

1940

## Criminal Law and Its Administration

Ernst W. Puttkammer

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

Ernst W. Puttkammer, "Criminal Law and Its Administration," 8 University of Chicago Law Review 386 (1940).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

## BOOK REVIEWS

---

**Criminal Law and Its Administration.** By Jerome Michael and Herbert Wechsler. Chicago: Foundation Press, 1940. Pp. xi, 1410. \$6.50.

In the last decade or so Criminal Law, like nearly every other field in the law school catalogue, has undergone sweeping changes both in content and in teaching method. Before then it was structurally very simple. With exceptions in only a few schools, there was only one course in which the substantive law of crimes was carefully worked out from judicial pronouncements and from no other source. Fine distinctions as to act and intent were its life-blood and (to mix one's metaphors) larceny, larceny by trick, embezzlement and false pretenses were a particularly happy hunting ground. How (and whether) all these fine spun analyses worked was a question that simply did not occur to anyone. After all there is no failure to answer a question when the question isn't even asked. Lee Kong, who ran a gambling joint in California away back in 1892 and thought a detective was peeking down at him through a hole in the ceiling, was guilty of assault with intent to commit murder, if he fired a bullet through a knot hole saying to himself, "I want to kill him, and so I'll shoot through the hole, where I think he is." But he was not guilty if he did the same thing saying to himself, "I want to shoot through the hole, because then he'll be killed." Probably Lee Kong himself didn't know which description fitted him, but the jury would, and the answer determined whether he was a community menace, to be locked up, or was fit for continued freedom. The distinctions were fine, whatever the results were. Presiding over the field in lonely majesty was Beale's *Cases on Criminal Law*, published in 1894, with a very much younger partner appearing in 1908 in the shape of Mikell's casebook of the same title. Those were the days when law was law, and no nonsense about it—either penological or sociological. Much later and of course on a much lower social level came occasional courses in criminal procedure. But these too were saved from damnation by sticking solely to "law." The reviewer's rather jumbled recollection of them is that they seemed limited to pointing out why all indictments were bad, really. Mikell's *Cases on Criminal Procedure* provided these courses with their necessary orthodox food.

Then, very gradually and slowly, things began to change. More and more there was a disturbing and annoying feeling that perhaps we ought to see—now and then—how these perfect, logical structures worked. Lee Kong might be very much the same kind of a social problem, no matter which intent he had when he fired that bullet through the ceiling. But the real trouble with looking at the facts is that it works like a snowball rolling down hill. Once you make the mistake of beginning you have a terrible time stopping. That is the way it has worked in criminal law at least, until now about the only thing that seems to matter is, how does it work? And perhaps a few of us—incurably old-fashioned—are not wholly ironical when we look back at the good old days when law was law and the accused merely a piece of the stage setting.

This change in emphasis has led to a complete structural change in each of the two criminal law courses, substantive and procedural. The latter, under the guidance of Keedy's casebook, has shed its cocoon and become a course in the administration of criminal law as a whole. The reviewer will have more to say on that head a little farther along. But the former—the substantive law course—has undergone changes just

about as fundamental, even if less striking on the surface. The old emphasis on building up the distinctions—a world of little, doorless rooms—was replaced by an effort to tear them down, to disclose the unity of the field and the artificialities of most of the boundary lines, all with the consistent idea in mind of disclosing how well or ill our substantive law worked in selecting all those, and only those, conduct patterns (to use the modern trade-language) which needed suppression by this particular social tool. This new viewpoint had its first chance in a casebook with Waite's compilation in 1931, followed only two years later by Harno's. The concern of their editors in how the law worked was still further emphasized, it might be added, by the fact that both of these books also assign a generous amount of space to procedural chapters. Aiding in spreading the new, functional attitude was the appearance of a few textbooks built along similar lines. Notable in this list was Jerome Hall's *Theft, Law and Society*, where the effort was made to show the real unity of social problems raised by many varieties of conduct which the law chose to regard as utterly dissimilar, and again the real varieties of problems raised by situations all dumped by the law into a single category. Books like these gave the new orientation a chance to spread rapidly—perhaps even too rapidly, with everybody climbing on the bandwagon. At any rate it seems to the reviewer a healthy sign that a very recent (July, 1940) casebook, Livingston Hall and Sheldon Glueck's, puts a mild brake on the movement. Not that it is a reactionary return to the days when Beale reigned alone, but even a mere glance at the table of contents suggests that it sounds a conservative note and that it urges a little more concentration on the law in the books. Probably it is just as well that we should have a voice on this side of the voting, particularly as it was followed, only a scant month later, by the book under review here, which constitutes definitely the farthest movement yet on the functional approach side.

Reviewers of casebooks almost always make the trite but obviously true remark that no such book can be really appraised until it has had classroom use at least once. If they were as frank as they are trite, they would add that another obstacle to reviewing them is that it is a gosh-awful, boring job to read a mere compilation and that they haven't done it and don't plan to. Your present reviewer is merely that much more frank—he has not read it from cover to cover, not fourteen hundred pages of it! But even the most cursory examination will reveal the enormous mass of material of a non-legal or not strictly legal sort made available to the user of the book. Every section, however short, is followed by a group of notes and problems, buttressed by a footnote array of supporting or supplementary reading that ranges all the way from St. Thomas Aquinas to the *New Republic*. Foreign legal texts, books on philosophy, economics and government, annual reports of police chiefs, all these and many more have contributed their bit to the staggering whole. Truly, under the dress of a "mere" casebook the authors have covered up a sum total of labor that must far exceed that of many a ponderous textbook. They have not hesitated to use, as part of the principal text, much non-case material, including an occasional law review article. Notable as an example along this line is the section on restitution of stolen articles, which consists in its entirety of a very realistic Columbia Law Review article describing the law in action in New York City. Naturally, then, the notes (already referred to) which appear at the end of every section, or even oftener, are as diversified as the footnotes, as to their source. For example, one is made up wholly of comments on the Italian law and the text of the law of Cyprus. Many are the original contributions of the editors. And finally, it should be added, all the items appear to have been gone over even at the very

last minute before going to press. Thus the American Law Institute's Youth Court Act and Youth Correction Authority Act, in the forms approved so late as April 10, 1940, are duly included in their proper places.

From what has just been said it will be apparent that the book is as much a reference work as it is a teaching tool. Indeed it is so much a reference work that one can hardly escape some regret that the editors did not see fit to throw it wholly over into that category, and by making the requisite structural changes make it more available for such use. As a teaching tool it is almost appalling by its sheer length—almost thirteen hundred pages (excluding index, appendix, etc.) of highly concentrated material. Of course the only recourse lies in drastic omission—a most unsatisfactory answer when everything is so valuable and significant. In LaFontaine's fable the donkey died of starvation because he could not decide to which hay stack to go. Criminal law teachers will probably not carry matters that far. But the choice of what to use and what to leave out will be a painful one none the less.

In the inadequate examination to which, as the reviewer has already confessed, he was limited, some items of arrangement of subject matter seem peculiar to him. Probably classroom use of the book would largely clear them up. Thus the Introduction seems a heterogeneous mixture of a preface-like statement of how criminal law should be taught, a philosophical analysis of the end and purpose of criminal law, and a description of what personal characteristics criminals are likely to have. The familiar error (at least to the writer it seems an obvious error) is made of treating omission to act, not under act, but under intent. As Rollin Perkins has abundantly made clear,<sup>1</sup> the doctrine that an omission may suffice as a substitute for, or qualification of, the requirement of an affirmative act, has to do only with the act side of the crime. It has nothing to do with the mental side, and the omission may be accompanied by any conceivable frame of mind, just as an affirmative act may, ranging from the most specific of intents to complete absence of thought. Why, then, continue to lump omission, along with negligence, under a heading given to motive and intent?<sup>2</sup>

Another sore point with the reviewer is the setting up of a separate chapter on Mistake. Why? The definition of each crime calls for certain external elements, which we collectively call the "act," and certain internal, mental ones, which we usually call (for lack of a better term) the "intent." If any thought or any item of knowledge required by the definition of "intent" applicable to the crime then under consideration is lacking, the crime is not complete. The showing of a mistake is significant only if it serves to show the absence of such a part of the crime's definition. The mistake itself, whether it be of fact (which often touches the definition of the intent) or of law (which is rarely referred to in any definition of the requisite intent), is no more a "defense" in the precise use of the term, than the non-death of the victim is a "defense" in a murder case. Why then treat it as a separate topic and hence begin by distorting the student's approach? Your reviewer, however, sadly recognizes from a check-up in the other casebooks mentioned above, that this is an example of "everybody out of step but Johnny," with the reviewer filling the role of Johnny.

<sup>1</sup> Perkins, *Negative Acts in Criminal Law*, 22 *Iowa L. Rev.* 659 (1937). Incidentally, this valuable article appears to have escaped the notice of the editors.

<sup>2</sup> Checking on the other casebooks mentioned shows that Harno and Hall-Glueck make the same "error" (assuming, in so calling it, that the reviewer is right), and that Waite does not. Neither does Sayre in his slightly earlier collection (1927).

A more serious and fundamental question, however, which a casebook like this must bring to the fore is as to whether the amount of time—all too brief—that the criminal law teacher can get his colleagues to allot to him should be given to substantive law or to administration. This is not to deny for a moment the great importance of what Messrs. Michael and Wechsler have to tell us. But the very abundance with which they lay valuable matter before us makes the inevitability of a choice all the clearer. The editors themselves recognize the problem and emphatically urge the primary importance of substantive law. Perhaps they are right. The reviewer thinks that they are not. Very few of the students in the sort of schools that use the casebooks referred to will ever practice criminal law to any great extent. This is a pity, but it is a fact just the same. A slightly larger minority will practice it indirectly as a member of the bench or as a teacher. The great majority will make no professional use of it. Why then do we demand that they take a certain amount of work in it? Obviously not in order to coach them for the bar examinations. Why, then? Simply because every intelligent citizen and voter needs to know something of how the criminal law is working, and because the citizen who is also a lawyer will be expected by his fellow citizens to have special information on the subject. However far from the truth this assumption may often be, so long as the assumption continues to be made it must be faced. Now what are the questions which are going to be asked of our graduates and which they should be at least partly equipped to answer? While, beyond a doubt, some of them will concern substantive law, the vast majority will be on the administrative side. Is our state's attorney doing a good job? Are the local police organized to get results? Should we have a coroner or a medical examiner? What shall we do to control the professional bondsman? Do we really need grand juries? Are probation and parole steps forward or backward? These are only a few that at once suggest themselves, but one feels rather confident that most of them will have a familiar sound in most states. Compared to them and their insistent urgency the substantive law is a deep, still pool. There may be plenty of movement at the bottom and it may all be changing by slow degrees, but sailing over its quieter surface certainly raises none of the immediate problems that the tossing rapids of administration raise for us.

Of course this is a question of values, and of course in a question of values no absolute result can be reached. Since, presumably, a choice must be made, the reviewer has indicated what he thinks should be the choice and why. The editors, after making the opposite choice, indicate their belief that much of administration can be brought out collaterally while dealing with the substantive law.<sup>3</sup> This may be so, although it is open to some doubt. And it is hardly a satisfactory answer in a casebook which, as has already been said, lays such an over-abundance of good things before us. Even if the administrative matter *could* be drawn in, *would* it, under such circumstances? There can scarcely be any doubt as to the answer to *this* question.

The moral of all of which is perfectly clear: having finished their little job in substantive law, Mr. Michael and Mr. Wechsler should at once do the same for administration as an entirely separate and new undertaking. There are many of us who would warmly welcome it.

E. W. PUTTKAMMER\*

<sup>3</sup> In justice to the editors it must be said that they do not carry this belief to extremes. They include two chapters on procedural matters, and in the preface they expressly state that intensive procedural work calls for a separate course.

\* Professor of Law, University of Chicago.