

The Criminal Law and Its Enforcement (Book Review)

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BOOK REVIEWS

THE CRIMINAL LAW AND ITS ENFORCEMENT. By John Barker Waite. Third Edition. Chicago: The Foundation Press, Inc., 1947. Pp. vii, 902.

Casebooks in the field of criminal law published in recent years reveal a tendency to enlarge upon the scope of the law school course of study in that subject. Whereas, formerly, the usual two or three semester hour course in the Criminal Law was devoted mainly to a study of the types of behavior denominated criminal and the legal precepts by which such conduct was made punishable, nowadays the study includes smatterings of penology, criminology, social psychology, psychiatry and related social sciences. The materials for study in the orthodox course consisted almost entirely of judicial decisions reported in full and citations to others in the footnotes. The modern casebook adds extensive excerpts of treatises and essays in professional and scientific journals, selected statutes from many jurisdictions for comparative analysis, statistical charts and reports of various governmental and private social welfare agencies.¹

With respect to the diversity of its materials, Professor Waite's third edition of "The Criminal Law and Its Enforcement" is as catholic as its contemporaries, but its aims are less ambitious. The editor states in the preface: "My first objective is to give the student a real and reasonably complete knowledge of just what is the law, as revealed in legislation and judicial decision. . . . My second objective almost as essential as accurate presentation of what the law is, is demonstration of how the courts handle it."² That is not to say, of course, that the multifarious precepts of the criminal law in the several Anglo-American jurisdictions are treated exhaustively, for, as the editor acknowledges: ". . . any detailed study in the law school of the heterogeneous body of varied crimes would obviously be both impracticable and impractical."³ The reference is rather to the basic techniques of judicial construction of criminal law precepts, both statutory and common law and the methods of applying these precepts to causes presented in the various jurisdictions, the emphasis being on the training of students in the professional skills of the attorney and advocate rather than those of the criminologist and social worker.

Passing consideration is given to the social aspects of crime and the philosophy of punishment in the introductory chapter. Throughout the work with reference to particular phases of the criminal law and its enforcement,

¹ *E.g.*, MICHAEL AND WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940); HALL AND GLUECK, CASES AND MATERIALS ON CRIMINAL LAW (1940).

² WAITE, THE CRIMINAL LAW AND ITS ENFORCEMENT, 3rd ed. (1947), p. vii.

³ *Id.* p. 66.

provocative commentaries by the editor, excerpts from legal periodicals, newspaper items and reports of government agencies touch upon problems of administration of the criminal law. But the main body of the materials is devoted to a study of "what the law is," *i.e.*, the analysis of legal precepts by which anti-social behavior is characterized as criminal and the mechanics of procedure by which criminal responsibility is determined and punishment inflicted.

The conventional approach to the study of the substantive criminal law begins with an analysis of the elements of the criminal act and the criminal intent in general, including the problems of causation, *mens rea*, and the distinctions between crimes *mala in se* and *mala prohibita*, before examining the elements of particular crimes in detail. Recent innovations dispense with the introductory analysis and proceed at once to a study of specific crimes thus avoiding a duplication of materials. In the present volume the elements of the criminal act and the criminal intent are treated separately but each in connection with the same specific crimes. Thus the student studies causation in "Homicide," the physical behavior characterized as assault, distinguished from battery, in "Assault," the characteristics of a "dwelling house" and "a burning" in "Arson," the definitions of "breaking" and "entry" in "Burglary," the elements of possession, trespass, asportation, etc., in "Larceny"—all in a lengthy chapter entitled "Punishable Acts and Omissions," only to run again the gamut of the same crimes in the chapter on "The Mental State Requisite to Punishability" where for the first time attention is focused on the criminal intent.⁴ Perhaps the division of the material affords the student a useful review of the elements of particular crimes, but it would seem to require a deliberate effort on the part of the instructor to discourage any curiosity concerning the elements of criminal intent, while studying the physical elements of each crime.

A similar curious division of subject matter is presented in the study of criminal attempts antecedent to the materials on criminal intent, and the treatment of accessories before the fact in an entire section called "Inducement to Crime," while deferring an analysis of principals in the second degree to a much later section on "Aiding in Crime." The incidental omission of the topic of rape and the inclusion of sections on "Compounding a Crime" and "Mispriison of Felony" are likewise unusual.

Whereas a section is devoted to the defense of entrapment and another to the factor of consent, and still others to "Self-Defense," "Defense of Others," "Defense of Property," "Defense of Dwelling," "Defense of Liberty," and one on "Promise of Immunity, Custom, Contributory Negligence, Command," seldom treated at such length in comparable works, no materials are furnished on conditional assaults, the *corpus delicti* in homicides or the merger theory in felony murder.

The editor has made generous use of law review articles and his own notes to introduce each topic, to state the problem, depicting the social or economic setting, to point out variations in the solutions afforded, and to re-

⁴ Inevitably of course in the study of various defenses to criminal prosecution, a review of the elements of particular crimes must again be conducted.

view the historical antecedents to precepts and techniques of analysis which are not intelligible or rational except in light of their history. Relatively minor topics are treated textually with little or no case exemplification in the interest of brevity.⁵ Occasionally these introductory commentaries and historical summaries are so cursory and dogmatic as to be misleading. Thus the "breaking of the bulk" doctrine in larceny by carriers is casually referred to but without explanation;⁶ the reasoning of the common law that choses-in-action were not property and hence not subject to larceny is characterized simply as "sophistic logic";⁷ the brief note distinguishing between custody of a servant and possession of a bailee concludes with the remark:

"If, however, the student clearly understands the problem of the differentiation between possession and custody, and the legal effect of the one or the other, class-room time can be more profitably spent than in the study of particular decisions involving it."⁸ The historical approach is especially suited to the study of the law of theft. The evolution of the protection afforded property by the common law and legislative enactments over the centuries, demonstrating the method by which law develops to meet changing requirements, gives meaning to rules which otherwise must seem to be arbitrary and senseless.

In teaching a subject such as the criminal law, which has been so greatly affected by legislation differing so widely in details from state to state, there is an irresistible tendency to emphasize the pattern woven by the legislation of a particular jurisdiction. Professor Waite's emphasis on the criminal laws of Michigan, whose penal statutes he quotes extensively, is understandable. Instructors in schools of other states may refer to comparable enactments elsewhere, in class room lectures. But the citation of cases from other jurisdictions which do not reflect the current views of those jurisdictions is apt to prove embarrassing to instructors who, in stressing the laws of these states, must constantly correct the misconception such citations will create. The case of *People v. Schryver*,⁹ 42 N. Y. 1, 1 Am. Rep. 480 (1870), is quoted for a proposition which is no longer the law of New York, the rule of *People v. Tompkins*,¹⁰ 186 N. Y. 413, 79 N. E. 326 (1906), has been changed by statute and it is at least doubtful whether the case of *People v. Sprague*,¹¹ 2 Parker Cr. R. 43 (N. Y. 1849), reflected the law of the state where it was decided.

The compulsion to "localize" the study of the criminal law is even more obvious in the case of criminal procedure which is largely statutory. Materials for use in the study of criminal procedure must either be restricted to the code and practice of a particular jurisdiction, or deal with only the broader phases of criminal law enforcement throughout the United States.

A study of the material presented by Professor Waite in the second half of the volume under the title "Enforcement of the Law" will not enable a

⁵ E.g., "condonation" *id.* at p. 430, "omissions" p. 68, "solicitations" p. 72.

⁶ *Id.* p. 208.

⁷ *Id.* p. 201.

⁸ *Id.* p. 209.

⁹ *Id.* p. 458.

¹⁰ *Id.* p. 50.

¹¹ *Id.* p. 379.

student to draft an indictment, secure the release of a prisoner on bail, or prepare a motion for a bill of particulars, but it should acquaint him with the methods generally by which an accused is brought to justice. The fundamentals of due process by which the accused must be informed of the charge against him and the cause tried, the limitations upon the right of arrest and search and seizure, the protection against "double jeopardy," and the mechanics of extradition are adequately presented. The American Law Institute's Code of Criminal Procedure is quoted extensively and frequent reference is made to the Federal Rules of Criminal Procedure. The practical phases of administration are dealt with textually and illustrated by statistical charts.

Much of the textual comment is focused on the absurdities in criminal procedure exemplified by instances many of which are anomalous and reflect the foibles of men as much as the incongruities of law. But the critical tone is a natural attribute of the informal style in which the editor's texts are cast.

The work is no mere collection of authoritative materials but is a pedagogical device for training students in the criminal law and its enforcement.

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TOTAL WAR AND THE CONSTITUTION. By Edward S. Corwin, McCormick Professor of Jurisprudence Emeritus, Princeton University. Alfred Knopf: New York. \$2.50.

The primary purpose, in the minds of the framers, for ordaining and establishing the Constitution as the supreme law of the land is expressed in the preamble. It is "to secure the blessings of liberty to ourselves and our posterity." The spirit of Liberty belonged to the people and was possessed by them as a blessing. There was no doubt from Whom it came. It was to be enjoyed now and throughout posterity by all. Some, it is true, would limit its application to the immediate family and interpret it by the saying: "God bless me and my wife, my son, John, and his wife, us four and no more." Others, more liberal, in their vision, would extend their petition to include "them, their children and their grandchildren." But, in 1789, loyal representatives, who established the document and offered it to the People for their ratification, intended that the newly created government would insure Liberty to all of them and their posterity.

Professor Corwin can be truthfully called an apostle of the Constitution. In his "Total War and the Constitution," consisting of five lectures delivered on the William W. Cook Foundation at the University of Michigan, he presents facts which conclusively establish how total war has destroyed this supernatural gift of liberty.

By the term "total war" is intended a functional totality by which the author means the politically ordered participation in the war effort of all per-

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