

Rosemary Pattenden

The Judge, Discretion,  
and the Criminal Trial



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# THE JUDGE, DISCRETION, AND THE CRIMINAL TRIAL

BY  
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To my mother,  
H. Osborne

In law some situations call for the product of hands,  
not of machines, for they involve not repetition,  
where the general elements are significant, but unique  
events, in which the special circumstances are significant.

Roscoe Pound, *An Introduction to the Philosophy of Law*  
(New Haven, 1954), 70.

## PREFACE

Discretion has become a subject *à la mode*. Much has been written about administrative discretion. Legal writers have turned their attention in increasing numbers to discretion in family law and in sentencing, but despite a number of excellent articles in academic journals no one has so far attempted to provide anything approaching a general study of discretion in the law of evidence and procedure. This book does not try to cover the whole of this vast field but deals with the discretions which a judge may exercise during a criminal trial on indictment from the time the accused is called upon to plead until the stage at which a convicted accused is sentenced. The sentencing discretion itself is not examined. The jurisdictions covered are those of England and Australia.

The aim of this book is twofold; first, to try to set out the more important discretions which may be exercised in the course of a criminal trial and the known principles by which they should be exercised; second, to provide a theoretical framework within which to assess and discuss the discretions. Part One is devoted to the second of these objects. Part Two to the first.

The forerunner of this book was a doctoral dissertation for the University of Oxford. A great deal of new material has been added but as a result of pressure to keep the length of the book down some of the text and footnotes of the thesis have unfortunately had to be excised. One casualty has been the detailed references to Australian legislation. Where similar statutes are to be found in most jurisdictions only one or two examples are cited. Economic considerations have also caused the publishers to set the notes at the end of the book. Some explanation about these notes is perhaps needed. References to articles and textbooks are often intended as a guide to further information rather than as support for the text. This is particularly true of references to *Cross on Evidence* and its Australian edition. In many cases more decisions are cited to support the text than is

strictly necessary, but I have felt that because of the difficulty of tracing cases dealing with discretion it would be helpful to readers to mention as many of the authorities as possible. Only where a more recent decision discusses earlier ones have I sometimes omitted any reference to the former, as anyone interested in the discretion can pursue the matter without difficulty.

I have been very fortunate to have been allowed frequent access by the Registrar of the Court of Appeal (Criminal Division) to the unreported judgments of that Court. The references in the notes to unreported judgments of the Court of Appeal are to the file numbers in use in the Court of Appeal (Criminal Division) library. I also wish to express my thanks to the librarians of the Australian courts who sent me unreported judgments and to the Director of the Criminal Law Review Division of the New South Wales Department of the Attorney General and of Justice and the Chairman of the Australian Law Reform Commission. They both very promptly sent me material which I had sought from them.

Over the years I have received advice and encouragement from a number of people to whom I must record my gratitude. They are P. B. Carter of Wadham College, Oxford who supervised my thesis, C. Tapper of Magdalen College, Oxford, who acted as my supervisor in his absence, the late Sir Rupert Cross, Vinerian Professor of English Law at the University of Oxford and the late R. N. Gooderson, Reader in English Law in the University of Cambridge, who examined my thesis, M. Weinberg of the University of Melbourne, who made many useful comments about Part One and part of Chapter V, and M. Aronson of the University of New South Wales who answered diverse inquiries from me. The Law School of the University of East Anglia greatly helped by providing typing assistance and defraying some of my expense.

I am very conscious of the fact that there will be references to discretion which I have overlooked and that at some points there may be disagreement about my interpretation of the law. Any comments from readers, especially any which would enable me to correct errors, are very welcome. The law, as stated, is generally that available to me in Cambridge in January 1981.

## ABBREVIATIONS

Court I	<i>Judgments of the Court of Criminal Appeal</i> 1976—1978, ed. R. Court (Department of the Attorney General and of Justice, Sydney, 1979).
Court II	<i>Judgments of the Court of Criminal Appeal</i> 1979—June 1980, ed. R. Court (Department of the Attorney General and of Justice, Sydney, 1980).
Cross	<i>Evidence</i> , 5th edn. (London, 1979).
Eleventh Report	Criminal Law Revision Committee, <i>Eleventh Report: Evidence (General)</i> , (1972) Cmnd. 4991.
Halsbury	<i>Laws of England</i> , 4th edn. (London, 1976).
Heydon	<i>Cross on Evidence</i> , 2nd Australian edn. (Sydney, 1979), ed. J. Gobbo, D. Byrne, J. Heydon.



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## PART ONE



