly from an act of wishing.

But it is not thereby clear that we know how the one differs from the other. We employ a simple test: everybody becomes absolutely capable of distinguishing the two kinds of mental acts of which we here speak; they become capable of distinguishing the act of wanting from the act of wishing. But it is often fruitless to ask what, in an exact sense, distinguishes one from the other; what marks out one from 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 set one object in relation to another, does not contain 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 known can differ from time to time. This leads us further: the legislator speaks of all sorts of things [*allerlei*], he means all sorts of things, yet he does not have to be conscious about the subtle differences of which he speaks. The theory of law “knows” [*erkennt*] that it makes visible the most important characteristics that were signified by the legislator. The task of the theory of law is knowledge of perhaps what was known, perhaps what was meant. The work of the jurist exceeds that of the legislator in this way. The jurist establishes the peculiarities of what was meant by the legislator; he obtains his position by distinguishing the meaning of certain objects from the meaning of others, and especially from the meanings of objects of the same sort.

We assume that the jurist first of all has to interpret individual signs, that through signs he makes clear what the signs mean. We now see that understanding of meaning is not a blind understanding. Rather it is an insightful understanding, an understanding of the signified object including an awareness of its peculiarities. Now, not all individual signs are interpreted in this way, only those that fall within the work of the jurist. It cannot be our task here to establish what sort of signs these are. Nevertheless, a broad characterization is necessary and required for our aim.

What in fact does criminal law consist in? Obviously, rules for punishment; that is, information about the special conditions of punishability. The distinguished task of the interpreting jurist is to establish all that may be applied as a punishable condition, according to existing law. Punishable conditions themselves can be divided into (i) outcomes (i.e., bodily injury), (ii) actions (i.e., the movement of an arm), (iii) psychological conditions of the perpetrator (i.e., intention [*Vorsatz*] and (iv) the causal connections between these (i.e., a causal connection between action and outcome). Outcomes can

again be divided into (i) physical outcomes (such as bodily injury) and mental (i.e., personal offence). Thus, the psychological element of law is not only the mental phenomena [*Bewusstseinerscheinungen*], but also the special understanding based on these mental phenomena. Psychological conditions of punishability [*Strafeintritte*] are the perpetrators' psychological conditions: intention, negligence, deliberation, purpose, sinfulness, wilfulness, awareness of an unlawfulness, infamy, sanity and so forth. It is the same in the case of outcomes: indignation, insult, humiliation, and so forth. The jurist must, as already indicated, establish these conditions. That is, he must grasp a condition in its peculiarities; he must state the most important characteristics of a condition. Yet the psychological investigation of the peculiarities of a condition is an independent task of psychology. We have here uncovered a connection between psychology and the interpretive theory of law: a jurist who intends to describe mental conditions unambiguously needs psychology or, to be more precise, he is a psychologist insofar as he realizes his intention.

Above we rejected the question of what methods the jurist makes use of in order to discover the arrangement and meaning of signs. We must now briefly describe one of these methods. We do not here speak of the cases where meaning is given unambiguously or at least is given from the arrangements of signs; what we have in mind are the cases in which the signified meaning does not clearly appear, or in which doubt exists about the essence of the words, or in which the signs possibly refer to a meaning that seems infrequent or self-contradictory. It is of the nature of the interpretive theory of law that too certain results cannot be demanded and that we must be content with saying: it is probably so; or: it is possibly so but possibly something different. There are even in the cases in which the signs leave their interpretation up to us possibilities for obtaining fairly trustworthy results. We shall consider here one of these possibilities.

It was just emphasized that the jurist does not consider the signs and the arrangement of signs as such; rather, he considers the signs as given by a figure normally referred to as the legislator. Accordingly, the meanings and their connections are not given as such; rather they are dependent on the figure of the legislator; they are particular meanings and particular acts of will. We shall now pursue this fact. The consequences of the dependency of signs and meanings on the legislator goes in two directions. First of all, it can to quickly draw on an example be doubtful whether the legislator by a sign or by an arrangement of signs has meant what is usually expressed by these. Or, whether the legislator had another meaning in mind, one that emerges only from the entire sign-sequence. When, then, the jurist bears in mind that it is here a matter of an act of meaning of a figure, then he can perhaps find psychological laws which make it obvious that this figure has meant exactly

such-and-such with a sign that is normally interpreted differently. Or that the legislator signified a meaning one generally expressed differently in exactly this way. Following general rules of psychology, the jurist can perhaps reveal that a confusion is here obviously possible. And he can thereby make the possible interpretations which at first sight seemed unlikely understandable and thus 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 expressions which seem infrequent, but the meanings. It is again appropriate to recall that we are here concerned with acts of judgment and acts of will of a figure; and this happens often to be the case, as in the case mentioned above. A legal determination [*Bestimmung*], which at the beginning appears absurd, can be explained psychologically through such a thorough consideration although any such consideration would, of course, be as absurd as the determination once was. What before seemed unlikely, now seems probable. Both of the cases that of a problematic expression and that of a problematic meaning become more intelligible when certain psychological laws are explained. The opposite, of course, is also possible: the jurist's awareness of certain psychological laws may make a problematic expression or meaning appear even more unintelligible.

The fact that meaning is for the jurist dependent on the legislator has further consequences. Until now we have spoken only of the figure of the legislator, but we shall not let it stand at that. The more often the jurist succeeds in understanding the clauses of the legal system, the more specific the legislator becomes. The legislator goes from being a figure to being a figure with these particular ways of expressing himself, by means of these particular meanings and ideas [*Vorstellungen*]. The extent to which the peculiar nature of a legislator can be made clear and explicit determines the fruitfulness of our method. It is then a matter not merely of psychological rules, but also of the meticulous rules of a particular individual. Such rules, of course, can be determined both more subtly and more decisively than can general psychological rules. Problematic expressions and problematic meanings can be determined as intelligible or unintelligible more frequently and in more detail through knowledge about the nature of the legislator.

We shall no longer concern ourselves with the consequences 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 probably unconsciously and in different naive versions. Whenever to give a single example we infer from the fact that the legislator somewhere has expressed a determinate intention that the legislator 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. This rule is merely a special case of the general psychological principle which can be called “the tendency of faithfulness toward oneself.” If we become aware that the legislator is consistent also in other cases and if we with still greater certainty can determine that legislators under the same circumstances share the same intention, then we can establish the rule that the more often the same mental operations take place under the same circumstances, the more efficient this tendency will appear.

We have thereby identified a second connection between psychology and the tentative theory of law: the jurist is a psychologist; he determines through psychological laws the expressions and meanings of the legislator as either intelligible or unintelligible. There are at the same time two fundamental differences between this second connection between psychology and the theory of law on the one hand, and the previously mentioned connection on the other. The two connections were explained in relation to the nature of legal theory: the jurist must unambiguously determine the individual meanings of the legislator which include his psychological tendency. The method is here straight forward: in order to determine the meanings of the legislator, the jurist must make use of psychological laws. Moreover, in the one case it was a matter of describing mental tendencies; in the other a matter of describing psychological laws. The one case is handled by the jurist in a descriptive way; the other in a causal-explanatory way.

This introduction to the connection between psychology and the tentative theory of law is not an exhaustive account, but rather an outline under which the following considerations will be described. These considerations shall at the same time serve as a clarification and justification for what remains recondite and doubtful.

### **A. Three Former Essential Solutions to these Problems**

## **2. The Theory of the Equality of Conditions**

We understand by criminal law a sum of institutional clauses, through which particular conditions for punishment can be inferred as consequences. We shall call these conditions, which follow particular justifications, penal presuppositions [*Voraussetzungen der Strafbarkeit*]. Generally speaking, a penal presupposition entails that the certain content of a crime (outcome) is brought about by the actions of a sane human being [*compos mentis*]. Thus, the presupposition of the death sentence is that the death of another human being was brought about through an action. However, the “bringing about”

[*Verursachung*] of a given (unlawful) outcome is never the only penal presupposition. To continue our example: a human being can bring about the death of another human being through his action without being sentenced to death, and sometimes without being punished at all. He is a murderer in the sense of the criminal law only if he brought about the outcome intentionally [*vorsätzlich*] and with purpose [*Sberlegung*]. In addition to the “bringing about” there must also be intention and purpose.

If intent without purpose is given, then we speak of “manslaughter” [*Totschlag*]. The presuppositions for the sentence based on manslaughter are thus “bringing about” and intent without purpose. Finally, intent may be completely lacking. That is, an outcome may be brought about unintentionally [*nicht gewollt*]. This is possible for two reasons: either the perpetrator failed to pay the legally required “attention,” so he is blamed for negligence; or, this is not the case. If the perpetrator has brought about the death of another human being, 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 human being, then it is not sufficient that a given outcome was brought about by an action of a human being; rather, as an additional penal presupposition, the action must be either intentional with purpose, intentional without purpose or negligent, or what we could call liable. Similarly, we may say the following: generally speaking, the penal presuppositions are the “bringing about” of an outcome and culpability [*Schuld*]. Culpability is always present, but not always in regard to the unlawful outcome which is brought about. In the cases where only an intentional action could have brought about a given outcome, that action is sufficient. To return to our example: suppose again that a human being has brought about the death of another human being. Yet the perpetrator’s intention was only to injure his victim, but instead the intended outcome brought about the death of his victim. In this case the law determines: “If the death is brought about by the (intentional) injury, then the sentence is at least five-years imprisonment.” This is obviously another and much more peculiar case. The outcome is brought about, 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 inattentively brought about. This is called “the crime qualified by the outcome” [*durch den Erfolg qualifizierten Delikten*]. It is now understandable for us to say: the penal presuppositions are always a “bringing about” [*Verursachung*] of an unlawful outcome and responsibility for the outcome on the one hand, and a cause [*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 determine what our law means by these penal presuppositions.

As far as we can see, there are no disagreements about what we understand by culpability and its various forms. Nor are there disagreements about the concept of “purpose.” Yet more elaborate investigations of the kind which as was pointed out in the introduction belongs to the field of psychology have not been carried out. We shall here be concerned with the forms of culpability only insofar as they are required for the problem of “bringing about” [*Verursachung*]. While there are no disagreements about the nature of culpability, what is in fact meant by a “bringing about” of an outcome though an action belongs to the problematic core of all criminal laws. The investigations of this go far back and are of course much older than present law.

The theory which should represent the present state of ordinary law throughout Germany, after which the action is to be called a cause and as a consequence of which the outcome is given with necessity, is antiquated and in every respect recognized as untenable. The outcome arises with “necessity” only from the sum of its conditions. Strictly speaking, it is only the complete complex of conditions which is called the cause of an occurrence. But what we, strictly speaking, understand by cause is indeed unimportant. Our problem is to establish what criminal law means when it says that an outcome must be brought about by an action. What can be said is this: it cannot mean that an outcome must be brought about by an action with necessity, for the single reason that in this sense an action is never a cause. Rather it must incorporate yet another series of factors by which the outcome is given with necessity.

An action alone brings about no unlawful outcome with necessity, but an action can be necessary for the achievement of a certain outcome. Such an action, which can be called “a single cause” [*Einzelursache*] or simply a “cause,” is in agreement with ordinary speech. It must be mentioned, too, that when the criminal law calls an action a “cause,” it just means that it is one of the many conditions which together brings about an outcome; that this action is something such that if it does not occur, then neither does the outcome. Such considerations lead to the following principle: causal connection between action and outcome in the sense of criminal law is given when an action is a condition for the outcome; not this or that special condition, but simply a condition. All conditions, then, are equal in relation to the outcome.

This view, already established by von Berner, Hälschner, as well as Köstlin, was first established by von Buri and can be seen as the present dominant view amongst the three main solutions to the causal problem. The clearest and since the 10th edition of his texts the most sufficient

presentation of this view is given by von Liszt. In what follows, we shall present his theory and attempt to test it.

### *Presentation*

Causal connection, says von Liszt,

is given when an outcome that involves bodily movement (e.g., an action) does not occur if the bodily movement did not occur. If the relation between the bodily movement and the 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. In effect, it is taken for granted in criminal law that “bringing about” and instigation [*Veranlassung*], cause and condition, merge together. More precisely, where the occasion is continuously sufficient, its “bringing about” (for which the activity of the will in itself would bring about nothing) is never required. Every condition for an outcome is equal in value to any other condition. The contributory cause [*Mitursache*], too, is a cause in the sense of the law. The notion of “cause” is not excluded from the simultaneous or following occurrence of the contributory cause.

Two important consecutive clauses are immediately given from these alternative expressions:

1. “The outcome can be traced back to a bodily movement as its cause when it, apart from the particular circumstances under which the action would have been carried out, would not have occurred.”

2. “The outcome can then also be traced back to the bodily movement as a cause, when it would not have occurred without the simultaneous or successive interplay of other human actions.”

Causal connection then is excluded only “when the withdrawal of the bodily movement would not have changed the occurrence of the outcome. This holds true, then, especially when the outcome upon which the intention [*Willensbetätigung*] was directed, would have been brought about by a new, independently caused causal series; that is to say, not by the intention.”

However, our present law makes an exception to this rule: “The free and intentional action of the sane means legally the occurrence of a new independent causal series; finally, it also means the acceptance of a causal connection between the first intention and the given outcome.” If, for example, A persuades B to murder C, then A is not which one in fact should expect punished for willful murder [*vorsätzlicher Tötung*]; rather, he is punished for instigation. We need not here expound the further consequences of this principle. According to von Liszt, it creates the sole deviation from the

otherwise steady concept of causality. “The concept of causality is to be realized beyond the limits of the presented principle.”

### *Critique*

Several doubts are raised against this theory, according to which, 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. There was, of course, an available “regulator” for the concept of culpability [*Schuldbegriff*]: culpability must become attached to the “bringing about” in order to hold the perpetrator responsible. But it was incorrectly believed that this corrective was not sufficient when available, and it was correctly objected that it fails in relation to the crime qualified by the outcome [*die durch den Erfolg qualifizierten Delikten*]. Let us consider both objections in more detail. The first one claimed that we come to absurd consequences if we always where culpability (perhaps intention) and “bringing about” in the sense of von Liszt are available like Liszt, were to presuppose responsibility. One should perhaps mention the following example: A wants to injure B. He forces him into the forest in the hope that lightning will strike him. What he wished for occurs. In this case, it is claimed, if A undoubtedly brought about the death of B, then according to the opponents, his action is a necessary condition for the consequences; the outcome would not have happened without the action. When A in this case also had the intention to kill B through the action, then according to the former theory concerning willful murder, he must be sentenced to death. That such a judgment is in opposition to the law is doubtless. Furthermore, it is inferred, the theory of the equality of all conditions leads to incorrect consequences and must therefore be rejected. Such cases can and have of course been extended. This is the case even in the old example that Feuerbach found 100 years back: A wants to kill B. B hears about this; he dies from fear. A desired and brought about the death of B. If we therefore applied Liszt’s theory, then A would be punished as a murderer.

We cannot agree with this line of argument. We believe, in contrast, that the former (Liszt’s) theory is a sufficient account of meting out punishment; we will, however, defend our view against these objections later. Yet Liszt’s concept of causality also seems untenable to us insofar as it is merely a matter of “bringing about.” “If the death of the injured is brought about by the bodily movement, then the sentence is at least three-years imprisonment.” If one here wanted to identify “bringing about” and “a condition leading to an outcome” (as it is required by von Liszt), then the administration of justice [*Rechtsprechung*] would obviously give rise to the most impossible consequences. B is slightly injured by A; he is taken to a

hospital that is struck by lightning a couple of days later, whereupon B dies. According to Liszt's view, if the slight injury of B had "brought about" his death, then the death would not have occurred without the harm.

Or: A, who is harmed by B, goes to the Riviera for convalescence. He is there run over by a train. A has again "brought about" the death of B and must accordingly be punished. This example, too, can of course be multiplied and elaborated. Liszt's concept of causality here leads to infinite regress, if it is not modified. We do not have to mention that the absurd consequences of Liszt's view are not encountered by the legislator. Liszt's theory does not support the cases where the legislator punishes the mere "bringing about" without considering culpability [*Verschuldung*].

In effect, von Liszt himself earlier added a restriction to his concept of causality: "Everywhere" as it says in the ninth edition of his texts "where an occurrence of a given outcome is understood by the law as a condition of punishability or as a condition of a more severe punishability, causal connection between an outcome and an action is not presupposed by the dominating view when the outcome is brought about merely by an exceptional connection of circumstances." However, in the following edition, von Liszt dropped these restrictions. "This view" as is mentioned in the twelfth edition of the text "contains a change of the law to which only the legislator himself is entitled. The legislator requires predictability of the outcome, although the legislator has disregarded this requirement."

Liszt is aware also of the complications to which his concept of causality gives rise. He originally sought to eliminate the worst problems by signifying through the crime qualified by the outcome as "brought about" only the predictable outcome. But he later believed that he should give up these restrictions insofar as the legislator explicitly speaks of "bringing about" and not of predictability. Later we shall also consider this line of argument.

### 3. The Theory of the Most Efficient Cause

As a result of its absurd consequences, the theory that claims that all conditions are equal for the outcome falters in relation to the qualified crime. On the one hand, it insists on that the "indisputable and undisputed principle" that cause in the broadest sense is the result of the total complex of conditions of an outcome is worthless for the criminal law. Similarly for cause in the narrowest sense: every condition of an outcome, which is proved as inefficient, suggests a middle course. Thus language usage seems to show that in the series of conditions, one or several conditions would be especially accentuated. We almost always signify one or more conditions as the "cause" of an outcome, while the others must be content with the name "condition."

Thus, the wrong move of a switch which brings about a train [. . .] accident is often taken to be 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 momentum of the train in relation to the accident, then we call it a condition. Such considerations make it seem probable that not all conditions are equal in relation to the outcome. We seek to establish special conditions as causes in the sense of the criminal law. Sometimes it is the most productive, sometimes the primary, sometimes the most weighty, sometimes the most effective condition, which we take to be the dominant cause (*κατ' ἔξοχήν* [*par excellence*, or according to the greatest]). We shall here restrict ourselves to a discussion of the last view, explored by Birkmeyer in his Presidential talk [*Rektoratsrede*] on “The Concept of Causation and Causal Connection in the Criminal Law” [*Ursachenbegriff und Kausalzusammenhang im Strafrecht*].

### *Presentation*

After having focused on a sharp separation between the question of causality and culpability, Birkmeyer established that the philosophical concept of causality (cause in the broadest sense possible) is useless for criminal law, and that it gives rise to the concrete principle “that nothing can be taken as a cause of an outcome, which is not a condition of the outcome.” This “poor” result is not sufficient for the criminal law. As opposed to von Buri, who (as von Liszt) takes every condition as the cause, Birkmeyer realized the previously mentioned objection and goes on:

While it is settled that, on the one hand, we can seek the cause only in relation to the condition which establishes that what is not a condition cannot be a cause; it is clear, on the other hand, that the definition of a cause as a sum of conditions is useless for the criminal law and that the definition: “a cause is every condition for an outcome” is no less useless and incorrect and unlawful. What is left is only a cause in the sense of the criminal law must be one of the conditions of an outcome, while the rest of the conditions have merely contributed to the occurrence of the outcome. It need not and it cannot be ignored that the other conditions also contribute to the outcome; but the practical needs require that we establish one condition as the cause. The nature of the matter prohibits the establishment of such a condition as the most effective for an outcome.

But that one condition is more effective than the others for the outcome cannot, according to Birkmeyer, be disputed. One dose of poison can just as easily as another contribute to the death of a person, which would not have occurred with the presence of only one condition. “It can, of

course, under additional circumstances be very difficult and impossible for the weak human forces to establish with certainty the various sizes of effectiveness of particular conditions. But this does not change the correctness of the concept; rather, the presumption of a single case works only in relation to this concept.”

“In the hand of a judge with common sense and practical sense this concept of causation is perhaps sufficient for the criminal law and will in a similar way maintain our sense of law in relation to the inconsistent settlements which Buri’s theory makes necessary.”

### *Critique*

Talk about effective conditions has of course its good senses under certain circumstances. 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 power is the effective condition for the outcome; it contributes to the outcome twice as much as the other horse. The work of the strongest horse is however not the only condition for the movement of the load. For instance, the particular strength of the chain by which the animals are pulling is necessary for the outcome to occur. A comparison of both of these conditions in relation to their effectiveness, however, clearly makes no sense. The work of the horse and the certain strength of the chain 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. We consider yet again what application this talk has and can have in and of itself. To talk of an “effect” of a condition, or of a “work” in the essential sense naturally makes no sense, because the concepts of effect and activity originate exclusively from inner perception. There is no justification to shelve our subjective experience in the world of things, however difficult avoiding this anthropomorphism might be. Rather what we know is exclusively the complex of conditions, the outcome, and the connection of necessity 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 complex of conditions with a, but without b. That the work of one horse is a more effective condition for the movement of the load than the other can, when we presuppose that both horses together draw a hundredweight, mean only this: that the one horse alone would draw two-thirds of a hundredweight, the other horse only one-third of a hundredweight.

We can see under what presuppositions we can compare conditions with respect to their effectiveness: when, on the one hand, the outcome in some way is quantitatively graduated. On the other hand, it can be established what part of the outcome a particular condition among the compared conditions would accomplish without the others (with which it is compared). It is evident that in most cases neither one of these principles are presupposed. One of these, for example, is not given when we want to compare the work 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, with the cancellation of a condition, the entire outcome is cancelled; they are absolute conditions.

These considerations aid us in a further insight. If, in a complex of conditions, one or several absolute conditions are available, then it is inadmissible to talk about a "most effective" cause in the essential sense. We can perhaps under the established presuppositions speak of conditions, the more effective as well as the others; but we cannot call them the most effective, since a comparison with absolute conditions although available is impossible.

Accordingly, if we examine the considerations of Birkmeyer's theory, then the following arises: that we can at all speak of the most effective condition is evident from the above mentioned exception. On the other hand it is admissible, when relative conditions in a complex of conditions are available, to compare their effectiveness. This means for our criminal problem the following: we can probably never say as Birkmeyer thinks that a human being has brought about the effective condition for an outcome. Rather, it is possible in very specific cases to say: the condition brought about by a human being is a more effective condition for an outcome than certain other conditions. Birkmeyer's principles must thus say: if a human being brings about a (relative) condition for an outcome, and if the more effective condition for an outcome has the same standing in respect to the same outcome as the other (relative) conditions, then this condition can be called a "cause" in the sense of the criminal law. Moreover: if a human being brings about a (relative) condition for an outcome and if the less effective condition for an outcome has the same standing in respect to the same outcome as the other (relative) conditions, then this condition cannot be called a "cause" in the sense of the criminal law.

Another objection against this principle is further that in most situations the cases under consideration have no application. It is obvious at first glance that the cases in which we can speak of more or less effective conditions, are very rare. Only in the most rare cases would part of an

outcome have occurred without the condition brought about by a human being. It is already clear from this objection that this concept of causality is insufficient for the criminal law. However, the criterion suggested by Birkmeyer in order to effect the cause in the sense of the criminal law is not merely 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 and here to be 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; the 10 grams which A previously consumed were the more effective. Thus, B has not "caused" the death of B and would according to Birkmeyer's theory be acquitted of willful murder [*vorsätzlicher Tötung*]. That such an acquittal would conflict with the will of the legislator, and that every law court in our case would have to convict A for willful murder does not have to be mentioned. However, Birkmeyer has, in a note, protected himself against such a consequence of his theory. Here it says:

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 acceptance is then necessary, when both the conditions a and b are more effective than every other condition, but both have contributed the same as the others to the outcome. This acceptance is then soon realized when the conditions a and b contribute differently to the outcome, but both a and b contribute more to the outcome than every other condition.

At any rate, Birkmeyer would immediately say that in the above mentioned case, B, of course, would 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 have to repeat that the comparison of these conditions with respect to their effectiveness is impossible. Of only those conditions which it makes sense to compare, the dose which A accidentally has consumed is the more effective and the one which B gave him the less effective. Either the impossible juristic consequence which we have just identified arises, or the theory is also here useless. Birkmeyer's theory has thus turned out to be useless in every respect.

We shall linger over this no longer. On the one hand, Birkmeyer's concept of causality fulfills "the requirements of the law." On the other hand, we have pointed out that only rarely do we find conditions which contribute more to an outcome than others. The question therefore arises of how Birkmeyer comes to this concept of the most effective cause. We have already mentioned above that the ordinary language requires that one of the conditions of an outcome is put forth as the "cause" of the outcome. The "cause" of a train collision, we say, is the wrong move of the switch; the momentum of the train, without which the accident would not have taken place, is, on the other hand, called a condition. Something similar is the case in the above used example. Most people would here call the physical constitution of B the "condition" of the outcome and the consumption of the poison the "cause" of the death. There are special "identified" conditions of an outcome which normally would be called the "causes" of an outcome. It further appears as if the naive man who speaks of causation in this way would admit that this cause has a positive reality 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 "essentially" brings the outcome about; it is effective to a larger extent; it contributes more than the other conditions; it is, following Birkmeyer, "more effective" than they are; and it "provides more to the outcome." The question now arises as to when and why the naive man speaks of causation in this way. To this the answer is: 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. That this is so is not surprising [*wunderbar*] when we recall what we just said above: there is a tendency to transfer [*übertragen*] the concept of activity which we derived from our inner perception, from the cause to the effect. We consider the complex of conditions as something that creates the effect. This transference becomes naturally simplified when the conditions are given as an occurrence. We cannot of course exclude the observation that the other "static" conditions assist; but the occurrence [*Geschehen*] appears to us as the essential happening [*Wirkende*]. Further, an outcome belongs to an activity if it is produced by the activity and is the result of the activity, but not if it merely stands close to the activity. On the one hand, the fact that we ascribe to a cause an activity makes it clear that we to a certain extent can consider the occurrence as a cause. On the other hand, we regard every activity which immediately precedes an outcome and this is always an occurrence in this way. The "static" conditions, of course, border temporally on the effect, but these were also already there before the occurrence of the effect. That which "essentially" draws in the outcome, that which once it appears has led to the outcome without further consequences is the

occurrence [*Geschehen*]. Two reasons can be distinguished, two reasons which lead 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 static conditions. Secondly, the fact that occurrence drags the effect immediately after it and that it therefore seems “essentially” to bring about the outcome, or at least stands in a close relationship with the outcome as opposed to the other conditions.

These two reasons alone will not suffice. We often call evident conditions a “cause,” which neither present an occurrence nor drag the effect immediately after it. This is already clear from our first example. We do not call the momentum of the train the cause, although it precedes the accident; rather, the wrong move of switch is the cause. Although on the one hand, this need not be considered as an occurrence, and on the other hand does not immediately bring about the accident in the above mentioned way. Even the second example needs only to be changed slightly in order to completely change the condition of things. We say here that the consumption of the poison, and not the (perhaps weaker) physical constitution would be the cause of death. It is in fact so, perhaps via 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 acquainted with a remarkable poison. He knows that it does not inflict severe damage on a heavy man, for he has perhaps tried it out on himself. He discovers now that another man dies from the poison. He would then consider the weakness of the body as the “cause” of death. A principle can be established from all these cases: “cause” is assigned to the conditions (a) of an outcome (e), which must be thought to be added to (b not e) the one part (b) so that the outcome (e) in the place of a second part (not e) could be thought of as real. The momentum of the train and its driving towards another train are in the first example thought together. The wrong move of the switch is the “cause,” though it must stand in relation to the momentum of the train in order to lead to a collision. In our second example, the consumption of the poison is the first cause, and then the weakness of the body; the bodily weakness and the life, or the consumption of the poison and the life are thought together. If we here again ask for the motives behind these usages of language, then it turns out that there is no new ground: that which must belong to a complex of conditions in order for an outcome to occur, now through this in particular, appears to stand in close relation to this outcome; it seems to be more of a cause than the other conditions. As before, the activity which immediately precedes the close connection between the striking sub-cause [*Teilursache*] and the outcome here creates the motive for the mentioned language usage, as well. With one exception, the connection was prior to a temporal connection, and we had assured ourselves about it in our perception and in our memory, respectively.

We cannot talk about it in the same way: we do not see or think of the “cause” as something immediately preceding the outcome; rather, we think of the outcome as connected with the “cause” in the way it is in other cases, in which both the cause and the complex of conditions which is a part of other connections, are available.

In short: a “cause” is, on the one hand, a condition which presents itself as an occurrence. On the other hand, the condition which to a certain extent is connected with the outcome is either connected temporally and thus given through perception or it is not connected temporally and is thus given through custom or similar subjective factors. The reason need not yet be exhausted by this, the reason which drives us to talk about “causation.” There may be given so many suggestions that a justification is not available. It remains from what we said above: we do not find such an effect or such an appearance in the things themselves, rather we attribute it to them. Again, the anthropomorphic approach turns out to be convenient; we must separate it from scientific research insofar as it does not depend on the things themselves.

Although we have previously objected to a justification of this approach, we have here undertaken something somewhat closer to its explanation. This will happen, insofar as we later of course from a completely different standpoint again meet the same subject matter.

#### **4. The Theory of the Adequate “Bringing About”**

Birkmeyer’s theory has turned out not to be capable of eliminating the problems to which Liszt’s theory led through the crime qualified by the outcome. We could also say that the theory operating with a “most effective cause,” “most excellent cause,” etc., is nearly disproved. By way of contrast, a new, third way of solving the problem of causation has lately won numerous supporters. It is the theory of the “adequate” “bringing about” which is held by J. von Kries, and under various modifications, especially by von A. Merkel, Thon, Helmer, M. Rümelin and Liepmann 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, not only in the single case, but in general. The conditioned action is not to be called a cause when it is found only in a single case, when it only “accidentally” leads to the outcome, but is not capable of doing this in general.

We shall present and discuss this theory only in its modified form, given by Moritz Liepmann in his introduction to criminal law in 1900.

*Presentation*

First of all, Liepmann asks whether we can justifiably isolate a single condition from a complex condition and call it a “cause” of a concrete event.

He hopes to confirm this conjecture: the cause that leads to an event is nothing but what is stated by the event. An explanation, however, cannot be drawn from the reference to the infinite series of complex conditions; rather, we must stop at determinate conditions. Not in relation to arbitrary ones, but in relation to those “producing a deficiency in our knowledge.” This also identifies, on the one hand, the ones that illuminate a certain aspect of knowledge as neutral for the progress of the occurrence. On the other hand, it identifies the ones the desire for an explanation is incapable of producing. Only those conditions that are important for the viewpoint under which we consider the process can be considered “causes.”

The task for the theory of criminal law is to “establish what part of the single conditions is important 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 a reasonable [*zurechnungsfähige*] human being, and those whose cancellation would not only change the concrete effect considerably, but which would also influence its criminal relevance.” But we must establish yet another aspect of these conditions. The quality of a cause 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 conceived as nor be held responsible as a 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 incidence which is to be held responsible.”

If we disregard abnormal positive determinations which of course could violate this basic principle, and if we include the presented content of criminal norms without principal meaning, then we can establish the following principle: “An outcome in the sense of criminal law is then only brought about by an action if this action occurs in a calculable connection with the outcome such that its actuality illuminates in a calculable way the outcome as necessary.”

The outcome, in contrast, is not caused when its occurrence is “accidental,” that is, “devoid of human calculation.”

*Critique*

We must first of all object to Liepmann’s position that the outcome is never linked to the action, in view of our earlier point that other conditions

must be present together with the action in order for the outcome to occur. Not only the action, but also the complete sum of conditions which make up the action must be present in order to calculate the necessary occurrence of the outcome. Nor can we take each principle as it appears, if Liepmann's account is to have meaning at all. The question now arises, what does it ultimately mean that an outcome is "calculable" on the basis of its conditions? It cannot mean that it follows with certainty from the conditions; we have already seen that. Nor does it mean that its occurrence is "possible"; that it is compatible with natural principles. The calculable outcome, of course, 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 that Liepmann could have meant and which he means, judging from his other points: an outcome is calculable when it is given from the action with a certain probability. We can establish from the action if it is not sharply restricted 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. We have here spoken of adequate and inadequate causation. The facts that concern us here can in a subjective way be expressed as dealing with the conditions from which an outcome is given or is calculable with probability, and those from which an outcome is given with improbability. That Liepmann had these in mind is clear from the fact that he agrees with von Kries's distinction between adequate and inadequate "bringing about." The expressions "calculable" and "incalculable," of course, 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 difference in relation to its use by the criminal law, then we meet difficulties in relation to the intentional "bringing about." 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 [not] give him [the right] prescription for an antiseptic and thereby brings about a deathly infection, then the agent would be punished for attempted murder.

Liepmann believes that his theory is validated against this example. If the outcome is not accidental, then it is not devoid of human calculation. The fact that the death could be calculated from the factual circumstances is a sufficient proof for its calculability. This is surely correct. But is it then a matter of whether the outcome is calculable? We shall object to this on the

basis of Liepmann's account, which clearly emphasized that the outcome must be calculable from the action. Now, first of all what Liepmann understands by action cannot in this connection be established, although this will eventually turn out to be moot for us. If he takes action as we do to be the act, then we can naturally object that the stroke means that the death was calculable only with great unlikelihood from our example. On the other hand, if he mean by action which is possible with the ambiguity of the word with the end "-ion" [-ung] not the act, but rather a consequence of the act, in our case perhaps the wound of the harmed person, then we can respond that the problem is dealt with in an inadmissible way. The action, in both its first and second senses, must be a cause of the outcome in the sense of criminal law, and it is to be examined when the action in both its first and second senses, has the quality of a cause. If we disregard this, then the outcome is not "calculable" in the second sense either as is clear from the example. Rather, the agent has taken further conditioning factors into consideration, for example the clumsiness of the doctor. The theory achieves a completely new meaning in each case. The calculability from the action which Liepmann has required from the beginning, without changing his words, is transformed into calculability from the action and the factors which were known by the agent. If Liepmann's theory is to be valid, then we must say "calculable from the action and the factors known by the agent" instead of "calculable from the action," or which is now permitted by this addition "calculable with certainty." And by action we must understand bodily movement. In this form, the theory is doubtlessly correct for intentional and unintentional [*fahrlässige*] "bringing about"; it is however likewise surely superfluous. Thus, that somebody has brought about an outcome "intentionally" means that he has already calculated that the probability for the occurrence of the outcome is high, provided that his action and the factors known to him are present. The "really calculated," however, belongs if we let Liepmann himself speak "to the area of the calculable." And similarly, that someone has unintentionally brought about an outcome means that from already known [*bekanntesten*] circumstances, he could have calculated the occurrence of the outcome with a certain probability. That which can in fact be calculated, however, belongs always to the realm of the calculable.

While Liepmann's theory when taken in an exact way is unsound in relation to the punishable "bringing about" and is superfluous when changed, this withstanding it seems to eliminate those problems related to the "crime qualified by the outcome." We have seen with Liepmann's theory that if we take every condition for an outcome as a cause in the sense of criminal law, then we eventually fall into an infinite regress. Liepmann's theory seems to offer us the previously missed corrective of "calculability." As soon as we say, for example, that a bodily injury has "caused" the death of the harmed person

only when the outcome is calculable from the factors known by the agent, then the desired limit of punishment is achievable. We had just objected in the following way: as soon as such a calculable connection is given, then the negligence of the agent is given. If, when taken in relation to a more severe outcome, no negligence is given, then the outcome was not calculable. Since we have now a particular section for unintentional killing, then the § 226 StGB,<sup>1</sup> which punishes an injury leading to death, would be superfluous. Thus, the theory of the meaning of the law would not be correct.

To this objection Liepmann could respond, first of all, that if a qualified bodily injury, even when it happens negligently, differs importantly from unintentional killing, then an intention in itself already more punishable is given in relation to the bodily injury. Secondly, he could say that it could very well be that “calculability” of an outcome, and yet no negligence, is given. In relation to the intentional and negligent “bringing about,” a certain degree of probability in the occurrence of the outcome is not calculated or ought not to be calculated; rather this probability can sometimes be larger, sometimes smaller, and here we could make a similar distinction between the negligent and the “pure” “bringing about.” The outcome would in both cases be “calculable.” But only in the first case would there be such a probability that the law makes the calculation obligatory. Every objection which says, following Liepmann, that in relation to the crime qualified by the outcome, negligence must always be an option, would thus be rejected.

However, this implication of the theory, as far as we can see, would not be correct. For example, someone returns to his house in which he has not lived for a long time, and which in the time of his absence was closed. In the strong belief that the house was empty he sets it on fire in order to collect the insurance claim. Yet a homeless person, who during the time of the absence of the houseowner has made himself at home, dies in the fire. The agent must here without doubt be punished for intentional fire arson which “caused” the death of a human being, although this outcome surely was not “calculable.”

Thus, we must agree with von Liszt who himself has earlier represented the theory of the adequate “bringing about” as already mentioned in relation to the crime qualified by the outcome, when he indicates that this theory adds an approach to the law which is not to be found in it and therefore is to be rejected.

If we gather together the results of our critique, then Liepmann’s theory is in conflict with the following: if a meaningful usage of its concepts

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<sup>1</sup>[StGB is an abbreviation for Strafgesetzbuch, the German criminal code. —SK]

shall be possible at all, then we must say about “the calculable action” that from the action and the factors known by the agent 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 of the punishable “bringing about” turns out to be superfluous, and simply incorrect.

This is not to deny that within the theory of the “adequate bringing about” there inheres something 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 fine sense of justice that the law here, focusing on the outcome, presupposes an innocent “bringing about” as a sufficient penal presupposition; we consider it unjust to make someone responsible for something he has not brought about. These considerations comply splendidly with this theory. According to this theory, only he shall be punished for whom the outcome was calculable, who could calculate the outcome, and it is clear from this that he must also have calculated it. There is no innocence in this case, rather an unintentional “bringing about,” and the sense of justice is satisfied. We can see from this that the advocate of the adequate “bringing about” in this connection often refers to his theory. But we might object is the goal to establish a concept of causation which corresponds to the sense of justice? Surely not. Rather, the goal is to understand what the legal text means when it speaks of causation. It is a completely inadmissible presupposition to accept that all legal determinations correspond to the sense of justice. That this is not the case is of course proved sufficiently by the stream of critical and reforming suggestions we are presently encountering regarding criminal law. Thus, a theory does not lead to a theory of causation merely because its results are made in accordance with a sense of justice. It is the exclusive task of the interpretive theory of the criminal law to examine, independently of such considerations, the meaning of the present legal determinations.

The more simple and evident such considerations are, the more astonishing it appears how often the line of argumentation characterized here, and similar arguments, are wrong. We take it, in contrast, to be appropriate once again to characterize the problem which we shall discuss in the following.

## B. The Solution to the Problems

### 5. Closer to the Questions

The task is, as we heard from Liepmann, “to establish what aspect of the single conditions are essential and required from a criminalistic viewpoint.” Such a question can be justified. It is, however, not the question to which we seek an answer, nor for which Liepmann as well seeks an answer. We can surely examine what conditions the criminal law “requires” as causes, or should correctly establish as such. But the theoreticians of causal connections cannot in principle know this. The question they seek to answer is this: what does the law mean when it says only he can be punished who has brought about an unlawful outcome? What should be examined is not only what the criminal law ought to understand by causation, but also what it in fact understands thereby.

It makes therefore no sense when a legal theory refers to the theory of a logician and covers his concept of causation with it. It makes, for example, no sense when von Liszt means 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, then it is clear that it is proof neither for nor against a theory, when the concept of causation presented by him is covered by Mill’s concept. It shall, on the contrary, furthermore be examined what the law means by causation, but without taking him or any others into consideration. This principle, however, requires an addition: the law does not speak of causation in relation to the attempted crime; rather, it simply speaks of the one who kills, who harms, or who forces someone to commit a crime [*nötig*] and so forth. First of all, the interpretive theory has, instead of all these activity-words, an expression; namely, that an outcome is brought about. This is certainly fully correct and in agreement with language use. Only it must not be forgotten that the law does not use this expression in relation to the intentional crime. In relation to negligence, and to the crime qualified by the outcome, in contrast, the legislator speaks of “bringing about.” Of course, it is possible that this word is used in the same sense both times. But since such an agreement, which is in the law and which is found within the law, need not be presupposed, it is necessary that the intentional crime be treated separately. But it is good to consider causation relative to the crime qualified by the outcome in itself. With respect to the unintentional crime does the law speak of “bringing about” 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 and in different meanings, the same expressions can also here be ambiguous. One of the results of the present critique arises exactly out of this problem. The same concept of causation which in relation to the punishable “bringing about” appears to us as signifying (von Liszt) or not as signifying (Liepmann) turns out simply as false. Our problems can be identified on the basis of these considerations:

(a) One penal presupposition relative to the 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, such a causal connection between action and outcome is given; that is to say, when an action is a cause of an outcome in the sense of the law.

(b) One penal presupposition relative to the unintentional 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 a cause of an unlawful outcome in the sense of the law.

(c) One penal presupposition relative to the crime qualified by the outcome is that the severe outcome is brought about by a less severe one. It must be examined when the less severe outcome according to a crime qualified by the outcome is a cause of more severe outcomes in the sense of the law.

This investigation must be carried out without taking into consideration the concept of causation, perhaps presented by the philosophers, and without taking into consideration whether the result is “useful in praxis” for the judge, whether it is “normal” or corresponds to the “pictured” sense of justice or not, but rather only with a concern for the meaning of the law.

It is now time to meet an objection which could easily undermine our account. We have several times used as a counterargument that it would lead to “impossible” consequences; for example, against Liszt’s concept of causation, that it in relation to the crime qualified by the outcome leads to impossible results. What does “impossible” mean after all? Might it mean unfeasible? Probably not. Why should it not be feasible that A who has given B a slight injury is to 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 the sense of justice; this is here the meaning of “impossible.” Thus, we have ourselves served the line of argumentation we just now signified as completely inadmissible. We have signified a theory as false because its consequences conflict with the sense of justice.

This objection does not apply to us, however. We must of course admit that “impossible” does not ultimately mean anything else than “unjust” or “against the sense of justice.” But we did not mean that these consequences appear as unjust or conflict with our sense of justice; rather, they conflict with the principles or sense of justice which dominates criminal law. Given this sense of “impossible,” we will say nothing but this: such consequences conflict with what the law elsewhere holds as just, which certainly is not desirable. Surely, only with great care can we make use of this line of argumentation in praxis. It cannot be doubted, however, that it was justified where it has been used.

## 6. The Cause in Relation to the Punishable Offense

### *(a) The Intentional “Bringing About”*

Every action which is a condition for an outcome is, in relation to the intentional crime, a cause of this outcome in the sense of the criminal law. It is neither the most effective condition nor the most excellent condition, nor anything else like this. To be a condition, it must be necessary [in the single case]. It is not sufficient that it is generally well-suited to bring about the outcome; it must rather 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 characterized principle is fully valid. It is then also to be said: if the action is a sound [*zurechnungsfähigen*] condition of an unlawful outcome, and if an intention is also given in relation to this outcome, then the agent is customarily punished. We have already spoken of the objection which could here turn up in relation to the Buri-Lisztchan theory (which we of course in relation to the intentional crime in principle could accept). A so does it say sends B into the forest in the hope that he is struck by lightning. His hope is fulfilled. Intention is here given; causation, according to the theory, too. A would thus have to be punished as a murderer, which however would surely conflict with the will of the law. But does this mean that the theory of the concept of the causation is incorrect? We shall deny that completely. Suppose first of all that A were capable of calculating exactly when lightning would strike a particular tree, and that he at this time sends B under this particular tree, now with the knowledge that he would there be struck. No human being 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 another kind of causation here given than in the first case? Of course not. A’s action and the consequences of his action are exactly the same in the two cases, or they at least could be so. 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. Since no punishability is given in the first case, but is in the second, then the second penal presupposition the intention fails in the first case. The example refers in both cases to the difference between the psychological states of the agent. He acts in the one case "in the hope" that the outcome will occur and in the other case "with the knowledge" that it will occur. Thus, the intention fails if the outcome is only hoped for, but the intention is present if it 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 against this principle is easily found. First, 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. Intention must now be present as it is in the first case. Yet A cannot be punished as a murderer. We can here see that in order to explain the situation fully, we must examine the question somewhat closer, and establish somewhat more exactly what intention really means in the sense of the law. That the investigation must essentially be a psychological one does not have to be mentioned after the introduction.

That an outcome is brought about means that it is brought about by an action which sets a condition for the outcome; to bring about intentionally means to bring about via an action that sets a condition. The latter condition brings about the outcome. Intention is a striving for an outcome via an action, or mediated by 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 things left behind which the murderer subsequently is entitled to. But the outcome is "striven" for, also when it is not a final goal, but in that case is "striven" for as a means towards a final goal. There are however several kinds of strivings: one can hope for, desire [*ersehnen*], or fear for [*befürchten*] a result. These are all "strivings" for a result, but not a striving in our sense. It is a striving "in relation to that to which it is applied"; for us it is a matter of striving for an outcome with the awareness that something can be contributed [such as to control] to its occurrence. Such a striving is called an act of will [*Wollen*]. To cause something intentionally means to set a condition for an outcome through a voluntary action such that this condition of course in combination with other conditions brings about the outcome.

Intention is to will an outcome. This is not sufficient, however, for not every act of will is an intention in the sense of the law. In order to establish

what an intention is, we must briefly consider the foundation 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, because it is the impossible that we of course strive for. We seek to build a perpetual motion machine; we also wish, after all, to become four years younger. But he who wishes to build a perpetual motion machine does not know that his plan is impossible, and he who wishes to become four years younger probably knows that he cannot do that; but he abstracts the wish from his experience for a moment, experience which gives him the feeling that it is impossible. He takes becoming younger only “experimentally” to be possible. This is expressed linguistically when we say: I wish that I “were” [*wäre*] younger, not as when we express a wish which is known to be possible such as when we say: I wish I “would become” [*werde*] younger. According to our principle, this impossibility which we for a moment were aware of cannot be striven for.

This applies to every striving, and so also to every act of will.

An act of will, too, can 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, furthermore, as we can now see, have the awareness that the occurrence of an outcome is possible from his “contribution” and the other known factors. 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 smaller probability, of the balance between probability and improbability, of the lesser or greater improbability of the outcome. But an awareness of the possibility of the condition is also contained in all these cases. This presupposition is the following: the occurrence of an outcome does not seem to conflict with the experience of what is also presupposed by it; what is certain is, as such, possible at once. But here further knowledge is necessary. In order to have the awareness of the certainty or probability of an outcome, I must not only know that it is contradicted by no experience, I must also know the circumstances which speak for or against the occurrence of the outcome. Here we should consider somewhat further how the awareness of certainty and so forth is brought about. It can of course be brought about through the pure memory of previously obtained experience, through the mediation of others, and so on. We disregard these considerations, however. Such an awareness, then, presupposes foregoing reflection [*Sberlegung*]. The problem of the act of will must precede the consideration of the reason

which speaks for or against the occurrence of the willed, and be concerned with whether, and with what probability or improbability, it would have occurred.

Consider the following example: in a box there are twelve balls: six white balls and six black ones. I will, 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 six white balls sit in the box suggests or “makes” me think that the outcome will occur; the fact that six black balls are in the box makes me think that it will not occur. Both suggestions have the same weight. If I weigh one suggestion in relation to the other, then I become aware that the outcome could just as well occur as not occur. My act of will is thus an act with the awareness that the outcome could just as well have occurred or not have occurred. It is different when more white than black balls are in the box. The suggestion that the outcome will occur weighs more than the suggestion that it will not occur, and it weighs 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 is given by 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, then we become aware that the outcome will certainly occur. And my act of will is accordingly an act with the awareness of the increasing probability, and finally, it is an act of will according to absolute certainty.

Suppose that the number of black balls is greater than that of the white. The suggestion that the outcome will not occur has then the greatest weight. Of course, it has a greater weight when the number of black balls are greater than the number of white balls. Here, an awareness of the improbability of the occurrence of the outcome is given. The improbability grows with an increase in the black balls and a decrease in the white. Similarly, my act of will is that 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. That such an act of will is impossible does not have to be mentioned.

Our example is particularly favourable, first because of its simplicity and second because it enables us to establish the degree of probability or unlikelihood in numbers. 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 reach exact probability. The different “weights” for and against the occurrences of the outcome are furthermore, as

above, to be established in numbers [*zahlenmässig*]. We can, by weighing the reasons, reach only approximate results; we can only judge that the probability for the occurrence of the outcome is “considerably small,” “very large” and so forth. This does not prevent these judgments from being made, and that they are made by someone.

We have until now presupposed that we can determine the likelihood of the occurrence of an outcome only through objective reasoning. We can weigh the facts which suggest the occurrence of the outcome against the facts which deny it. But this is not the only way in which a judgment of the likelihood of an outcome can be established. The objective judgment can be replaced by a subjectively conditioned judgment. 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 wonderful. We are inclined to hold the occurrence of what we wish or fear for as a certainty. Such a subjective inclination to believe in the certainty of something can turn what objectively seemed as impossible into something possible; it can turn our awareness of the probability of something into an awareness of the improbability of something and vice versa. In the previous example the number of black balls could perhaps turn out to be eleven. The objective awareness then suggests that it is unlikely that I pull out a white ball. But I am nonetheless convinced that I will succeed. I have always had luck and will also have it today. “The wish is the father of thoughts.” A willing according to certainty is also here given. But certainty is not objectively founded as it was before, but rather subjectively conditioned. And the act of will is similarly followed by a subjectively conditioned consciousness of the likelihood or unlikelihood of the outcome.

These considerations enable us to answer the above question. When A sends B into the forest in the hope that he is struck by lightning, then it is objectively required that his act of will be accompanied by the awareness of the unlikelihood of the outcome. Even if a thunderstorm discharges over the forest, it is still very unlikely that lightning, out of the thousand of trees in the forest, will strike exactly the one under which B stands. As we have seen: A is not punished in this case, not even if B really is struck by lightning. Hence, an act of will accompanied by the objectively founded consciousness of the unlikelihood of the outcome is not an act of intending in the sense of the law. Suppose that A with certainty could calculate when and where lightning would strike. When he then sends B into the forest, then a willing according to certainty is given, provided that B would follow his order unconditionally. As we have seen, A would, in this case, be punished. An act of will accompanied by the objectively based consciousness of the certainty of an outcome is an intention in the sense of the law. Imagine, then, that A could

calculate the exact time and place for lightning to strike as a result of a dream which gave him reason to believe that lightning would strike B. A willing according to certainty is also here given. We should ask 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 mysterious belief of A's. His willing according to certainty is therefore not, as in the other case, objectively based, but rather a subjectively conditioned act of will. Hence, no punishment is here given. An act of will accompanied by the subjectively conditioned awareness of the certainty of an outcome is as opposed to the objectively founded awareness not an act of intending in the sense of the law.

Following the objection against our concept of causation stated in the beginning, it is now clear where its mistake lies. The objection was based on the belief that intention is given in cases where it in fact is not given [directly]. The objection produces the peculiar claim that insofar as no punishment is given in these cases, no "bringing about" is given in the sense of the criminal law. A similar mistake is the basis for the other objection mentioned above, which we shall now briefly consider.

A wants to kill B. B dies from fear. Since A acts intentionally and following the theory has brought about the death of B, then he must be punished as a murderer. Since this consequence is absurd, then the theory of the concept of causation is incorrect. Once again we must say that this objection does not apply to our concept of causation. The punishability fails not because no "bringing about" of the outcome is given through A's action, but rather because the second penal presupposition, the intention, is not given. It is not to be doubted that A brings about the fear and thus the death of B, but he did not have intention in the sense that there is no act of will with the awareness that the outcome from these circumstances is given with probability. A does not think at all of such a causal connection. Rather he wills to kill B through his act; that is, he wills something impossible; this he can only will because he does not know the unlikelihood of the outcome. Juristically put, only an attempt with useless 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 von Buri has given the example this time the agent uses the knowledge of B's sickness for his own purpose. In other words, when he hoped with substantiated awareness that the severely sick and superstitious B would most probably die through the agitation. Intention is then really given, and A is punished as a murderer. Our concept of causation surpasses this objection in every case.

We must, in the following, briefly look at the concept of intention. We shall do this only so as to prevent an attack on our concept of causation. This approach, although brief, is perhaps sufficient to show what kinds of offenses a fruitful investigation into the area of intention alone can lead to.

*b) The Negligent "Bringing About"*

The outcome in relation to the negligent "bringing about" is, as in relation to the intentional "bringing about," brought about or caused through an action when the action presents a condition for the outcome. Every condition is also here a cause in the sense of the law. The following example can serve as an objection to this principle. A traveller goes over land by wagon. The negligent driver falls asleep. The wagon, as a result of this, goes the wrong way. The traveller is struck by lightning. Negligence is here given. The outcome is according to the theory brought about by the action of the driver. He must therefore be punished for negligent killing. Since this undoubtedly conflicts with the will of the legislator, the concept of causation is incorrect. The response to this objection is easy because the objection does not apply to the theory. If the driver had known that lightning would strike the traveller, then he would according to everyone's opinion be responsible for the negligent death, though the causal connection between the action and the outcome would not be a different one. Just as an incorrect concept of intention was used before, an incorrect concept of negligence is used here. It is completely meaning less to say here that the driver is negligent. The law does not speak of pure negligence, but rather of negligence as a relation between outcome and the penal presupposition. That this, however, is not here given, i.e., that the driver even with the presence of "sufficient attention" could not have foreseen the outcome, is evident. All problems which can be and are found relative to the negligent offense rely on problems with the concept of negligence. Here we shall not concern ourselves with the concept of negligence, however. It is sufficient to establish that here, as well as in relation to the punishable offense, every action which conditions an 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 the two cases.

## **7. The "Bringing About" in Relation 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 be a concept of causation in the criminal law which, if applicable to the punishable offense, would also turn out to be correct for the crime qualified by the outcome. We shall claim, in contrast, that the legislator has not understood the same thing by the word “cause” both here and elsewhere. Our exposition and critique of other theories suggests that the concept of causation must be treated differently relative to different types of crimes. When we now examine what the criminal law means when it speaks of outcomes which are brought about by other outcomes, the following can be said: a cause can here be something different and more special than a condition, but it must always at least be a condition. It is therefore also relevant that the connection between both outcomes, whose natures we shall now examine, cannot be a connection of similarity or difference and cannot be the same. If someone is to be punished, then his negligent act (the first outcome) must at least be a condition for the second outcome. It is now only the question of whether it is in relation to the punishable offense is sufficient as a condition. The question, which we have already raised in relation to the discussion of von Liszt’s theory, is: when can an outcome itself be a cause in the sense of the criminal law?

The method, according to which we believe this question can alone be answered is a very simple one; we take two cases in which a negligent outcome is a condition of a more severe outcome, and we then formulate these cases such that the agent in one case must be punished without doubt, while he cannot be punished in the other. The first outcome in the first case is then a “cause” of the second outcome, while the first outcome in the second case is not a “cause” of the second outcome. If we compare both cases, then it can be established to what extent the first outcome in the first case is a condition for the second outcome while it is not in the second case. The problem is then solved.

Let us turn to some well known examples:

1. A carelessly sets his house on fire. Without A knowing it, B is in the house and dies in the fire. A must here doubtlessly be punished after § 309,2 StGB. The death of a human being is “caused” by the fire.

2. A harms B. B recovers and goes to convalesce at the Riviera. He is here run over by a train and dies. A cannot here be punished after § 226 StGB for deathly injury. 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 say that in the first example the death follows indirectly from the fire. In the second case, in contrast, it does not. The injury is not present at the moment when B is run over. This does not yet indicate the important difference, however. B can go to the Riviera, still

injured. If he is run over there, then his death in this case follows immediately from his wound. But we would not punish him. The first outcome still exists when the second one occurs, but this cannot be what changes something from being a pure condition to being a “cause.” There is another evident difference, however. In the first example, the fire must be present in order for the death to occur. The bodily wound, of course, could be present, but it is not necessary. We have thus reached the essential difference with which we are here concerned: we must distinguish between immediate [*unmittenbaren*] conditions for an outcome, that is, conditions which necessarily must exist directly before the outcome; and mediate [*mittelbaren*] conditions, that is, conditions which, of course, can precede the outcome immediately, but not directly, rather only through one or more conditions with which it stands in a necessary connection. The fire is an immediate condition for the death of B. (More correctly; it is an immediate condition for the bodily wound, on which the death is dependent in a way not further examined here). The bodily wound in the second example, by contrast, is only a mediate condition for the death. It becomes a condition through the travel to the Riviera and so on. It must further be examined whether the criminal law by “cause” understands the immediate condition or the mediate condition,. We must, however, here make a hasty generalization. There are doubtlessly cases in which an outcome is a “cause” of another outcome, without being its immediate condition. If A is severely wounded in the fire and later dies from it, then the fire is an immediate condition only for the injury, not for the death, for which it is a mediate condition. B must nevertheless be punished. It is not difficult to see, however, that the situation here differs from the one before where the bodily injury conditioned the death through travel.

When fire on the basis of bodily injury (and through the subsequently present conditions) leads to death, then the injury constitutes a precursor for the final outcome. When injury due to some event is increased or dilated to a certain extent, then it is naturally connected with the death as previously mentioned. However, it is also somewhat connected with death when a fire is an immediate condition only for a bodily injury, but not for the death. When the fire immediately conditions a deathly injury, then it also conditions something which through other conditions leads to the death. It brings about, we could say, a precursor for the final outcome. From such a precursor, a condition is evidently not what the first example is about, when an injury brings about the death through travel etc. This difference makes it clear that in the first case, but not in the second, “bringing about” in the sense of the law is given. It is now evident why we say that an outcome is a “cause” of another, when it conditions it or is a precursor for it. Thus, “immediate” means it should be noted perhaps not the temporally last occurrent condition, rather every condition which must be necessary for the occurrence

of a second outcome. By “precursor” [*Vorstufe*] of an outcome we mean in the criminal law it comes into consideration probably only in this case an injury in relation to death, because it increases or dilates the presence of something which is connected with the immediate death; the concept of causation in relation to the crime qualified by the outcome is, then, characterized. It is sufficient for us to establish it in general and to refer to the juristic single-approach, which could add a lot to this account later.

One could perhaps object to this concept of causation on the basis that it is not logically justified. We need not emphasize after our earlier considerations that it is not a matter here of logical justification. The only objection that could really apply to us is this: it is hard to believe that the legislator understands by “cause” exactly what we have assigned to him. In order to show that this objection does not apply to us we could first of all refer to our method. 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 provide the distinguishing features. And such a distinguishing feature is precisely the immediacy of conditions. Everything which differs from what is a condition in our case is not important. Through modification of the example, it can be excluded without the outcome ceasing to be a “cause” of or a “condition” for another outcome.

Furthermore, this objection operates apparently with a silent presupposition which, as we shall show, is not completely correct. It supposes that it is incomprehensible and strange for the legislator to use the expression “cause” in this sense. It is of course fully understandable, and this understandability is useful to make our interpretation fully evident. We have already discussed this consideration fully, but in another sense than here. It was also at this time, of course, a matter of making it understandable that we ought to call certain conditions “causes.” But here we wanted to show that a logical right is not given despite all subjective motives, contrary to Birkmeyer; we shall now emphasize that although a logical right to that is not given, we are always driven to this appellation. We call, as already mentioned, the one a “condition,” amongst several which can be believed to be responsible for an outcome, a “cause” of that outcome. We have examined through this use of language that this condition stands in closer relation to the outcome than to other conditions. Furthermore, we have seen that we can perceptually link sometimes this and sometimes that and that we can also consider sometimes this and sometimes that condition as a “cause.”

Now the question arises of how this difference in the way of consideration is determined? Various answers are possible here. First of all, we can take the condition which has particular psychological energy as

outstanding and thus as a “cause” (more correctly; the condition which provides the representation [*Vorstellung*] of a particular psychological energy.) And we can, on the other hand, consider those conditions which do not draw our attention to them to a particular extent together with the facts with which they ought to be connected. Among the manifold of conditions, a representation can possess psychological energy or, alternatively, the ability to characterize psychological energy. There is a quantitatively conditioned energy: the energy of the greatest and most intensive; there is further an effective energy: the energy of the pleasurable or unpleasurable; and the contrast-energy, that is, the energy of the new, the strange and the wonderful. We have not the space to concern ourselves with this at present. There is still another peculiar energy which consists in a certain readiness of mind. This readiness consists in a talent or an ability, which, as it were, relies on a longer occupation with the particular object [*Gegenstande*], yet it presents itself only as a temporary expectation. We can in this way speak of every disposition, for example, in relation to musical tone or to painter’s colours, both of which possess a particular psychological energy. 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. It will be sought to be established in the same way and this concerns us for the legislator who seeks to establish the harm of rights as a condition for punishability, the legislator who possesses this peculiar psychological energy which presents to him the harm of a right.

Seen from this side it appears fully understandable when the legislator, in relation to the crime qualified by the outcome, calls the first outcome a “cause” of the second and the other contributing conditions, “conditions.” The first outcome is, as we have already seen, regular and unlawful; it most concerns, in principle, the legislator. He considers the first outcome in addition to the other conditions as that which leads to the second unlawful outcome. A harms the weak B intentionally. B dies as a result of the wound and his weakness. But the weakness is in any case less significant to the legislator, it is only a condition for him. He has a greater interest in the unlawful outcome, the injury. It is for him that which “really” leads to the death; it is for him the “cause” of the death. This is the case when the first outcome immediately conditions the second, and similarly when it brings about only a precursor for the second. The second outcome thus follows from the first, even when it is only gradual: the fire is for the legislator a “cause” of the death because it precedes the injury, which is not immediately connected with the death, but gradually.

It is completely different when the first outcome is only a mediate condition of the second: we cannot speak here of a preceding condition in

the previous sense. That something is a mediate condition means precisely that the outcome does not follow immediately from it. When the injured A goes on convalescence and in the foreign place is run over by a train, then his death does not follow from his injury; it rather following the consideration follows perhaps from the momentum of the train or from his travelling. Accordingly, the driver of the train or the journey is a “cause” of his death. The injury can, however, as well as every other mediate condition, be considered as a pure “condition.”

We can now return to the objection which initiated these considerations: the concept of causation that we have in mind, following criminal law, in relation to the crime qualified by the outcome is not completely strange and therefore improbable. Quite the contrary! We have shown that it is fully understandable for the legislator despite all logical hesitations to characterize the unlawful outcome, on the one hand, as a “cause” of the second when it leads immediately to another. On the other hand, he does not consider it as such, when it is only a mediate condition.

We have at the same time used that method referred to in the second paragraph of the introduction. We have sought to make what we found in the legal system more probable through the meaning of the sign “cause.” We have sought to consider the signs as something. We assume that the legislator means something with them; the legislator not simply as a figure, but as a figure possessing a particular psychological energy for discerning the unlawful outcome. We have accordingly discovered that it is entirely reasonable how, from psychological regularities, such a figure characterized one unlawful outcome as a “cause” of a second outcome when it is an immediate condition for the second; but the first outcome is merely a condition when it is a mediate condition.

Yet there is still reason to fear that all doubt is not silenced. We must admit, on the one hand, that it appears amazing that the legislator, from the point of view of the criminal law in relation to the crime qualified by the outcome, by “cause” understands the immediate condition and, on the other hand, that this way of expression is entirely reasonable. Nevertheless, this leads to still another objection. According to our theory, someone is made responsible for an unlawful outcome when it is an immediate condition for another unlawful outcome, but not when it is a mediate condition. Does such a decision of the legislator not appear absolutely inexplicable and unreasonable? Is it not more probable that the legislator by “cause” has understood something else than an immediate condition? This objection deserves a brief discussion. Earlier we explicated what is meant by an expression, now we must explain a determination of the legislator by referring to our psychological method. On the basis of the indubitable

decision of the legislator, we must first of all establish on what principles he ought to base punishment, and then examine whether it can be explained psychologically that such a figure establishes responsibility only for the immediate conditioned outcome.

People can only be punished for their acts. Nobody is, in any system of law, made responsible for results which do not “belong” to him. Still, the kinds of “belonging” have over the course of time repeatedly changed. It would be an interesting legal/psychological task to examine the development of the basic principles of the criminal law from this point of view, but here we can only be concerned with the present criminal code. We have already established the following: it is never sufficient as has been the case from the very inception of the life of the law - that an outcome is conditioned or “caused” by a human being; for an act is his act, only when responsibility can be joined to the agent. A person is held responsible for a caused outcome first of all if he has intended this outcome in a certain way. This is easy to understand: the event which I intend is dependent on me; I possess power over its being and non-being; it is an event “in my favour.” An act that depends on me belongs to me to a particular extent; it can to a certain extent be considered as “my act.” It is similar for the responsibility of a negligent act. The outcome is naturally not intended by me, but I could have avoided it, and ought to have done so. It is “my act” insofar as it is dependent on me.

But this is not sufficient for accounting for the criminal law, as we have seen. It is not only what I have brought about intentionally or negligently that is ascribed to me, but also that for which I am responsible is occasionally ascribed to me. The question now arises of what kind of connection this is. We can pull out of the legal system two things with complete certainty: first of all, the first outcome must at least be a condition for the second; and secondly, it is not sufficient that the first outcome is just a condition. We must furthermore ask in what way one outcome has to condition another in order for responsibility to be present. The answer to this is not difficult: when, on the one hand, it is clear that the agent is 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 a punishable outcome, but also on the basis of another outcome which stands in connection with the punishable outcome, then it is evident that this connection must be a particularly close one. However, if an unlawful outcome that conditions another be considered as standing in so close a connection, then it is already firmly established. It is firmly established when it is an immediate condition for another. We shall also put some constraints on responsibility. A perpetrator is responsible if the second outcome is immediately conditioned by the culpable outcome or if he seems to be

connected with the second outcome through the first. We also saw this when we used the purely juristic method. If the second outcome is conditioned only indirectly through the first outcome, or if the agent stands in no particular close connection to it, then responsibility is not present. In view of these considerations, “cause,” legally conceived, is an immediate condition, not a mediate one.

It is not only reasonable that it is so, indeed, it would be bizarre if it were not. We cannot, of course, accept such a basic principle for punishment as “correct.” But whether it is correct or not is not here the question. We are again at a point where we must emphasize our approach: the tentative jurist need not establish what the law should mean according to logical or ethical or other norms, but rather what it in fact means. Surely, both questions are justified, because close to the investigation of the present positive law stands the theory of the objectively valid and correct law. When the justification of the latter is contradicted, as happened in the case of von Bergholm, it can then only rely on confusions. But the importance of avoiding confusion of both problems cannot be over-emphasized. Such confusions are often present. They occur, for example, for anyone who would examine the concept of causation in the code and at the same time require that this concept of causation 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 theory of the psychological conditions for the origin of the law in general and for the single legal system in particular. In proximity stands the practical psychology of law, which has to refer to the psychological facts and regularities about which one can achieve knowledge through the use of legal determinations. The question of the correct law of which we have just sought, must be characterized as a task of the philosophy of law. It is most difficult to specify a plain theory of law. The most important task of the latter is to interpret the given sign connections, which constitute the meaning of a legal system. This latter theory stands in multiple connections with psychology. We have sought to show as a problem for this theory that it is connected with psychology. Likewise, we have demonstrated the difficulty in determining to what extent this theory is connected with psychology.