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Donnelly, Goldstein & Schwartz: Criminal Law

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RECENT BOOKS

CRIMINAL LAW. By *Richard C. Donnelly, Joseph Goldstein* and *Richard D. Schwartz.* New York: Free Press of Glencoe, Inc. 1962. Pp. xxvi, 1169. $15.

Perhaps the fact that this work is reviewed at all in a law review aimed at a general readership is sufficient to vouch for both its uniqueness and its worth, for it is a "casebook" intended for classroom use and not a "text" or "treatise." Under the usual ground rules, therefore, it should be reviewed in the *Journal of Legal Education* or some other periodical aimed primarily at the teaching profession. But the terms "casebook," "text" and "treatise" imply a system by which suitability for reviewing is to be determined; when no label quite fits, reviewability must be determined on other than a basis of denomination. By the same token, when a persuasive idea, concept or system appears which does not fit the usual categories, it is in order to re-examine the traditional definitions and analyses. The fact that Professors Donnelly, Goldstein and Schwartz have done this in the area of "criminal law" is the reason why their work is not necessarily a "casebook" for review purposes.

A traditionalist no doubt will find it a somewhat traumatic experience to leaf through this book. For where are the categories of offenses against the person, offenses against the habitation, offenses against property, other offenses, imputability, responsibility and special defenses?[1] Where is the structural organization based on elements of criminal liability, qualifications in the intent element, disorders of the mind affecting criminal responsibility, and where the specific chapters on solicitation and attempt, assault, battery, mayhem, false imprisonment, kidnapping, homicide, rape, larceny and related offenses, receiving, burglary and arson?[2] Where is the capsule treatment of criminal procedure? Where are the certain norms inherent in the law of crimes? Where can one determine what the law is?

But a closer examination reveals that one has here a comprehensive device for unfolding the human events coldly characterized by the law of crimes. In many respects its approach is like that of the Japanese short story from which the film and play *Rashōmon* were made,[3] in which a rape and murder are described several times, as viewed by one of the actors. Traditional materials present only one view, and probably a most unreal view, of what the problems in the subject area of criminal law are.

1 Major headings in PERKINS, CRIMINAL LAW (1957).

2 Major headings in HARNO, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE (4th ed. 1957).

3 The story, by Ryunosuke Akutagawa, is actually entitled *In a Grove* (*Yabu no Naka*); it is published by Bantam Books in a collection entitled RASHŌMON AND OTHER STORIES (Kojima trans., 1959).

Legislatures, judges and lawyers tend to analyze patterns of human conduct as if man were stamped out by machines in various patterns, equipped with a self-operated "stop" and "go" button, and regulated by a small governor which can either be reset automatically by carefully measured external pressures or which the man himself can reset if he is subjected to sufficient pressure to do so. Or the "norms" of criminal law are handled as if they were realities in themselves, each with its own essence, unrelated to human activities except as they come to be applied to the miscreant in the setting of the courtroom, and an antiseptic appellate courtroom at that.

But *Criminal Law* takes the *Rashōmon* approach; "each of the three chapters is an entity which permits a total view of the criminal process, though from different vantage points."[4] Like *Rashōmon*, it leaves the viewer, or reader, discomfited, for where is the specific problem, where the pat solution, where the truth? Nevertheless, three views considered separately and together may reveal problems and tentative solutions far more clearly than any one view alone, particularly that view which has been traditionally associated with the teaching of criminal law.

So in chapter I, the authors present the case of one Dr. Martin, whose unorthodox methods of treating disturbed children have led him to contravene the terms of the sodomy statute. He has committed a crime—or has he? His acts are immoral—or are they? His treatment methods violate medical ethics—or do they? His acts worked positive good to the children concerned—or did they? They caused positive harm—or did they? The doctor himself is a homosexual—or is he? Punishment will not change him —or will it? He is a good parole risk—or is he? One cannot avoid the questions, what should we do with him and why, with no wholly persuasive answer evident. The next part of the same chapter considers absolving or mitigating circumstances, the first of which is that based on a claim that the act charged as criminal was performed for scientific research purposes. The first case is the "Doctors Trial";[5] this one is easy. But then comes the problem of importing erotica for use in university-level research—is this different in quality or kind from the experiments at Auschwitz or Ravensbrueck? Was the conclusion which the material was to be used to demonstrate any less obvious than those which the German military doctors contemplated, or is it only that the harm actually inflicted is less? Next is a discussion of the statutes authorizing sterilization of certain classes of civil prisoners, and the accepted practices by which prisoners may "volunteer" to participate in medical experiments. How are those different from the practices in the World War II concentration camps? In terms of the motives of the experimenters? In terms of the goodness or badness of the

[4] Preface, p. v.

[5] United States v. Karl Brandt, 1 & 2 Trials of War Criminals (Nuremberg Military Tribunals 1949).

inmates? In terms of the degree of actual consent? In terms of the actual danger to the participants? Because they were Germans and we are Americans?[6] Where has the pat answer gone? The second mitigating or absolving circumstance is that the act was done for a therapeutic purpose. Under anti-contraceptive legislation, should a doctor be penalized if he advises a woman whose life will be endangered by an additional pregnancy to use contraceptives? Should the woman and her husband be penalized for using them? Should they be told that abstinence is the solution?[7] Is it an answer that in fact contraceptives are sold in the state, or that the couple need only travel to an adjoining state to receive contraceptive advice? What of the young victim of an interracial rape—can nothing be done to terminate her pregnancy? What of the unwanted child which results if abortion is not performed? Will termination of pregnancy cause psychic trauma to the mother? Will such trauma be more or less in the rape case than in a "normal" case? Once more, problems without answers. Similar problems are raised in the third part of chapter I concerning whether homosexual acts between consenting adults should be penalized; similar doubts are created.

Chapter II, which forms by far the largest portion of the work, is directed at "Promulgating a Criminal, Penal, Correctional, or '?' Code." Viewed traditionally, there should be no great problem in distinguishing "civil" from "criminal." Compulsory commitment of a tubercular or one infected with a venereal disease is obviously civil in nature. But what makes it so—the lack of fault on the part of the person restrained, the degree of danger to the community, the kind of installation in which restraint takes place, the availability and type of treatment, or what? What of the sex psychopath laws, and what of special laws relating to juveniles? On the other hand, ordinance violations are "criminal," but are they "true crimes," and are they more or less punitive than the sex psychopath laws? From this the authors proceed to consider the purposes of sanctions. What is accomplished by use of the death penalty, by detention, by serial or multiple punishment when one transaction offends against the laws of more than one jurisdiction, by supervised release, by taking the offender's property through fines or otherwise, by taking away his respect or standing? Traditional materials supply the answers; these materials raise the questions. The remaining portion of chapter II examines in detail concepts of the criminal act, the state of mind accompanying the act, negating and mitigating circumstances, and the relevance of age and physical and mental

6 The material at 951-965 describing the forced relocation of Japanese resident aliens and of American citizens of Japanese ancestry raises sobering questions as to whether "it can happen here."

7 As the Connecticut court did in Tileston v. Ullman, 129 Conn. 84, 91, 26 A.2d 582 (1942).

health. Chapter III reconsiders several problems in terms of groups. Each part is constructed of equally provocative material.

Can such a book be used to teach beginning law students? The most obvious answer is that it has been so used, and used well; to the reviewer there is a feeling of rightness about the materials chosen. They range widely through law, medicine, psychiatry, psychology, sociology, literature and logic; they are all relevant to the questions raised; they summarize the differing answers which have been advanced and they suggest avenues through which pragmatic action is possible. Will the students achieve enough grasp of doctrinal legal materials to pass bar examinations or to commence practice? The obvious answer again is found in the fact that Yale law graduates[8] pass bar examinations with eminent success and take their places of honor and respect in the profession. *Criminal Law* is adequately endowed with matter with which to develop in the classroom the traditional subject matter: statutory degrees of murder, defenses which have been traditionally accepted and rejected in cases of homicide and assault, traditional conceptual differences between larceny, obtaining and embezzlement, modern theft legislation, and legislative regulation of conduct prejudicial to the public health or economy. No other teaching materials available at present provide comparable insight into the development of substantive rules of insanity; the extensive coverage of the *Durham* rule,[9] its aftermath and its alternatives creates a challenging opportunity to explore in the classroom the interplay of law and psychiatry in both trial and appellate courts. It is true that on the basis of these materials the student may not learn the technical details of common-law burglary or arson, but such details are readily accessible to one possessed of knowledge of techniques of statutory construction who is willing to engage in a limited amount of supplementary reading. But in recompense for this non-exposure to traditional legal metaphysics and this loss of opportunity to learn the ritual movements of the "case system," the student should achieve the beginnings of insight into the dimensions of human conduct which traditional teaching of criminal law obscures.

Are there drawbacks to the book? There probably are, though the chief test of this will come as the book is put to use. One is the sheer size of the materials. Selectivity is required, and indeed encouraged by the authors. But the instructor who is not also the author may have some difficulty in making a selection which does not do violence to the essential thrust of the work. First-year students may have great difficulty coping with the extended

[8] Messrs. Donnelly and Goldstein are professors of law at Yale; Mr. Schwartz is associate professor of sociology at Northwestern. The materials have been used at Yale in temporary form for several years.

[9] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

reading assignments which use of these materials probably requires.[10] They may also have difficulty keeping parallel tracks straight. It is true that lawyer, judge, legislator, psychiatrist and sociologist may all direct their professional efforts toward the same terminal goal; the materials of each discipline are cognate to those of the others. But it is also true that the legislature works within limits set by constitution and tradition and couches its conclusions in traditional legal language forms, that judges think in and are receptive to arguments phrased in terminology which does not appear in abstracts of psychiatric publications, and that administrative officials utilize terms meaningful to themselves, which perhaps sociologists do not recognize. The law student is enriched as he learns of these different conceptual frameworks and vocabularies, but the instructor must also exercise care to see that he learns when and where a given phrase or argument is most likely to be accepted and put to the uses for which it is tendered. It may also be that these materials insufficiently incorporate existing penal statutes covering offenses against the person, against property and affecting the administration of government. But the reviewer is persuaded, at least until actual experience proves him wrong, that it is better to promote a positive awareness of the vital questions posed by a system of penal (or "?") law than to strive for technical proficiency at the expense of an incipient grasp of the human and social values involved in a system of criminal law administration.

Is there any value in the book for the practitioner? I submit that there is. This is not to say that he will be able to use it as a quick reference on particular legal problems, for it is not intended or designed to be used in that way. But if he reads it reflectively and searchingly, he may be jolted in his complacency concerning criminal law matters. Members of the bar too often take refuge in the aseptic regions of tax, corporate or estate law practice and abandon utterly any concern about criminal law. Most "reputable" lawyers, particularly in metropolitan areas, will not touch criminal cases, except perhaps those involving corporate clients. To a degree such lawyers can rationalize this attitude so long as they conceive of criminal jurisprudence as merely one more body of legal rules, embodying no different problems from and bringing in far less financial return than cases arising in a civil practice. A perusal of *Criminal Law* may shatter such complacency, and thereby foster a concern for criminal law administration which too few lawyers now possess. It might make them somewhat more sensitive human beings in the process.

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[10] The work is typographically attractive, however, and conducive to the reading of a large amount of material with relatively little eye fatigue. It is enlivened with attractive woodcuts interpreting gargoyles adorning Yale's Sterling Law Building.