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Cases and Materials on Criminal Law (Book Review)

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BOOK REVIEWS

Cases and Materials on Criminal Law. By Livingston Hall and Sheldon Glueck. St. Paul: West Publishing Co., (2d ed. 1940) pp. vii, 556.

In many respects the course of study in the criminal law is treated in the conventional law school curriculum as a stepchild which deserves no further consideration than may be afforded in the two or three semester hours which can be spared in the first or second year. With the necessarily inadequate preparation provided in so limited a time, law school graduates are released upon the public at whose expense they may continue their education.[1] To the students, who with their laymen's notion of the importance of the criminal law and its administration are continually surprised by the lack of emphasis upon its study, it is explained that the legal technique and the judicial processes, employed in the solution of problems of criminal law, are simple and uncomplicated; that the practice of the criminal law is unpopular; the field narrow, the mechanics routine; and that special training is best had by experience before the criminal courts—this despite the fact that the cause, prevention, and cure of crime remains one of the most difficult of socio-legal problems.

Steps have been taken in recent years to improve and increase the scope of training in the law of crimes and the administration of criminal justice. Separate courses in criminal procedure, special studies of probation, parole, correction, juvenile delinquency, and police work are being provided. But the proper scope of the conventional course in criminal law is still undefined. Course books in the subject illustrate the lack of general agreement upon the topics that should be included in such a course and the emphasis each phase deserves.

In the preface to *Cases and Materials on Criminal Law* by Professors Hall and Glueck the editors state:[2] "In a half-year course the emphasis must be placed upon problems fundamental to the subject of the course." The problems therein treated fall almost entirely within the substantive branch of the subject; except, incidentally, in isolated cases and briefly by way of scattered notes, the influence of criminal procedure upon the operation of the substantive law is not expressly considered. In the preface to another modern and unusually comprehensive course book on criminal law it is stated:[3] "The subordination of substance to procedure in the teaching of criminal law is, in our opinion, unwise. The crucial problems of the criminal law—administrative as well as legislative—are substantive. They involve basic issues of ends and means. The major vitality of procedure is its potency to affect the resolution of such issues by furthering or hampering the achievement of substantive ends. We have, therefore, chosen to treat procedural matters collaterally, in the context of some substantive issue which they visibly affect . . ." But the latter work, covering

[1] This condition has concerned the Council on Criminal Law and Procedure of the State of New York; a group of legal educators, public officials, and members of the bar organized for the purpose of improving the administration of the criminal law.

[2] Hall and Glueck, Cases and Materials on Criminal Law (1940) vii.

[3] Michael and Wechsler, Criminal Law and Its Administration (1940) v.

almost fourteen hundred pages requires, for classroom use, such excision as to destroy its continuity and therefore its effectiveness.

Combining substantive criminal law and procedure in one course is not impossible though care must be exercised in assuring each the proper emphasis. Some of the "fundamental problems" treated by Professors Hall and Glueck have received more than due attention. For example, the cases and materials devoted to the element of provocation, which may reduce murder to manslaughter, are largely repetitious; the element of asportation in the crime of larceny is exaggerated; the "breaking bulk" doctrine in larceny by bailees is overdeveloped. So the distinction between specific intent, recklessness, negligence and constructive intent evolved from other wrongful or criminal acts is fully covered by the assault cases and repeated at length in the study of criminal homicides. Such duplication, it is explained by the editors,[4] is caused by the desire to permit instructors to select topics complete in themselves in courses limited to two semester hours. Yet no course, however restricted, could be adequate which did not include a study of both assault and homicide. Furthermore, so few are the general topics included that hardly any could be properly omitted. Of the list—assault, homicide, theft, receiving stolen property, other property crimes (burglary, arson, etc.), inchoate crimes (conspiracy, attempt, solicitation), general principles of criminal liability (including defenses and criminal capacity), and parties—only property crimes other than theft and burglary could be excluded from the minimum requirements of an adequate course. This is not to intimate that an insufficient quantity of cases and materials is provided. On the contrary, each phase of every topic is covered by many times the cases necessary.

As a selection from among the included topics is undesirable, so a restricted choice of cases and materials within each topic is not feasible. Among the reported cases appear more than two hundred problem cases consisting of digests of facts and rulings. Since many of these express conclusions that do not harmonize with the generally accepted authorities, and are frequently at variance with the views of any given jurisdiction, they cannot pass unconsidered. The result is, every case and problem within any topic must be discussed in the class room. When, in addition, the aspects of procedure and administration which qualify or explain the substantive results, must be treated by lectures, haste and consequent confusion on the part of both instructor and students become matters of serious concern.

Another difficulty that is inherent in teaching criminal law has not been solved by the modern approach adopted by Professors Hall and Glueck. Whereas formerly fundamentals were considered first and their application to specific crimes studied thereafter, now students are plunged into cases involving specific crimes without any previous training in the traditional classifications of the criminal act, *mens rea,* causation, capacity and particular defenses. One of the reasons assigned for this radical change in approach is stated by the editor of another casebook:[5] "In each case the student reads he finds the defendant accused of a specific crime and interposing a definite defense. Most defenses

[4] HALL AND GLUECK, CASES AND MATERIALS ON CRIMINAL LAW (1940) vii.
[5] MIKELL, CASES ON CRIMINAL LAW AND PROCEDURE (3d ed. 1933).

are valid when, and only when, they negative some element of the crime charged. Therefore a given defense is valid in the case of certain crimes and of no avail in the case of other crimes . . . In the study of criminal law by means of cases, if these matters of defense are treated before the specific offenses, they must necessarily be presented in a case in which a specific crime is charged; thus, the student must study the defense in connection with a crime before he knows what the elements of the crime itself are. It would seem more logical as well as more realistic to reverse the process." [6]

Other explanations have been offered for the modern approach, notably that such variations in the fundamental elements are created by legislative inroads into the common law pattern, and that the exceptions are more obvious than the rule. Hence a study of the rule is in vain except in connection with its application in specific situations in the present-day law of crimes. And yet, since a study of each and every classifiable crime is out of the question, and only the traditional attitudes of approach in criminal jurisprudence and the traditional techniques of administration can and ought to be treated in the law school, however much these traditions are being undermined by changing social necessities and modified in particular modern-day cases, it would seem that an introductory analysis of the fundamental elements of the traditional pattern is still essential to an understanding of the cases founded upon them. Such an approach may well be undertaken by the use of cases selected for that purpose. A preliminary training in the elements of *mens rea* would then eliminate the superfluous duplication above referred to and further illustrated by the division of the topic Theft into the Criminal Act and the Criminal Intent, where the cases on the act cannot be understood without a consideration of the element of intent.

As a concession to the requirement that general principles be examined separately, the editors have devoted one part, toward the end of their work, to the doctrine of mistake and what they chose to call "culpability". In the latter, they group problems of capacity, involving insanity and infancy, with the defenses of compulsion and intoxication, omitting corporate criminal capacity on the one hand, and the defenses of consent, entrapment, self-defense, and defense of property on the other.

Another phase of the modern approach to the study of the criminal law is treated by the editors in the introduction to criminology and penology found in the first chapter entitled "Criminals and Punishment" and the appendix devoted to the "Social Case History of James Glynn". Despite the limitations of time which frustrate efforts to deal adequately with the law of crimes, substantive and adjective, in theory and in practice, as evolved by courts and legislatures, the modern law teachers insist upon crowding their courses with social studies more appropriately conducted elsewhere than in law schools where a vast majority of the students seek preparation for careers in the practice of law. However forcefully it may be argued that judges wielding broad discretionary sentencing powers need training in the sciences of criminology and penology, the fact remains that improvement in peno-correctional methods will not follow

[6] *Id.* at vii. And yet, Professor Mikell treats of the Sources of Criminal Law, The Nature of Crime, The Elements of Crime, including the act and the mental element, before proceeding to specific crimes.

from the brief exposure of law students to this phase of criminal administration, which is possible in a two or three hour course in the criminal law. And yet, as the editors point out in a "Note on the Substantive Criminal Law": [7] ". . . to study the criminal law without bearing in mind the frame work—procedural and administrative, social and psychologic, as well as historic—within which its materials operate, is to overlook an opportunity for deeper understanding than that afforded by the mere search for logical or doctrinal consistency."

To the extent that an understanding of the criminal law in operation is dependent upon an evaluation of the factors that cause judges and other officers of criminal administration to behave as they do, a study of these factors is essential. But such a study might be more efficient if made in connection with the specific crime situations wherein particular factors exert the greatest influence. For example, the general statement made in the introductory chapter on "Sentencing Practices and Principles": [8] "In sex crimes, where consent is a defense, the responsibility of the victim for bringing on the disaster, and the injury done to her, are important", is less significant to the student who has not yet learned the elements of "statutory rape", than the observation made after a study of the crime, that, under certain circumstances, the prosecuting attorney and the court may be persuaded to accept a plea on simple assault.

The selection of cases on the topics of substantive criminal law is excellent. The editors have chosen the best of the modern cases which review the older authorities and which deal with the contemporary situations which the student will meet in his practice. To conserve space and therefore time, the cases have been edited freely, and, in the main, to good effect. In some instances, however, the choice of parts to be omitted has not been happy. The case of *Commonwealth* v. *Webster* [9] has been edited to leave only the court's rambling dissertation on the general law of homicide—which could have been more efficiently condensed into an editorial note—omitting the portion dealing with the *corpus delicti*, which, since no other case involving that subject is provided, constitutes its most significant contribution to the study of criminal homicides. So in the case of *People* v. *Miller*, [10] wherein the court strove desperately to justify its affirmance of the conviction of a notorious swindler, the contentions of the defendant, which provoked the court's mental convulsions, have been deleted. A splendid opportunity to demonstrate the divergence of law in theory and law in practice has been lost thereby.

The historical causes for present-day criminal law concepts are sufficiently identified by properly spaced notes. The development of the law of theft is particularly emphasized by arranging the cases chronologically, interspersed with the statutes enacted to remove the anachronistic results of the cases. Again, however, the material demands more time than can ordinarily be spared to its study.

A final observation may be made. Difficult as it is to touch upon all the important variations in the criminal law technique manifested in different jurisdictions, conflicting points of view are well represented by the cases. In this

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[7] HALL AND GLUECK, CASES AND MATERIALS ON CRIMINAL LAW (1940) 46.
[8] *Id.* at 40.
[9] *Id.* at 85–91, 5 Cush. 295, 52 Am. Dec. 711 (Mass. 1850).
[10] *Id.* at 209–214, 169 N. Y. 339, 62 N. E. 418 (1902).

connection it should be noted that pertinent statutory sections from many states, including New York, are quoted and compared.

For the most part the criticisms above outlined are not directed to the scholarship displayed by Professors Hall and Glueck, but to the adaptability of the work in the usually limited course in the subject. Unless additional courses in procedure and administration are made available to students, the organization of the single course in criminal law compels an economy of materials and a prudent distribution of emphasis upon the fundamentals of the criminal law, in theory and in practice, which have not been observed in this work. Nevertheless, until a more utilitarian product appears in the field, this reviewer will continue to use this course book in his own classes.

G. ROBERT ELLEGAARD.*

OUTLINE OF THE LAW OF SALES. By Frederick A. Whitney. Brooklyn: New York, 1941, pp. xii, 309.

Professor Whitney modestly calls the new edition of his book on Sales an "Outline". He is doing himself an injustice by doing so. To students and lawyers who visit the lawbook stores and see stacks of "Outline of This" and "Outline of That" the term has come to mean a pamphlet containing a set of rules of thumb not articulated to the principles underlying them, covering single-issue, run-of-the-mine factual situations and without critical analysis or commentary. Outlines of this sort have given the term a bad name. They are extremely light lunches to be partaken of only when in desperate haste or because of intellectual poverty and are likely to cause at least indigestion if not ptomaine poisoning.

Now this book which Professor Whitney pleases to call an "outline" is nothing of the above sort. It is a full meal to be eaten at leisure. It is not a pamphlet but a book into which the author has packed a surprising amount of information. It is written chiefly to the New York law and the citations are overwhelmingly of New York cases. This might be thought by some to be a point for criticism. Yet the facts are that New York is a great commercial state and that its courts have been called upon to decide almost every variety of question that might arise in the field of Sales. So its reports are rich in illustrative cases and uncommon problems. When an interesting question has presented itself in another jurisdiction and has not been passed upon by the New York courts the author cites the case. But most of the time he is satisfied to use as authority the New York courts of high and low degree. His painstaking canvass has turned up over four hundred New York cases on different points; citations from other sources bring up the number he uses to nearly five hundred.

The ferment that has taken place in other fields of the law in recent years has shown plenty of signs of developing in the field of Sales also. The historical approach to the subject has been through the Title-concept; now advocates

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