CHARLES W. THOMAS
DONNA M. BISHOP

Criminal Law

Understanding Basic Principles

Volume 8. Law and Criminal Justice Series

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SAGE PUBLICATIONS
The Publishers of Professional Social Science
Newbury Park Beverly Hills London New Delhi

To Our Parents
Charles H. and Virgina P. Thomas
and
Joseph F. and Dorothy A. Bishop

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PREFACE

There was a time in the fairly recent history of American criminology when many if not most criminologists recognized that the demands of their discipline required a reasonably well-developed understanding of substantive criminal law and criminal procedure. Evidence of this may be found even in introductory criminology textbooks of the type authored by such figures as Richard A. Korn and Lloyd W. McCorkle (*Criminology and Penology*, published in 1959) and Paul W. Tappan (*Crime, Justice and Correction*, published in 1960). However, somewhere along the way—perhaps as American criminology came to be thoroughly dominated by persons whose training was largely in sociology and as sociology sought to elevate its status as a behavioral science discipline—we lost touch with the world of law. We came to think that law is the proper province of lawyers and of law professors and that the behavior of those who apply or who violate the law is the territory of criminology. Those working in the areas of criminal law and criminal procedure soon came to be of less and less relevance to criminologists. Criminologists, in turn, were perceived by those with special interests in law to be little more than part of that undifferentiated mass of people "on the other side of the campus" who were uninterested in and uninformed about law.

The lack of a firm linkage between law and criminology has never had the slightest rationale. During the past two decades or so, however, it has had many consequences that seem almost bizarre. A generation or two of criminologists, for instance, became so blissfully ignorant of the subject matter of law that they wrote and relied upon textbooks within which such terms as crime, delinquency, law, felony, misdemeanor, and many more were used but never given definitions. Similarly, one routinely encounters work by those trained in law as well as judicial opinions written by, to choose only the most obvious illustration, the members of the United States Supreme Court in which authors cry out for empirical evidence regarding various serious concerns like the effectiveness of alternative sentencing models, capital punishment, and the relative advantages of privately retained and publicly appointed counsel. They are apparently unaware of the considerable research literature that criminologists have produced on these and a host of other important legal issues.

The tide now seems to be changing. Criminologists increasingly are coming to think of themselves as people who share many interests with their sociological colleagues who specialize in the sociology of law and the sociology of deviance but who also are a "different breed." Whether they think of themselves as

representatives of a fully independent discipline (which happens to be our view of ourselves) or as participants in an interdisciplinary enterprise, they understand the necessity of having a basic appreciation for relevant aspects of law (and also of anthropology, economics, history, philosophy, political science, and a good deal more). They recognize that they cannot "do criminology" in an adequately sophisticated manner if they persist in pretending that ignorance is a virtue when every shred of logic and evidence proves it to be a vice.

And what, one might well be asking, is the relevance of these comments to the discussion we are about to begin? The relevance is really quite simple. This is a book about basic principles of substantive criminal law—its history, its structure, its diverse and sometimes contradictory purposes, and its application. The book is written not by lawyers or law professors but by two criminologists that regularly and routinely confront undergraduate students who, although often planning careers that are not law-related, have a sincere interest in the subject matter of both substantive and procedural criminal law. The book is written to and for that audience—and also to those of our behavioral science colleagues who recognize how they, too, might profit from a review of fundamental legal theories, terms, and concepts.

We introduce what is to come with no more than a single but exceedingly important qualification: It is entirely impossible to identify anything beyond very general principles of criminal law in so concise a monograph. At quite literally dozens of points in our writing we have had to force ourselves away from a more exhaustive examination of the issues we had touched upon. We did so out of a feeling that the purposes of this book would best be served if we sacrificed depth of discussion in order to achieve the objective of an adequately broad scope of coverage. Hopefully, however, our frequent references to significant judicial opinions and related scholarly research will serve as an initial guide for those who wish to pursue various topics more thoroughly.

In any event, the discussion has been divided into six chapters. The first seeks to provide an overview of the history and development of law—especially those foundations for our system of criminal jurisprudence that are to be found in the English common law tradition. Attention then shifts to a reasonably detailed discussion of the characteristic features of criminal law, to an examination of the essential elements one finds in definitions of crimes, and to a brief overview of contemporary sources of criminal law. Chapter 3 is devoted to some very different concerns, for there we consider basic theories about the origins and uses of law as well as various models that have been put forward in an attempt to justify the imposition of punishment by the state. The next three chapters shift the focus of the discussion back to fundamental principles of substantive criminal law. More specifically, Chapter 4 identifies basic limitations on the forms of conduct that may be defined as crimes and some constitutionally-based limits on the state's efforts to prosecute. This basic theme continues in Chapter 5, for that chapter is devoted to many of the problems the state must overcome in its effort to claim jurisdiction over particular offenses and particular offenders. Finally, all of Chapter 6 reviews a sample of the most common

justifications, defenses, and excuses defendants rely upon when they are charged with violations of criminal law.

ACKNOWLEDGMENTS

Whether it involves a modest or an unusually ambitious objective, writing is seldom an exciting activity. The seemingly endless hours one spends behind a desk—or in our case behind a microcomputer—are hours that are lost to friends, family, and other personal interests. And there is more to it all than some consideration of these sorts of losses. Those who occupy themselves with writing have a way of becoming so consumed with their subject matter that they tend to impose on everyone else with whom they come in contact by babbling about the topic they wrote about the previous day. Thus, they often deserve to be thought of as a pain in the posterior of everyone they know.

Here, fortunately, we have an opportunity to do three things. The first is to extend a formal apology to those who have tolerated our single-minded commitment to completing this work and our consequent inattention to their preferences. The second is to express our sincere thanks to those of our colleagues and students who have commented on draft versions of one or more of the following chapters. We are especially indebted to Alexis Durham and Lonn Lanza-Kaduce, two of our colleagues in the University of Florida's Center for Studies in Criminology and Law, and to Dianne Bolinger, one of the Center's secretaries who is recognized by all associated with it as the only person talented enough to inject some degree of order into what would otherwise be total chaos. In addition, the senior author is most appreciative of the input he received from an unusually gifted group of young law students who enrolled in a seminar he taught at the University of Florida's College of Law. More than a little of what appears here flows from the ability of those students to teach a criminologist more about criminal law than he may have been able to teach them about criminology.

Finally, perhaps one of the most meaningful and personal opportunities authors have is to dedicate the product of their labor to someone, often someone to whom they owe a debt that is larger than they will ever be able to pay. Each of us is in precisely such a position. It is with much love, gratitude, and respect that we dedicate this modest work to our parents, Charles H. Thomas, Sr., Virginia P. Thomas, Joseph F. Bishop, and Dorothy A. Bishop.

—*Charles W. Thomas*
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1

THE HISTORY AND DEVELOPMENT OF LAW

We must begin our study with an obvious problem of definition. What is law? The question is deceptively simple. Law is such an integral aspect of our lives that we seldom pause to reflect on its meaning. When we do, we find that the concept is elusive. Philosophers, legal scholars, theologians, and social scientists have discussed and debated the issue for centuries. In fact, the eminent legal anthropologist E. Adamson Hoebel once remarked that, "To seek a definition of law is like the quest for the Holy Grail" (1954: 18).

We can begin to appreciate the formidability of the problem by considering the variety of meanings we attach to law in everyday life. To some of us law is thought of in terms of legal professionals and the things that they do. The law is the police officer on the street. It is the work of elected representatives who enact legislation. It is the work of attorneys who represent clients and of judges who render decisions. To others, law is a set of rules, commands, or directives. It is what requires the payment of taxes, prohibits the sale of marijuana, and threatens to deprive us of our liberty should we fail to do the one or proceed to do the other. It is what commands that children attend school, that workers receive at least a minimum wage, that public utilities charge reasonable rates, that automobiles meet certain safety standards, and what in hundreds of other ways affects almost every aspect of our lives. Many look at law from more lofty vantage points. To some of them law is a divinely inspired set of eternal and unalterable truths. To others law signifies our development of principles for living that have been derived from logic and experience. To still others, law is an exercise of raw force in the service of a variety of ends (for example, the reinforcement of customary modes of conduct, the engineering of social change, the imposition of a particular group's notion of morality on all of us, and the systematic oppression of the powerless by the powerful).

Fortunately, our definitional task is simplified by our purposes. We need not spell out the meaning of law in all its complexity. It will suffice if we can arrive at a working definition that marks the broad contours of what we mean by law. We can begin with the simple observation that rules are essential to orderly social existence. Without rules to produce patterned modes of conduct, social life would soon degenerate into chaos. Law is an important part of this regulatory system. It is one of the means that societies employ to encourage desired modes of behavior. However, law is not adequately defined in these terms. There are many rules and accompanying sanctions that do not involve law. For example, parents often establish rules for their children whose violation may result in a spanking or loss of privileges. We might think of these rules as "laws" of the household, but that is not the ordinary sense in which we use the term law. Similarly, it is normative in our society that men wear trousers. If a man wears a dress, he may be subject to gossip, ridicule, ostracism, or other forms of social censure. Thus, we can have a rule backed by the threat of sanctions but still not have a violation of law. Something more formal is required before we define a norm as a law.

That "something more" has concerned scholars for centuries. One of the most well-known definitions is that offered by Benjamin Cardozo, who defined law as "a principle of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged" (1924: 52). Cardozo viewed enforcement by the court as the distinguishing feature of law. But what is a court? If the term means an official, organized tribunal with the specialized function of enforcing rules of conduct, then his definition is of limited utility. There are many primitive societies, for example, which are generally recognized as having had law but that lacked such administrative bodies.

Others have offered definitions broad enough to encompass the law of primitive peoples. For example, an influential conception of law was provided by Max Weber. He defined law as "an order [that is] externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose" (1954: 5). This definition is superior to Cardozo's in at least two respects. First, it emphasizes the coercive nature of the law. Law is an order or a directive that has at least a reasonable probability of being backed by force. Second, through its reference to a specialized staff rather than a court, Weber's definition is applicable to law administered by, for example, ad hoc tribal councils that respond to rule violations among many

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