

# CRIMINAL LAW AND THE REGULATION OF VICE

Franklin E. Zimring  
Bernard E. Harcourt

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# CRIMINAL LAW AND THE REGULATION OF VICE

By

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## Preface

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The principles and problems of the substantive criminal law have a prominent but quite limited role in the curriculum of the modern American law school. The course in substantive criminal law is one of the star attractions in the standard first year program, but that is not merely the beginning of course work on substantive principles, it is the end as well. There will be one or more courses on criminal procedure, courses on evidence and trial practice and perhaps a course on the criminal justice system. Some schools offer courses in the jurisdictional and procedural aspects of federal criminal law. But the issues of substance on criteria for selecting behaviors properly to be prohibited and punished in the modern state are considered in the first course one takes on the subject or not at all.

These materials were created as an effort to construct a second course in the principles of modern criminal law, an offering that could be characterized as advanced criminal law. The idea was to build on the foundation of case analysis and statutory issues that is provided in the first course but to add the materials of modern history, legal philosophy and social science. To build an advanced course, we wanted to consider interesting topics where policies were changing rapidly.

There are two attractive candidates in the borderlands of current criminal law for an advanced course. One is the area variously called organizational, corporate, or white-collar crime. This is a complicated and important cluster of questions that richly deserves a sustained treatment in a law school classroom, and many but not all of its central concerns fit closely with the principles of substantive criminal law. It is also an area where regulatory and criminal law efforts require coordination. So a modern course in white collar or organizational crime spans both regulatory and criminal concerns in areas such as the environment, securities and consumer protection.

The second natural area for advanced work in substantive criminal law involves a central debate over the last two centuries: the harm principle of John Stuart Mill and the response of James Fitzjames Stephen in the nineteenth century produced a lively debate between Lord Devlin and H.L.A. Hart in the twentieth century and a rich literature on harm and the costs of prohibition in a wide variety of behaviors traditionally governed by criminal statute but subject to a wide variety of swift changes in the twentieth century. Traditionally regarded as vice offenses, behaviors such as pornography and prostitution, non-marital and nontraditional sexual conduct, recreational drug taking, gambling and alcohol control have been the subject of a wide variety of legal changes throughout the twentieth century. Alcohol was first the subject of national prohibition in

the United States then its repeal. Gambling and pornography were decriminalized in the United States and most of the developed world in the generation after 1970. But the criminal prohibition of narcotics and other recreational drugs was intensified dramatically in the 1980s in the United States. Other traditional vice behaviors such as prostitution have not yet been the subject of extensive legal or regulatory change. Are these traditional topics of the police vice squad one type of criminal law question or many very different topics? Is there one dominant trend over time in the legal regulation of these behaviors or several crosscurrents? Is there a single thread of principle that is observable through the wide variety of traditional “vice” crimes? Do these principles also apply to modern topics like handgun control and drunk driving? These are the cutting edge issues we confront in the materials we have organized in this book.

And the modern discussions of sexual conduct, pornography, drugs and gambling are also a crossroads for the humanities and social sciences. The relevant literature on the topics of this class includes philosophy, history, economics, criminology, sociology and psychology. One set of important questions is whether the criminal law should play a dominant, secondary or minor role in governmental policy toward the behaviors we consider and why. A second question is what other domains of governmental involvement are potential substitutes for the policy of criminal courts? Or do we mean it when we say that some of this conduct is not the business of the public law at all?

The topics discussed in the chapters that follow are frontier areas for legal policy in both the twentieth and twenty-first centuries.

## Authors' Note

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A variety of people and institutions helped us produce this volume. Our earliest and largest debt is to Gordon Hawkins, a philosopher and senior fellow at the Earl Warren Legal Institute from 1984 to 2001, who launched this project in 1996 and put together the first draft of Chapter 1. Professor Hawkins was the inspiration for this venture. The Boalt Hall Fund of the University of California, Berkeley supported the preparation of these materials through the Criminal Justice Research Program. Toni Mendicino at the Institute for Legal Research produced the volume and kept us organized. Karen Chin provided the substantial administrative support this kind of effort requires. Judith Randle, a doctoral student in Jurisprudence and Social Policy at Berkeley helped to assemble the materials in Chapters 3 and 7 while Jeffrey Bergman at the University of Chicago Law School helped with Gambling and sections of Chapters 2, 6, and 7. Aaron Blumenthal, a Berkeley undergraduate helped with the index. Tim Chevalier coordinated permissions and was indispensable in preparing a properly formatted electronic version of the final manuscript. Bonnie Karlen at Thompson West helped launch the project and Kathleen Vandergon supervised the production process with care and good humor.

We hope the final product merits this epic assistance.

FRANKLIN E. ZIMRING  
BERNARD E. HARCOURT

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## Acknowledgments

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