TATBESTAND UND TYPUS: UNTERSUCHUNGEN ZUR STRAFRECHTLICHEN HERMENEUTIK. By Winfried Hassemer, Carl Heymanns Verlag K. G. 1968. 184 pp. Paperback. DM 19.50.

This book deserves attention as a contribution to general analytic jurisprudence, even though its direct concern is basic problems of criminal law. In the course of his examination of logical and semantic aspects of what the Germans call "*Tatbestand*" (the complex of operative facts as formulated in the expression of a legal norm which entail the legal conclusion specified in the norm), the author delves deeply into a number of problems whose clear understanding and proper solution are instrumental for a high-level scholarly treatment and sound practical application of law. Thus the book examines the problems of legal interpretation, legal logic, and legal axiology. By numerous citations and apposite discussions of important contemporary literature in these problem areas it serves as a valuable guide for conducting research in them.

In the present review I propose to concentrate on logical aspect on Dr. Hassemer's treatise because particularly in this area it is very challenging. As to other above mentioned areas, I happen to be too much in agreement with what he says to be able to offer at present anything beyond mere commentary.

Hassemer has a rather critical attitude to the value of modern logic in the service of law. Of the critics of this logic, he is one who is competent in its theory and techniques. Therefore, in contrast to some most illustrious legal scholars who have expressed adverse views about modern logic as applied to legal thought without having understood its principles and methods, his relevant appraisals are to be taken seriously. A direct confrontation of my views on the nature and role of legal logic with the author's views is somewhat difficult due to the fact that for him the scope of logic is considerably wider than it ought to be in my view. Thus diverging from the concept of logic encountered in the works of principal contemporary exponents of modern logic, Hassemer speaks of "an object-directed hermeneutic logic" which must be able to say whether and why a given instance of behaviour constitutes the crime of obtaining goods through false pretenses or the crime of larceny" (pp. 49-50). A discipline of thought from which the answer to this question could be expected can certainly be constructed and has a most important intellectual role to play; however, it is not one which modern logic proposes to be or has been designed to be—a purely formal discipline providing principles and methods for self-consistent reasoning in abstraction from any material content of thought. Nevertheless, the author employs the word "logic" also in the sense in which the majority of contemporary logicians use it, and in the segment of this use it is possible for me to discuss logical aspects of the present book without excessive terminological adjustments.

The author raises the important question of formalization of legal reason-

ing (p. 20). He says that if such a formalization were feasible, the programmer would step beside the legislator and the computer would replace the judge. The prospect of such a "dehuminization" of law and it administration may be felt horrifying by many lawyers; however, whatever the curse or blessings of such a development may be, nothing like this is really involved in the formalization of legal reasoning. For if this reasoning is to be a rational enterprise, it must be self-consistent, that is, it must conform to laws of logic and must fit into forms of logical expression. Within the frame of logical reasoning, legal reasoning can have any other rational virtues: lucidity, persuasiveness, elegance, and what not. Neither modern logic nor the computer as such render legal reasoning purely mechanical. For this to happen, a special human decision is required which would delegate legislation and adjudication to machines. Such a decision may be either right or wrong or neither, depending on circumstances and on the areas of normative regulation. Anyhow, the proper vocation of modern logic in the service of law is to make available to the lawyer the best means for handling efficiently one particular human element of legal reasoning: the desideratum of its self-consistency, leaving its other human elements to be treated by ways and means which are not formalizable or computerizable.

When logic is employed for organizing and evaluating the thought of law itself as to its correspondence to the standard of self-consistency (and not only for treating thought about law), the question arises as to whether the logical values "true" and "false," which in ordinary treatments of logic play a central role, are applicable to legal norms. Legal norms, as distinguished from statements about legal norms, do not seem to have truth-values; they seem to have different semantic features as compared with propositions and accordingly the logical values which are appropriate for them may perhaps be called "valid" and "invalid" or "tenable" and "untenable." Although logic has been developed mainly as apophantic logic, that is, as a discipline of thought concerned with articulated or unarticulated propositions, there is no good reason why systems of anapophantic logic cannot be developed, *viz.* the logic of imperatives, or interrogatives, of optatives, and of norms.

A kind of anapophantic logic which is already well established is the logic of classes in the form of Boolean algebra, for classes are among those thought-formations to which the values "true" or "false" cannot be meaningfully ascribed. It may be remarked that it depends on the context of thought whether or not self-consistency (and hence logic) is relevant to thought-formations and their expressions: in some contexts and for certain purposes, it is definitely relevant, for example, to imperatives; in some other contexts and for some other purposes it is irrelevant even to propositions, for example, when these are employed in lyrical poetry or by a hypnotist to induce trance. Hence Hassemer's attempt to bring logic to bear not only on thought about law but also on the thought of law itself is undoubtedly well founded.

According to the author, legal reasoning when operating with the con-

cept of *Tatbestand* has the following basic structure (p. 17):

(1) The class of thieves is punished with . . .

(2) (The individual) *X* belongs to the class of thieves . . .

(3) *X* is punished (as a thief) with . . . .

In this inference the major premiss and the conclusion are formulated as propositions. This is feasible, for even though they represent norms, norms can be expressed by way of indicative sentences understood as having "normative force." So it is possible to employ principles and methods of apophantic logic for the logical treatment of norms. However, I would prefer to say "All thieves" instead of "The class of thieves." Expressed in this way, the above sentences would sound more natural and the propositions which they signify could be easily treated by recourse to principles of predicational logic. Thus the conclusion would follow by simple application of the rule of universal instantiation.

However complex the legal or factual states of affairs may be in actual instances of the application of law, it is always possible to formulate the steps of legal reasoning along the above lines. Difficulties arise, of course, in the endowment of appropriate meaning to legal provisions from which legal norms amenable to logical procedures can be construed and in the qualification of actual facts as legally relevant facts. But these difficulties do not constitute logical problems. When they are not overcome by means of legal interpretation or fact-finding, no logical application of law is sensible. This application requires a great deal of preliminary juristic work assisted fundamentally by semantics, hermeneutics, topics, and other disciplines relevant to the discovery and ascertainment of material contents of legal thought. It is to be noted that reasoning by recourse to principles of these disciplines is not alogical: logic enters variously into the steps of reasoning in all these areas, because they all are areas of rational discourse and therefore subject to the laws of self-consistent reasoning.

The author rightly observes that the actual legal expressions purporting to circumscribe a *Tatbestand* are usually such that their formalization does not yield a formula which can be employed for logical inferences. Thus he shows (pp. 27-33) that the material of enacted law only allows the formulation of "open formulae," that is, predicational formulae with free variables. Such formulae, although they may be regarded as logically well formed, are not complete to function as premisses in legally significant inferences. They are nothing else but logical formulations of what is given as an open texture of enacted law in general or vagueness of law in particular instances. However, all this does not mean that logical reasoning is irrelevant to the application of law but that the application of law involves both "rhetorical" (zetetič) and logical procedures. Where the contents of enacted law are not complete enough for conducting legally significant logical reasoning, they have first to be complemented by what is discovered through the application of methods of legal science.

How this is to be carried out in the light of recent developments of legal methodology is discussed by the author in the substantial part of his book. I would like to draw attention particularly to pp. 121-24, in which there is an illuminating exposition of the theory of type concepts as applied in legal reasoning, and to pp. 127-40, in which the problem of "evidation" (*Evidierung*) of the results of interpretation of *Tatbestände* is examined. The question here is about the rational foundations of justification of the submissions of the interpreter—it is a vindication, not a verification of his findings; for in the area of reasoning in question value judgments are to be established as reasonable assertions. In characterizing the process of "evidation," the author says that it does not constitute "a compelling proof of correctness." The correctness which interpretative procedures strive for is still "objective correctness"; however, not in the sense of universal validity (*Allgemeingültigkeit*) but in the sense of "individual validity" (*Einzelgültigkeit*). Thus the evidation settles the question only for the individual case, leaving the rest of the relevant law in uncertainty (p. 138). This is a fine statement of the aims of an essential part of legal reasoning in which those who are competent to determine what the right law for a given case is arrive at decisions which are as well founded as possible, but leave the freedom to decide future cases otherwise unaffected.

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