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Silving: Constituent Elements of Crime

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RECENT BOOKS

BOOK REVIEWS

CONSTITUENT ELEMENTS OF CRIME. By *Helen Silving*. Springfield, Ill.: Charles C Thomas. 1967. Pp. xxiv, 458. \$19.

A book worth reviewing can usually be dealt with as an integrated whole; the author's aims, conclusions, and the data he advances to support them can be found within its covers. *Constituent Elements of Crime* is eminently worth reviewing. However, I do not find that it can stand by itself—and I say this after three readings. In order to obtain what I hope is an accurate understanding of Professor Silving's basic premises, I have had to turn to other articles that she has written individually¹ or in cooperation with Professor Ryu.²

The author's primary purpose is to present most of the general part of a draft penal code. However, my three years' experience with a state bar committee composed of legislators, judges, prosecutors, defense attorneys, and law enforcement specialists engaged in preparing a draft criminal code³ and a code of criminal procedure indicates that there is no chance that any American legislature would give serious consideration to Professor Silving's draft. It has its principal roots in abstract European scholarship which even the European code-drafters largely ignore, judging by their work.⁴ The Silving draft reflects few if any of the current problems of crime definition and law enforcement reflected in the new pragmatic codes.⁵ It assumes that there are, or soon will be, judges who are—when aided by experts joining in the decisional process⁶—capable of reaching the critical decisions required by the draft, as well as institutions which can supply the care and treatment similarly required. If this draft were enacted into law in my state, I think I would flee to Canada or Sweden.

Professor Silving's other writings have indeed catalogued many deficiencies in American criminal law and procedure. She is con-

1. *A Plea for a New Philosophy of Criminal Justice*, 35 REV. JUR. U.P.R. 401 (1966); *La Filosofía de la Parte Especial de un Código Penal*, 33 REV. JUR. U.P.R. 17 (1964); "Guilt"; *A Methodological Study*, 32 REV. JUR. U.P.R. 11 (1963); "And Let Them Judge the People at All Times," 32 REV. JUR. U.P.R. 337 (1963); "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 77 (G. Mueller ed. 1961).

2. Ryu & Silving, *Toward a Rational System of Criminal Law*, 32 REV. JUR. U.P.R. 119 (1963); *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421 (1957).

3. MICHIGAN REVISED CRIMINAL CODE—FINAL DRAFT (1967).

4. Particularly the German and Austrian drafts; the Japanese Draft Penal Code is similar in approach to the European drafts.

5. E.g., the Illinois Criminal Code, ILL. REV. STAT. ch. 38 (1965) and the New York Revised Penal Law (1967).

6. See "And Let Them Judge the People at All Times," *supra* note 1, at 345-52.

cerned about the American emphasis on procedural rights up to the time of conviction and the corresponding lack of concern for determining and enforcing the sentence.⁷ She would put to rest notions of "guilt" incorporating those outdated religious or moral ideas which do not provide a functional basis for imposing punishment.⁸ She would also eliminate concepts like felony-murder, automatic accomplice liability, and criminality based on negligence.⁹ She is repelled by determinations of criminality based on character, status, or condition (pp. 13-14). These concerns are of course not Professor Silving's private preserve—they underlie the Model Penal Code and the revised state criminal laws which have appeared in recent years.

New American and foreign codes recognize that penal law must be directed toward several ends: identification of activity that substantially harms public or private interests; selection of those who must be segregated as dangerous; legislative delineation of areas of permissible conduct either through silence about particular activities or through definitions of justification or excuse; and determination of the relative gravity of activity defined in the statute.¹⁰ But these codes also recognize that the critical judgment must be made in the context of each specific crime, and that some parts of a code should serve one or two of the enumerated purposes, while others reach different needs. The new codes also recognize that functional criminal law is not the preserve of the so-called scholars who serve as Big Brothers in academic gowns. It must reflect community attitudes, and it will therefore evince a number of expectations and assumptions which an expert finds "irrational." Some of these irrationalities disappear over time, and there is much that trained professionals can do to teach the community the self-analysis indispensable to major changes in law. But no statute can safely run so far ahead of public attitudes that it loses the intangible yet vital underpinning of tacit group endorsement.

Most modern codes avoid fixed penalties, whether in the form of mandatory life sentences, capital punishment, or high minimum sentences imposed by a single sentencing judge. None of the attempted reforms has thus far been wholly successful, although there have been many proposals: sentencing councils or other aids to the judge before sentence determination; judicial or administrative review of sentences actually imposed; or elimination of the judge's power to set a minimum sentence and vesting of the power to determine release within the statutory maximum term in a parole board or other administrative authority. Still, there at least is progress.

7. *A Plea for a New Philosophy of Criminal Justice*, *supra* note 1, at 403-10; "Rule of Law" in *Criminal Justice*, *supra* note 1, at 78-93, 130-33.

8. "Guilt": *A Methodological Study*, *supra* note 1, at 19-30.

9. *A Plea for a New Philosophy of Criminal Justice*, *supra* note 1, at 419-20.

10. *E.g.*, MODEL PENAL CODE § 1.02(1) (P.O.D. 1962), which Professor Silving rejects (p. 8).

Code draftsmen, if not always the legislators who consider their work, have also undertaken to rid the criminal law of certain obvious efforts to perpetuate outmoded morality through legal norms by eliminating crimes of adultery, seduction, consensual homosexuality, and abortion for therapeutic purposes. Although the felony-murder rule remains a popular prosecution device to enlarge the number of criminal participants subject to the death penalty or mandatory life imprisonment, and although conspiracy is similarly useful to expand the gross number of participants upon whom vicarious responsibility for a criminal act can be imposed, both concepts are sharply limited in the new codes. Strict liability offenses are usually relegated to special regulatory statutes outside the criminal code. Judicial power to invoke the negligence concept is severely curtailed by limiting those states of mind deemed culpable to intent or purpose, knowledge, recklessness, and criminal negligence, and by requiring intent or knowledge for all crimes except a few which directly affect human life. A fair reading of every recent draft shows that Professor Silving's concerns have been substantially met; if the codes as finally enacted are more conservative than the proposed drafts, this simply reflects the fact that it takes time to persuade legislators and their constituents to abandon the norms and procedures to which they are accustomed.

Professor Silving, however, is not satisfied with this approach because she feels that it is "unscientific." To her, the only legitimate goal of criminal law is "retribution," because that is the way in which society reacts to the specific act. She feels that this desire eliminates any possibility that the general character of the actor will be made the basis of punishment. However, "retribution" is not in any way invested with "vindictiveness"; the latter must be eliminated through "appropriate preparation of judges" and "limitation of the right to punish" (p. 11). For retribution to be scientifically acceptable, it must be based on the presence of three factors:¹¹ first, the act (*Tatbestand*) or "conduct" (p. 81) conforming to the activity specified in the particular criminal statute as well as the factual circumstances (*Tatumstände*) also specified in the statute;¹² second, "illegality," (*Rechtswidrigkeit*) which means the absence of factors that negate criminality (p. 81);¹³ and third, "guilt," (*Schuld*) defined as "implying a psychological state of mind of 'intent' or 'recklessness' with regard to the conduct charged and mental capacity" (p. 19).¹⁴ Because of the classical (and largely theoretical)

11. Based chiefly on Ryu & Silving, *Toward a Rational System of Criminal Law*, *supra* note 2, at 125.

12. "Rule of Law" in *Criminal Justice*, *supra* note 1, at 99.

13. See also pp. 381-89, where the author suggests that this element might well be eliminated, as discussed in the text *infra*.

14. Cf. "Guilt": *A Methodological Study*, *supra* note 1 at 32-36.

misuse of the second factor, elements of illegality are reduced in effect to factual circumstances—an element of the “conduct”—while the subjective elements merge into the “guilt” determination in any particular case. It is thus only through the basic formula of “conduct” plus “guilt” that there can be, according to Professor Silving, a “rational” criminal law that qualifies under the “Rule of Law.”¹⁵

This approach leaves open the question, however, of what to do with the dangerous people who would be held under the irrational and archaic traditional criminal law, but who might roam the streets after the new scientific order comes into its own. According to Professor Silving, these people would be denominated as “dangerous” and subjected to “measures of security and care” (pp. 20-26, 192-94, 246-48, 295-314, 351-55). Certain interesting aspects of these “measures” gradually unfold. First, they are determined at the end of a standard criminal trial. Second, at least in homicide cases, there is a minimum period of required incarceration (p. 261). Third, the maximum period for “measures of security and care” is the same as the maximum period of imprisonment for the equivalent crime (pp. 212, 267-68).¹⁶ Fourth, a person receiving “measures” can be placed on probation (pp. 265-66). Fifth, the burden of proof is on the inmate to establish that he is not dangerous and therefore not subject to “measures” (p. 263). Finally, if “measures” become inappropriate or unproductive, or presumably if the maximum period for “measures” expires, recourse is had to ordinary civil commitment procedures (p. 268).

Of course, if the professional caliber of judges and court-related service personnel is better in a criminal court than in the court with responsibility for civil commitment proceedings, and if more procedural safeguards surround criminal trials than civil commitment and release procedures, there might not be any harm in granting a criminal court the power to order a dangerous person acquitted of crime to be held in hospital custody until he becomes a safe risk for release. If *Specht v. Patterson*¹⁷ requirements are to be met, however, it would be necessary either to provide a second proceeding subject to the same constitutional procedural requirements as the original criminal trial, or to remove the blatantly penal aspects of the ensuing incarceration or probation. Professor Silving’s manuscript went to press months before the *Specht* decision, and it is clear that many of the procedural aspects of her security measures system would now have to be radically altered to be constitutionally acceptable.

Procedural deficiencies aside, the “dangerous” people who will

15. Despite Professor Silving’s use of the term, I am not clear exactly what this is. Since as she uses it in this context it has very little to do with procedural regularity, it seems to equate with what she otherwise recommends as “rational.”

16. Misdemeanors could merit up to twice the amount if “treatment” is required.

17. 386 U.S. 605 (1967).

be the fortunate beneficiaries of the security measures system have not yet been considered. It is here that 1984 seems nearest. Under Professor Silving's draft, criminal punishment can be imposed only upon those whose "conduct" is accompanied by "guilt"—awareness, belief, foresight, intent, purpose, or recklessness (pp. 206-10).¹⁸ But a long list of persons who are not "guilty" become eligible for "measures" because they are "dangerous": (1) those who lack mental capacity either to proceed (p. 255) or to entertain a "*schuldisch*"¹⁹ state of mind; (2) those who are addicted to alcohol or narcotic drugs or habitually use them to excess (pp. 314-17); (3) those who are intoxicated, though not addicts or habitual users, but are not criminally responsible (pp. 317-21); (4) those who make certain mistakes about circumstances affecting criminality (pp. 356-58); (5) some persons who overreact in preventing criminal conduct (which includes traditional self-defense) (p. 390); (6) some habitual criminals (p. 171) or "sociologically conditioned repeated criminals" (p. 174);²⁰ (7) those (*nota bene*) who are negligent or "*de facto* reckless," if the specific statute calls for it and if the offender's "unconscious attitude" makes him dangerous (pp. 210-13);²¹ and (8) certain persons who cannot be classified as having made an "attempt," under the Code's technical definition (p. 104), or who make threats (p. 127). While the evidentiary aspects of the "dangerousness" hearing remain to be developed in an unpublished portion of the draft, in at least one context (p. 264) the question of dangerousness will be determined in part by consideration of a number of acts not charged as well as the particular act which is charged. The test of unawareness in negligence is chiefly a psychiatric one in which the judgment of a "Psychiatric and Sociological Examinations Center" is to have considerable weight (p. 212).²² In sum, the system advocated in *Constituent Elements of Crime* might conceivably produce fewer persons labeled as criminal, but many more who would be incarcerated as "dangerous" for a period potentially as long as the term of imprisonment that would have flowed from a finding of guilt. In any jurisdiction today, and probably in any jurisdiction that fallible humans might inhabit in the future, the result would approach a form of totalitarian repression of any persons or groups viewed as deviant by the judges and psychiatrists who staffed the system. In saying this, I do not express hostility toward psychiatric diagnosis and treatment, nor a desire to continue in force archaic criminal codes administered

18. There are many civil-law derived variations of them that would thoroughly confuse all jurors and most judges—and perhaps a few law students.

19. Admittedly a bastard term, but any English term I choose is inconsistent with Professor Silving's terminology.

20. The author talks about "resocialization," which seems to be a "measure" in its operative effect. See pp. 191-94, 196-97.

21. See also pp. 240-44, 247-54.

22. Cf. §§ 58, p. 169; 93, p. 262; 123, p. 320; 132, p. 357.

by judges who are not subject to review in matters of sentencing and disposition of offenders. But judges and juries, faced today with the choice of guilty or not guilty, make enough irrational and objectively unjustified decisions without also throwing them the choice between "punishability" and "dangerousness." Moreover, in most states the mental hospitals to which "dangerous" persons are consigned are little better than jails and less well-equipped than many state penitentiaries. Judging from the reactions of many inmates, a prison sentence with a definite parole possibility is preferable to open-ended compulsory hospitalization. However "rational" the Silving draft may be, there is greater potential for rectifying deficiencies in present law through developing procedural safeguards for civil commitment and release, imposing a requirement of treatment for those who are treatable, and encouraging a shift from criminal prosecution to civil commitment proceedings at the earliest possible time. In any event, the courts are moving in the direction of reformed procedures under the due process and equal protection clauses, and it makes little sense to approach legislatures with any such abstract substantive scheme as that laid out by Professor Silving.

Professor Silving's second purpose in publishing *Constituent Elements of Crime* is to provide a law school text for a systematic, comparative, and interdisciplinary course in criminal law. She notes that "submitting to students a Penal Code Draft prepared by a particular professor carries some danger of indoctrination in the approach of his choice" (p. vii). This is an exercise in classic understatement; I doubt that any instructor other than the author could use the book to teach a basic course which would equip a student for the practice of criminal law in any American jurisdiction, including Puerto Rico.²³ Professor Silving promises a casebook to supply conflicting views;²⁴ if that is forthcoming, *Constituent Elements of Crime* might prove a helpful supplementary text. Standing alone, however, it constitutes only a highly personalized set of teaching materials that is unlikely to be adopted outside the author's own school, although I should hasten to add that this is not the only time that a professorial *magnum opus* has suffered such a fate.

Despite a feeling that the book is too personal a teaching instru-

23. On first reading, I thought that perhaps Roman-civil law derived elements were present in Puerto Rico law that might make the author's European approach to criminal law relevant. This is not so. The Penal Code of Puerto Rico, P.R. LAWS ANN. tit. 33 (1956), was enacted in 1902, based on the California Penal Code in effect at that time, and thus is completely common law oriented. The Rules of Criminal Procedure, P.R. LAWS ANN. tit. 10 (Supp. 1965), are also purely American in approach.

24. *Constituent Elements of Crime* is painfully thin in American statutory references (4 sections for California, 1 for the District of Columbia, 1 for Illinois, 2 for the New York Penal Law and 1 for the Revised Penal Law, and 6 for Puerto Rico itself) and in state and federal case citations (46 for the entire book). She also refers to a number of Model Penal Code sections, with most of which she disagrees, and to secondary sources by Jerome Hall and Glanville Williams.

ment to be of much use in law schools and that it embodies a totally unrealistic approach to criminal code revision, I still recommend it for one purpose—as a useful guide for a common-law practitioner who wants some understanding of prevailing civil-law doctrine. However, this is a one-way street; since the book gives only a truncated and distorted (or to be charitable, a highly personal) view of contemporary American criminal law, it would be completely misleading to one not already acquainted with the new thrust in American criminal law doctrine. Still, there are very few available English-language sources about Continental European concepts of crime and responsibility. Thus, I can value *Constituent Elements of Crime* as part of a comparative law collection, but it will gather dust on the shelves of any law revision commission.

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