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Book Review [Handbook on Criminal Law]

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BOOK REVIEW

HANDBOOK ON CRIMINAL LAW. By Wayne R. LaFave & Austin W. Scott, Jr. West Publishing Co.: 1972.

With a style of refreshing candor and a rare skill in marshalling resources, this treatise[1] is an invaluable supplement to the basic course on substantive criminal law. The goal of this work is not to delineate all Anglo-American crimes but to provide an insight into the disparate elements and influences that have shaped modern criminal law. Due to Supreme Court decisions such as *Gideon*[2] and *Argersinger*,[3] a greater number of law students will engage in criminal representation than heretofore, and because of the increasing body of regulatory crimes in the consumer protection and environmental law fields, the authors appropriately choose a general approach to substantive criminal law rather than the traditional segmented review of crimes.

Broad areas of substantive criminal law are examined, including the goals of criminal law, the sources of authority and limits on criminal jurisdiction, and the elements of a criminal act. Using cases and statutes to illustrate relevant legal principles, the text promotes a deductive approach. In contrast to the typical textual pattern of cases surrounded by some editorial comment, the competing theories are discussed with the supporting authorities cited or summarized in the margin. In this manner the authors achieve an integrated set of materials, each chapter forming the basis for the next.

Realizing the "undue preoccupation" with appellate court decisions and common law crimes in the first year of law school, the authors attempt to rectify this imbalance with frequent references to legislative contributions and limitations. There are also provocative forays into such developing fields as discretionary enforcement.[4] Furthermore, to the probable endearment of their

1. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW (1972) [hereinafter cited as HANDBOOK].

2. Gideon v. Wainwright, 372 U.S. 335 (1963).

3. Argersinger v. Hamlin, 407 U.S. 25 (1972). *See* Portman, *Gideon's Trumpet Blows for Misdemeanants—Argersinger v. Hamlin, The Decision and Its Impact*, 14 SANTA CLARA LAW. 1 (1973).

4. In contrast to the rigidity of substantive criminal law, the procedural side of the administration of the criminal justice system is replete with situations in which the exercise of discretion determines what happens to an of-

readers, the authors avoid the use of the Socratic method. Instead, they offer the relevant, competing legal or policy considerations, and, where appropriate, express their opinions on issues in dispute between jurisdictions. For example, in discussing the question of whether a defendant is guilty of murder if he is not aware of the risk created by his conduct, the view of the English judge and criminal law historian Stephen is contrasted with that of Justice Holmes. Because of the severe penal consequences of a murder conviction, the authors express their preference for Stephen's requirement of the defendant's subjective realization to the reasonable man standard posited by Justice Holmes.[5]

In an interesting exploration of the relationship between criminal law and civil law, particular attention is focused on the interplay between criminal law and its civil counterpart, the law of torts.[6] The aim of the criminal law, as the authors see it, is to protect the public against harm, while the function of tort law is to compensate someone who is injured for the harm he has suffered. Despite the different purposes, the laws frequently overlap. For example, some crimes utilize the idea of "proximate cause", an important tort concept in liability for negligence; and, liability for failure to act where there is a duty to act may be criminal as well as tortious. Indeed, this interweaving of criminal and tort law suggests the potentially ominous expansion of the criminal process beyond dealing with purely antisocial behavior to regulating all forms of human conduct.

The textual materials pose the question of whether it is useful, in terms of general deterrence, to punish an individual for conduct which creates an unintentional risk. The authors properly criticize legislation which defines criminal standards which are virtually indistinguishable from those of tort law. The authors suggest that the carefully defined terms of the Model Penal Code provide a solution. Notwithstanding the greater clarity and precision of the Code's definition of recklessness[7] and negligence,[8]

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fender. For example, a prosecutor may decide certain offenders should not be prosecuted, or juries will sometimes refuse to convict persons proven guilty beyond a reasonable doubt. *See* HANDBOOK, *supra* note 1, at 18.

5. HANDBOOK, *supra* note 1, § 70.

6. *Id.* §§ 30-33.

7. The MODEL PENAL CODE § 2.02(2)(c) (1967), defines "recklessness" in this manner:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

8. Criminal negligence is defined by the MODEL PENAL CODE § 2.02(2)

the Code's distinction between a criminal and tortious act is not altogether satisfactory.

The application of such tort concepts as strict liability and vicarious liability to the criminal law offends the basic common law traditions of criminal justice. In order to counter statutes which impose criminal liability on a third party (usually an employer) for the acts committed by another and without his knowledge, the authors propose that the desirable social goals (protection of consumers, employees and the environment) can be achieved by utilizing the Model Code's characterization of the act as an "offense" and penalizing by fine rather than legal disability.[9]

When the criminal process is utilized to arrest and detain a drunk and there is no intention to seek a conviction,[10] the traditional purpose of criminal law takes on a new character. Presently, there are efforts to employ within the criminal process "protective custody" programs wherein the purpose is not to punish the offender for wrongs committed against society, but to treat the individual in order to prevent his own destruction. Similarly, drug users are often provided with deferred sentences if they will enter diversionary treatment programs.[11] As the criminal process develops this perspective of protecting the individual, its scope is enlarged beyond the traditional task of protecting the public from harm. One may properly question whether the criminal process should be utilized as a means of regulating lifestyles, not necessarily harmful to society, especially in view of our historical concern for individual freedom and civil liberties.

In chapter 3, entitled "Basic Premises of the Criminal Law", society's right to control antisocial behavior is tempered by classifying what constitutes offensive individual conduct. In the course of defining the specific elements of criminal conduct the question arises as to the limits of criminal sanctions. Those who argue against imposing sanctions for "victimless crimes" would decriminalize purely private conduct, such as acts involving the use of narcotics or consensual sexual behavior. Others insist that society must have the right to regulate morality and to define as criminal conduct

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(d) (1962):

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

9. MODEL PENAL CODE § 1.04(5) (1962).
10. *See* CAL. PEN. CODE § 849 (West 1970).
11. *See* CAL. PEN. CODE §§ 1000-1000.4 (West Supp. 1973).

which tends to imperil the existence of society.

In dealing with the relationship of procedural to substantive law, the authors characterize the former as essentially softening or humanizing the latter. Substantive law, with its strict definitions and mandatory penalties, is less flexible than procedural law, with its inherent opportunities for discretion. It is only in the exercise of this discretion in the successive procedural phases of arrest, arraignment, conviction and sentencing that the otherwise absolute legal definitions can be applied in such a way as to meet the practicalities of everyday situations. One such flexibility device is plea bargaining. While calling for an end to this device, the National Conference on Criminal Justice, funded by the Law Enforcement Assistance Administration (LEAA), at its January 1973 session, failed to suggest an alternative which might compensate for "the inability of the legislature to envisage all the day-to-day situations."[12]

Presumably, the authors regard post conviction procedures and plea bargaining as well as punishment and treatment as not within the ambit of substantive criminal law. In any event, their decision to omit these topics is consistent with the traditional attitude of the Bar. Despite the fact that nationally approximately 80-85% of all defendants plead guilty and as many as 80% of the remainder are found guilty, the authors give scant attention to the defense counsel's responsibility after adjudication. It is unfortunate that the treatise did not present the substantive law and its underlying principles from the perspective of plea bargaining, since this device is employed in every jurisdiction in the United States.

That the authors' treatment of criminal rehabilitation is somewhat superficial is illustrated by their suggestion that the number of habitual criminals may be exaggerated. Although this reviewer joins in the skepticism that "habitual offenders" can be so classified with any certainty, the authors' theory is at best doubtful and appears to have been rejected by the pronouncements of Chief Justice Warren E. Burger, who noted that because only a fraction of those who leave custody and commit crimes are detected, the recidivism rate is actually higher than official arrest reports would indicate.[13]

The authors deal only in passing with the issue of the right to treatment. In discussing the question of insanity and the sev-

12. HANDBOOK, *supra* note 1, at 19.

13. Address before the National Conference of Christians and Jews, February 1973.

eral phases of adjudication where this issue may be raised (pretrial, trial and disposition), the authors barely touch on the defendant's right to treatment as contrasted to the state's right to confine.[14] This is not only an issue in cases where competency is in question, but in all cases where a defendant is incarcerated. The adversary system requires the lawyer to receive proper training regarding his prospective client's right to treatment. The alternative is to abdicate full responsibility to other professions at a time when increased appropriations are being applied to corrections and no profession has demonstrated any significant degree of expertise in this field. It must be recognized that even if the convicted defendant (or, for that matter, the defendant who waives his procedural and substantive rights in exchange for a "diversionary treatment program") is placed in the best-intentioned rehabilitation program, he may continue to need legal representation.

In the chapter entitled "Sources and General Limitations", the authors deal with the critical relationship between legislation and substantive due process. Litigators, judges, and legislators have been troubled by legislatively-created conclusive presumptions and affirmative defenses on the one hand and judicial enforcement of such traditions as separation of powers and guilt beyond a reasonable doubt on the other. The authors explore the tension between the court and the legislature in this area and regard *Leary v. United States*[15] as providing the standard to be applied in determining the legitimacy of a statutory presumption. The test in *Leary* is that a statutory presumption is immaterial "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[16]

In the chapter on "responsibility" the authors expose a weakness in the law in their discussion of the defense of diminished capacity.[17] If a defendant is acquitted based upon a defense of insanity, the end result is usually some form of commitment; although the jury on occasion may direct the release of the defendant if it finds that his mental condition no longer exists and the defendant is not a danger to society. However, if the defendant is acquitted pursuant to a defense of diminished capacity or lack of sufficient intent and is not found guilty of a lesser included offense (where intent need not be proved or can be satisfied by a lower standard), there is no automatic mental commitment.

14. HANDBOOK, *supra* note 1, § 41.
15. 395 U.S. 6 (1969).
16. *Id.* at 36.
17. HANDBOOK, *supra* note 1, § 42.

Therefore, the defendant who is unable to satisfy the requirements of criminal insanity, but can show diminished capacity, can obtain absolute acquittal, but the defendant who successfully proves his criminal insanity will typically be confined to a state mental institution. In an attempt to remedy this anomaly, revisions to the California Penal Code have been proposed[18] which would subject a defendant acquitted under a diminished capacity defense to a commitment similar to a civil commitment under the Lanterman-Petris-Short Act.[19]

In the chapter "Justification and Excuse", there is an extended discussion of the defense of duress. This defense, recognized at common law and adopted by statute in California,[20] is unavailable as a defense to a charge of murder. This contrasts to the Model Penal Code,[21] which would allow the defense in murder cases when the threat to the defendant was one which a reasonable man could not resist.

The use of force in the defense of property is another topic of current concern.[22] While most modern authorities authorize the use of deadly force in defense of one's dwelling, there is increasing support for the rule that before the occupant can use deadly force, he must reasonably believe that the intruder intends to commit a felony and to threaten the occupants of the dwelling with violence.[23]

The authors' artistry in the arrangement of their materials is illustrated by their discussion of "felony-murder". By virtue of previous analyses of such concepts as criminal intent, causation and self-defense, the reader is in a position to evaluate the argument that the felony-murder doctrine be abandoned.[24] In their discussion of this issue, optimum use is made of significant available resource materials including the Model Penal Code, the statutory law of Ohio and Great Britain[25] and the incisiveness of Justice Holmes.

The final two chapters demonstrate the relationship between common law and statutory law. Using illustrative discussions of specific laws, the authors facilitate an evaluation of the criminal process as a technique for social control.

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18. Penal Code Revision Project Tentative Draft No. 2, at 92 (Report of the Joint Legislative Committee for Revision of the Penal Code, 1968).

19. CAL. WELF. & INST'NS CODE § 5000 *et seq.* (West 1972).

20. CAL. PEN. CODE § 26 (West 1970).

21. MODEL PENAL CODE § 2.01(1) (1962).

22. HANDBOOK, *supra* note 1, § 55.

23. *See* MODEL PENAL CODE § 3.06(3)(d)(ii) (1962).

24. HANDBOOK, *supra* note 1, § 71. *Cf.* Comment, *Taming the Felony-Murder Rule*, 14 SANTA CLARA LAW. 97 (1973).

25. Both of these jurisdictions have, in effect, eliminated felony-murder as a substitute for intent to kill.

Unlike most texts on criminal law, this treatise enables the reader to sense the evolution of Anglo-American law and the interaction between social developments and the common and statutory law. The authors appreciate the law's response to changing social concerns and by sharing this appreciation with us allow the student a glimpse of modern criminal law beyond that offered by traditional case books.

*Phillip H. Ginsberg**

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* Chief Attorney, Seattle-King County Public Defender; B.A., Princeton University, 1961; LL.B., Harvard Law School, 1964; member Washington State Bar; National Legal Aid & Defender Association—Board of Directors, Executive Committee (1972-1973).