

work them through. The book does not contain the texts of the various acts or regulations which are necessary concomitants to this volume. The authors assume that separate copies of those acts and regulations will be available for use with the book. It would have been very helpful had it been possible to reproduce these in an appendix so that they could be readily available instead of requiring the use of separate pamphlets. The material on state blue-sky regulations and on the definition of what is a "security" is overweighted and somewhat distorted by the disproportionate inclusion of California material. It might also have been well to shorten a number of the cases by summarizing their facts.

Despite these few observations of a minor and gently critical nature, this book is a very welcome and excellent "coursebook" which recognizes a long felt need and fills it very well.

STANLEY A. KAPLAN*

* Professor of Law, The University of Chicago

Criminal Law: Problems for Decision in the Promulgation, Invocation, and Administration of a Law of Crimes. By RICHARD C. DONNELLY, JOSEPH GOLDSTEIN, and RICHARD D. SCHWARTZ. New York: The Free Press of Glencoe, 1962. Pp. xxvi, 1169. \$15.00.

The merits of the traditional case-book approaches to teaching law have given rise to debates too numerous to recount. But *Criminal Law* constitutes so vigorous a dissent from the traditional heavy reliance upon printed decisions that it may be worth recalling two of the criticisms toward which its authors appear particularly responsive.

First, there is the complaint that the experience which has been the life of the law has all too often been the experience of lawyers alone, and that case-books have failed to keep students abreast of the teachings of non-legal fields. No doubt, the "law" that a student can read in the decision of an anti-trust case may have drawn heavily upon the literature of "economics." A hard case in the law of equitable nuisance may have forced a court to investigate the state of industrial technology, and thus to have made good law.¹ But even in those areas in which decision law has absorbed the logic of other learnings, students dieted wholly upon printed cases are better trained to keep up with the pace of the courts than to assume a lead.

Further, issues actually litigated and appealed may be somewhat narrower in scope than those with which a lawyer or legislator does or might concern himself. Thus, for example, a prisoner's civil rights action against a guard may convey a glimmer of what can happen in a prison; but as a picture of the total post-conviction concern of the criminal process, any series of conceivable

¹ See *L. Martin Co. v. L. Martin & Wilckes Co.*, 75 N.J. Eq. 39, 71 Atl. 409 (1908); *Fletcher v. Bealey*, L.R. 28 Ch. 688 (1885).

law suits will be woefully one-sided and inadequate. Similarly, for every Bonanno² or Colonel Abel³ whose search and arrest grievances find their way into print, one suspects a thousand arrests whose victims are not even taken to jail with an eye towards ultimate prosecution, much less bound over to the courts: suspected homosexuals and gamblers arrested for the sanction of arrest itself; suspected prostitutes rounded up at night in order to be given a medical examination in the morning; suspected drunks locked away so that they will not stumble under a trolley.⁴ As a result, no matter how conscientiously a case-book author may have screened his field, there will remain at least a penumbra of quasi-legal activity that a traditional case-book can do little to illuminate, and that may rightly merit a law student's consideration.

The authors of *Criminal Law* have, indeed, seen fit to reprint goodly portions of over two hundred cases. But the entire book spans about 1,200 extra-large pages, and the balance of materials has been drawn from sources ranging from V. I. Lenin and Thurman Arnold to A. Jones (inmate, Connecticut State Prison) and Donald Webster Cory (pseudonym for a homosexual). For philosophical guidance *Criminal Law* looks to Jeremy Bentham, Immanuel Kant, C. S. Lewis and Percy Bridgman; for spiritual insight, to the Church of England Moral Welfare Council, Pope Pius XII, the British Catholic Advisory Committee on Prostitution and Homosexual Offences and a professor of moral theology, West Baden College, West Baden, Indiana. The Chairman of the Board of the General Electric Corporation is on hand to explain how decentralization will assure responsible and profitable management. A professional thief lends his memoirs to illustrate the "shakedown" and the "muzzle."

It is, however, with the views of sociologists, psychiatrists and psychologists that *Criminal Law* has been particularly indulgent. Bernard Glueck, Henry Beacher, Margaret Mead, Alfred Kinsey, Karl Menninger, Talcott Parsons, Sigmund Freud, Albert Ellis, Karl M. Bowman, Pitirim Sorokin, Hermann Mannheim—these are just a few whose writings one finds interlaced with the more traditional text-book teachings of Justices Holmes, Cardozo and Frankfurter.

Criminal Law is divided into three chapters, each of which the authors maintain to be "an entity which permits a total view of the criminal process, though from different vantage points."⁵ Chapter I is "The Case of Dr. Martin:

² *United States v. Bonanno*, 180 F. Supp. 71 (S.D.N.Y.), *rev'd sub nom.* *Bufalino v. United States*, 285 F.2d 408 (2d Cir. 1960).

³ *Abel v. United States*, 362 U.S. 217 (1960) (upholding the conviction of the accused Russian agent who was subsequently exchanged for U-2 pilot Francis G. Powers).

⁴ See LaFave, *The Decision to Take a Suspect into Custody* pt. IV (1962) (unpublished monograph prepared for the American Bar Foundation); J. Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960); *N.Y. Times*, June 16, 1957, p. 67, col. 1, reprinted in GOLDSTEIN, DONNELLY & SCHWARTZ, *CRIMINAL LAW* 547 (1962) [hereinafter cited as *CRIMINAL LAW*].

⁵ *Preface to CRIMINAL LAW* at v.

An Introductory View of the Criminal Process"; Chapter II, "Promulgating a Criminal, Penal, Correctional or ' ? ' Code"; Chapter III, "A Re-examination of the Criminal Law in Terms of Groups."

The first chapter is the most strikingly indicative of the new approach. Although some 250 pages in length, it never loses sight of a single "case."⁶ The focus of concern is one "Dr. Martin," a pseudonym for a man who was a highly eminent and respected pediatrician. (Among his many laurels, at one time he ran both the Pediatrics Department of the University of Chicago Medical School and its Bobs Roberts Memorial Hospital for Children.) One summer he decided to settle in a cabin in a small town in Connecticut to practice an "experimental and unorthodox approach" to the treatment of disturbed children. As explained by defense counsel:

The approach was to induce the child to go back in his life to the age when his trouble started, and then to guide him anew up to his present age along lines which would be more comforting to him and more acceptable to others—regression, and then progression or re-education.⁷

In the eyes of the state's attorney, who was prepared to concede both the doctor's eminence and his unorthodoxy, his treatment looked a good deal like what the State of Connecticut deems sodomy. And if the "cure" had proved successful in preventing a ten year old boy from barking like a dog, the prosecution evidenced a layman's bewilderment as to why the lad's normal and non-barking brothers, nine and thirteen, had to be summoned to the cabin and treated with equal fervor.⁸ The defense: It was "calculated to show the structure of the [family] relationship."⁹ And so the debate begins.

The authors proceed to pursue this "case" with a thoroughness that is in many respects highly rewarding. Two separate lines of inquiry appear. First, Dr. Martin's involvement with the law becomes the occasion for a broad survey of the administration of the criminal process. Second, the charges that are levied against the Doctor allow for an unusually far-ranging examination of the concepts of "guilt" and "innocence."

From the first standpoint, in the *Martin* case, as often throughout the book, *Criminal Law* takes pains to point up the full breadth of legal activity—even to the point of acquainting the student with the minutiae of a lawyer's craft which other texts ignore. Dr. Martin's confrontation with the criminal law is examined from Connecticut's first legislative decision to define the crime (the sodomy statute of 1642) until Dr. Martin's release from parole (September 1960). In the interval, the book has afforded the student an opportunity to consider the chance conversation that led to the invocation of the criminal process; to examine the present statutes; to inspect a criminal information; and to debate the criteria by which he might decide whether to plead his client

⁶ The case is unreported.

⁸ See *id.* at 26.

⁷ CRIMINAL LAW 17.

⁹ *Id.* at 20.

nolo contendere (as Dr. Martin's counsel pleaded him). The courtroom scenes (at the pre-sentence hearing) continue the survey of the legal process. Here is how the state's attorney presents "the facts"; here, the way in which they are molded by the attorney for Dr. Martin. Through the judge's colloquy with counsel, and through his fairly spontaneous remarks at the sentencing session, the judicial portrait emerges honestly, without the self-consciousness that necessarily infects an oft-drafted opinion.

Rather than abandon their subject at the sentencing, the authors proceed to examine the functions of the Sentence Review Board. Should the members inquire into Dr. Martin's remorsefulness, the extent of harm to his victims, the extent of harm to the community? A section based on the Connecticut Security Treatment Act follows: "Should Care and Treatment in a Mental Institution Be an Alternative Sanction to Sentence or Probation?" Thereafter, the authors return more directly to Dr. Martin by parading out his file as it first came before the eyes of the Parole Board. What statutes govern the Parole Board's operation? What considerations ought to guide *their* decisions—as distinguished from the decision of the prosecutor? of the judge? of the Sentence Review Board? Can the social sciences come to the law's aid with "prediction tables"? To cast light upon the operation of the Parole Board, the authors reprint an actual parole hearing. Then: should Martin have applied for a pardon? The book sets out Governor Stratton's reasoning in his pardon of Nathan F. Leopold, Jr.

From this "procedural" standpoint, the net impact of the *Martin* case is to have presented the administration of the criminal law in full perspective—both as to time, and as to actors; to have shed light upon the nature and "cause" of the community's reaction; and to have alerted concern for alternative theories of sanction and/or treatment. It is well worth noting that in the process, by representing the accused as a human being caught up in the machinery of the criminal process (and not as a cause of action, merely) the book may do its part to heighten the interest of students in proceeding to the criminal bar.

In handling the second inquiry—the issue of "guilt" or "innocence"—the authors have avoided the case-book pitfall of presenting only the criteria that the present state of the Law has sanctified as relevant and of seeking guidance only in the sources it has stamped with approval.

One of the statutes under which Dr. Martin was accused makes it a crime to "do any act likely to impair the health or morals of any . . . child" under sixteen. How likely was Dr. Martin to have impaired the health of any of his wards? The prosecutor told the judge he had "no doubt . . . as to the effect of the homosexual acts upon the boy." Enter Donnelly, Goldstein and Schwartz with an excerpt from the *American Journal of Orthopsychiatry*, "A Follow-up Report on Children who had Atypical Sexual Experiences." Should one seek to determine how likely was Dr. Martin's treatment to *improve* their

health and to advance science? Or would such an investigation be foreclosed by the logic of the doctor's trial at Nuremburg? Or should the law regard these cases differently? Why? How about cancer research experiments on prisoners—are wardens entitled to arrogate to themselves authority denied Dr. Martin? Is this because cancer is worse than barking like a dog? Or because the inmates are “of age” and sign “release” blanks? Or because whereas wardens are paid by the state, Dr. Martin received sexual gratification?

The statute spoke of injuring “morals.” How do we know what *is* “morals”? The authors set out an opinion and a dissent upon this point by Judges Learned Hand and Jerome Frank. Excerpts follow from a debate and correspondence upon the subject of “Ascertaining the Moral Sense of the Community”¹⁰ and “The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Science.”¹¹ *Criminal Law* reprints letters sent to the editor of the local newspaper after the various versions of the *Martin* case “facts” have been aired: “there is no doubt in my mind as to the soundness and honesty of Dr. Martin as an individual as well as a professional . . .”; “everyone who ever had the privilege of knowing him will stand up for his integrity and sincerity of purpose . . .”; “vile . . . sex perversion . . .” The focus on Dr. Martin then fades out and a legislative hearing is in session. Here the authors have gathered together fifty pages of materials which may or may not be relevant to enactment upon (or refusal to enact upon) the problem of consensual homosexual acts between adult males in private. The thirty-seven “witnesses” range from the Most Reverend William Godfrey, Archbishop of Westminster, England, to Fowler V. Harper. These materials have been utilized, both at Chicago and at Yale, as the basis for mock legislative hearings, the various members of the first year classes having been given different points of view to propound, assigned roles as inquisitive “legislators,” or appointed “counsel” to represent the divers “witnesses” who appear.

Chapter II, “Promulgating a Criminal, Penal, Correctional or ‘?’ Code” progresses by gathering materials under a series of basic questions: “What are the Differences Between Civil and Criminal Law?” The authors begin with an excerpt from Samuel Butler's *Erewhon*, in which a judge is sentencing the accused for “the great crime of laboring under pulmonary consumption” (“you are a bad and dangerous person”), and follow it up with *Moore v. Draper*,¹² a 1952 Florida case in which a habeas corpus petitioner, challenging the constitutionality of a statute under which he was committed to a tuberculosis sanitarium, is told, “tuberculosis was recognized as one of the most dreadful diseases and one of the greatest killers. . . [T]hose afflicted with the disease were a menace to society.”¹³

¹⁰ CRIMINAL LAW 126–31 (Professors J. Cohen, R.A.H. Robson, A. Bates and Judges L. Hand, J. Parker).

¹¹ *Id.* at 132–36 (Professors W. Blum, H. Kalven).

¹² 57 So. 2d 648 (Fla. 1952).

¹³ *Id.* at 648.

"Is a Law of Crimes Dispensable?" Lenin says, under communism, "yes"; Bertrand Russell says, under anarchy, "mostly."¹⁴

"What are the Purposes of Sanctions in the Criminal Process?" The authors produce a 1595 Dutch case in which the accused, a dog who has fatally bitten a little boy in an effort to snap away a piece of meat, is condemned to be "hanged by the executioner upon the gallows with a rope until death ensues, that further his dead body be dragged on a hurdle to the gallows-field, and that he there remain hanging . . . to the deterring of other dogs and to all as an example."¹⁵

"What are the Requisites of a Crime?" The American Law Institute cleaves the principles of liability into (1) "act"—"a bodily movement"; (2) "omission"—"a failure to act"; and (3) "possession."¹⁶ Is it a "bodily movement . . . voluntary or involuntary" to have one's "head out of the [car] window leering at [the prosecutrix] a curious look"?¹⁷ Upon which theory does California punish one who "roams about from place to place without any lawful business"?¹⁸ "Act"? "Omission"? Or something else: an "act of status"? Upon which theory does the New York police department justify its periodic arrest extravaganzas, in which "the courts [turn] those arrested back into the streets almost as fast as they [are] picked up"?¹⁹

"What Provoking Events Mitigate or Negate What Crimes?" An American soldier, released, brainwashed, from a P.O.W. Camp in Korea, is alternately "tried" for collaboration by the United States Court of Military Appeals²⁰ and by a psychiatrist.²¹

Inevitably, with such a collage of wisdom as the authors of *Criminal Law* have pasted together, the book will make baffling headway for a reader nurtured on more conventional undertakings, geared to demonstrate the harmony that lies at the end of the path of Reason. The challenge is not so much that the materials gathered together so often compete and contradict. It is rather that, so often, counterpoised sections have never, until now, given one another the slightest thought; and finding themselves wanting in a common tongue for debate, they are left to stare back and forth in uneasy, bewildered silence. The overall structure has been thoughtfully conceived. But the very conception

¹⁴ See CRIMINAL LAW 300-02 (selections from LENIN, IMPERIALISM—THE STATE AND REVOLUTION 193 (1929) and RUSSELL, ROADS TO FREEDOM 130-36 (1918)).

¹⁵ The Case of Provetie (1595), reprinted in 24 S.A.L.J. 232-34 (1907); CRIMINAL LAW 309.

¹⁶ MODEL PENAL CODE §§ 1.14(2), (4), 2.01(1), (4) (Tent. Draft No. 4, 1955).

¹⁷ State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1953).

¹⁸ CAL. PEN. CODE § 647 (3).

¹⁹ See N.Y. Times, *supra* note 7.

²⁰ United States v. Fleming, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957).

²¹ Schein, *The Chinese Indoctrination Program for Prisoners of War*, 19 PSYCHIATRY 149 (1956), selections reprinted in CRIMINAL LAW 708-17.

is a labyrinth of a thought, cautious enough to turn and to withdraw and to reexamine its handiwork, but thus wrought with dead ends, too, and often difficult to follow. *Criminal Law* is not what a first year student will consider an "easy" text, with a fast moving sequence of questions raised and answers given.

The book's treatment of *Regina v. Machekequonabe*²² may serve as an example. The defendant was a pagan Indian whose tribe believed in evil spirits in human form, called Wendigos, or Windigos, who ate human flesh. Rumor having it that a Windigo was dallying about their camp, the defendant and others were posted as sentries. Espying what he took to be a Windigo, and receiving no answer to his repeated challenges, defendant fired upon what turned out to be, on more conscientious inspection, his foster father. The trial judge directed a verdict of guilty of manslaughter should the jury find (as it did) that the prisoner was "sane apart from the delusion or belief in the existence of a Wendigo." Michael and Wechsler bring up this unfortunate episode twice, once under "The Problem of Criminal Negligence" and once under "Mistake of Fact."²³

Donnelly, Goldstein and Schwartz, who treat of Machekequonabe's fate under the broader heading "What Provoking Events Negate or Mitigate What Crimes," are not satisfied with the court's decision as a basis for classroom discussion. They add to the Michael and Wechsler account the defense's argument ("There was no intention even to harm a human being, much less to kill. At common law the following of a religious belief would be an excuse.") and then pick up an excerpt from a paper on "Windigo Psychosis" delivered to the American Ethnological Society.²⁴ Its author points out (1) that ten of thirty-three windigos whom the tribe "treated" for their cannibalistic urge "recovered" in the people's eyes; (2) the tribe did not believe in retribution, but killed for purposes of prevention; an especially critical consideration since (3) they believed that one act of cannibalism led to another. This information is followed by a lengthier paper discussing "Cultural Factors in the Structuralization of Perception."²⁵ Its author examines in detail one Adam Big Mouth's run-in with a Windigo, concluding that while "perception in man may be said to have acquired an overlaid *social* function," any given perception has, at its core, an element of the individual:

Part of the psychological interest of Adam Big Mouth's experience with a *windigo* lies in the fact that he himself was responsible for the perceptual

²² 28 Ont. 309 (1897).

²³ MICHAEL & WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940). The case is set out at 101-02, and referred to be read again at 772.

²⁴ Teicher, *Windigo Psychosis*, 1960 PROCEEDINGS OF THE AMERICAN ETHNOLOGICAL SOCIETY 108, set out in part in *CRIMINAL LAW* 679.

²⁵ Hallowell, *Cultural Factors in the Structuralization of Perception* in *SOCIAL PSYCHOLOGY AT THE CROSSROADS* (Rohrer & Sherif eds. 1951), in *CRIMINAL LAW* 679.

structuralization of *this particular situation*. Another Indian in the same objective situation and belonging to the same cultural group may, or may not, have perceived a *windigo*. Consequently, it is inaccurate and misleading, I believe, to speak of cultural *determinism* in such a case.²⁶

Much of such material does, of course, anticipate possible lines of student reaction and can lay a foundation for some lively classroom rhetoric. But at times one suspects that, from the authors' fear of leaving out anything that might contain the merest germ of a useful idea, they were willing to risk many inclusions of tenuous relevance. A reader's ability to skim with a discerning eye will prove a virtue.

At least two sections of the book ought to be singled out for their general excellence. One is the section on provoking events, negating or mitigating, already mentioned. Beginning with a Justice Cardozo opinion on the "law of retreat,"²⁷ it advances through a wealth of generally fine material without much further concern for the traditional legal pigeonholes; and the reading is no less thought provoking for the sacrifice.

The following section—"Under What Circumstances and to What Extent are Health (Mental and Physical) and Age (Chronological and Psychological) of the Defendant Relevant to his Criminal Liability?"—is easily the most complete and thoughtful treatment of its subject matter to be found in any law school text. It is typical of so much of the authors' handling of material that after reprinting the appellate decision in *Durham v. United States*,²⁸ Messrs. Donnelly, Goldstein and Schwartz pursue the affair to the retrial that the District of Columbia Court of Appeals ordered. They ask: What difference does *Durham* make in practical effect? And if the answer is just a wee bit comical, it is not without its virtue for alerting students to the chasm that may separate appellate court theory from trial court practice—and doctors from lawyers.

Undoubtedly, when considered as a guide-book to prepare law students for their roles as winning attorneys, the merits of assembling such a text will be debated. Some will quip that a well-rounded young lawyer, made acquainted with Sigmund Freud's *Thoughts on War and Death*, may win clients with an added dimension to his repartee, but probably not cases. If there is truth in this jest, it ought not to be overlooked that "the law" *has* found its way into *Criminal Law*, both through the wide selection of cases, and through the wealth of non-case-law legal materials with which the book abounds: oral argument before the Supreme Court, examination and cross-examination of expert witnesses, grand jury reports, argument on prayer for instruction, opening and closing statements to juries, the entering of pleas, appearance of

²⁶ *Id.* at 681. (Emphasis in original.)

²⁷ *People v. Tomlins*, 213 N.Y. 240, 107 N.E. 496 (1914).

²⁸ 214 F.2d 862 (D.C. Cir. 1954).

counsel before Congress, psychiatric evaluations of prisoners, probation reports, a request for removal of detainer, a charge to a jury, a congressional report, an appellate brief, pardons, the entering of sentences, arguments before the Nuremberg Tribunal, parole hearings, the appointment of a lunacy commission, and a great deal more. From this standpoint, the problem (if it is one) is merely that *Criminal Law* is an unusually large book, and although the strictly legal²⁹ materials do not lack, traditionalists will consider them spread out and watered down. *Criminal Law* has so many resources, however, that no instructor will be able to teach from it without some picking and choosing; and a teacher who is so inclined *could* pick and choose so as to conduct a class that is just about as traditionally "law" oriented as anyone would like.

On the other hand, *Criminal Law* was not conceived to lend students "such a mastery [of doctrines] as to be able to apply them with constant . . . certainty."³⁰ Insofar as the book has "doctrine," it is to disturb doctrine and to mock certainty. *Criminal Law* must be something like what Walter Cook imagined, a quarter of a century ago, when he proposed the establishment of a school whose "primary purpose would be the non-professional study of law, in order that the function of law may be more clearly understood, its limitations appreciated, its results evaluated, and its future development kept more nearly in touch with the complexities of modern life."³¹ The usefulness of *Criminal Law* need not await the creation of such a school, however. Utilizing any criminal law class as the setting for unconfined inquiry, the book may succeed in lending to the students' approach to the entire range of the law both a skepticism and a constructiveness that would be well worth the added effort.

CHRISTOPHER D. STONE*

²⁹ *But see Introduction to CRIMINAL LAW* at 4: "In preparing these materials we have sought to avoid categorizing them either as legal or non-legal. They have been selected to help law students become lawyers, not to become professionals in other disciplines."

³⁰ *Preface* to the first edition of LANGDELL, *CASES ON CONTRACTS* at viii (2d ed. 1879).

³¹ Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303, 309 (1927). Professor Cook meant "non-professional" in the sense that "the aim of the school would not be the production of practitioners but the development of the scientific study of law," although "without doubt, some of the graduates of the school would go into practice, and perhaps become leaders of the bar, judges, members of the legislature, or members of administrative commissions or other public bodies." *Ibid.* As indicated, note 28 *supra*, Professors Donnelly, Goldstein and Schwartz regard the primary aim of their materials as "to help law students become lawyers, not to become professionals in other disciplines."

* Law and Economics Fellow, The University of Chicago.