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PRINCIPLES OF CRIMINAL LAW

WAYNE R. LAFAVE

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Preface

This text may seem in one respect to be an unlikely product for a law professor, as it has no footnotes—not a single one! The absence of footnotes in this work reflects the fact that it is primarily intended not as a research tool, but rather as a study aid for use by law students during their enrollment in the course on criminal law. By excluding any documentation via footnotes of the various points considered and discussed herein, I have been able to use virtually all of the space in this conveniently-sized paperback volume for textual elaboration of the subjects covered.

While criminal law casebooks currently in use vary considerably in their approach and coverage, I have selected for inclusion in this volume the subject matter that is most commonly included in all basic criminal law courses. What this means, for one thing, is that a relatively small part of this work is devoted to discussion of the definition of particular crimes. Today, most criminal law courses consider in depth some or all of only three offense areas—homicide, rape, and theft—on the theory that they are particularly suited to achieving several of the objectives of a law school course in criminal law. And thus only these three offense categories are extensively discussed herein.

As is true of criminal law courses generally, this volume is devoted primarily to what is usually referred to as the "general part" of the criminal law. And thus the emphasis herein is upon the sources and limitations (including constitutional limitations) of the substantive criminal law, as well as upon general principles concerning mental state, acts and their consequences, defenses to crime, inchoate criminality (solicitation, attempts, conspiracy), and liability for the conduct of others. I have given greater attention to those particular topics which, based upon my own experience in teaching a course in criminal law for a good many years, I have found are most troubling to beginning law students. While this book is about substantive criminal law rather than criminal procedure, some procedural aspects essential to an understanding of the significance of certain criminal law doctrines are considered herein.

Because of the important part that the Model Penal Code has played in the revision and codification of substantive criminal law in recent times, Code sections are often given specific mention in this text; the location of references to a particular section may be found in the table of code sections. When appellate cases are mentioned in the text, they are referred to by name and date only; they are cited

fully only in the table of cases. Notwithstanding the lack of footnote references, it must be emphasized that language herein within quotation marks or block indented is that of others who can be readily identified by the interested student (see below).

How does a law professor manage to write a book without footnotes? Easy, first write a much longer work *with* footnotes, and then revise that work down by making many revisions in the text *and* by deleting all the footnotes. Yes, this book is the offspring of another work also published in 2003, namely, the second edition of a multi-volume treatise for lawyers, judges and researchers called *Substantive Criminal Law* (itself the outgrowth of another work initially published back in 1972). I mention this here so that the student who *does* want to explore particular topics in the present book in greater depth, especially by finding illustrative cases, applicable statutes, and useful secondary authorities, will have an easy way of doing so. In Westlaw, just go to database SUBCRL and examine the comparable chapter or section. (Because of the different coverage in the treatise, chapters 4–14 herein are chapters 5–15, respectively, in the treatise; chapter 15 herein is chapter 17 in the treatise, and chapter 16 herein is chapter 19 in the treatise. The arrangement of sections within comparable chapters is unchanged.)

WAYNE R. LAFAVE

March 2003

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Chapter 1

INTRODUCTION AND GENERAL CONSIDERATIONS

§ 1.1 The Scope of Criminal Law and Procedure

The substantive criminal law is treated in this book. It is mostly concerned with what act and mental state, together with what attendant circumstances or consequences, are necessary ingredients of the various crimes. Criminal procedure, which is not covered in this book, is concerned with the legal steps through which a criminal proceeding passes, from the initial investigation of a crime through the termination of punishment. Besides criminal law and procedure, the administration of criminal justice includes such matters as police organization and administration (how most effectively to detect and apprehend criminals), prison administration, and administration of probation and parole.

(a) The Concern of Criminologists. There are, however, groups of people other than lawyers, policemen, probation and parole officers, and prison authorities whose professional work involves the problems of crime and criminals. In particular, criminologists spend their professional lives studying crime and criminals and the administration of criminal justice. Criminologists have varying backgrounds, coming from the fields of sociology, social psychology, medicine (especially psychiatry), anthropology and biology. They are concerned with the study of the phenomenon of crime and of the factors or circumstances—individual and environmental—which may have an influence on, or be associated with, criminal behavior and the state of crime in general. Criminologists are trying to determine why people become criminals, not just to acquire knowledge for its own sake but for the practical ultimate purpose of eradicating the causes of crime and thus reducing if not eliminating crime. The cost of crime in this country is, of course, enormous—doubtless several billion dollars a year if we consider property losses, personal injury losses, the cost of law enforcement (including the cost of maintaining the police, the criminal courts and the prosecutor), the cost of maintaining prisons and parole agencies, and the loss of productive labor of criminals. It is obvious that if crime could be reduced, the savings would be great.

The modern criminologist's method of attacking the problem of crime and criminals is a scientific one, including the collection of

statistics on crime and the making of case studies of individual criminals and group studies of criminal classes. What effect does heredity have on crime? What is the effect of environment? What is the effect of poverty, lack of education, unemployment, urban life, poor housing, broken homes, or evil companions? Is there a connection between physique and criminality, between mental defect and crime? Are some racial groups more prone to commit crimes than others? What is the effect of cultural influences—religion, newspapers, comic books, television and radio, moving pictures? In order to take effective steps to combat the crime problem, we must first know with some degree of certainty the answers to such questions. But the field of criminology as a science is relatively new, and the answers are by no means yet certain.

Criminologists are interested not only in the causes of crime and remedies to be taken to eliminate these causes, but also in the treatment to be given the criminal who is caught and convicted. How should we treat him in order to reduce his chances of committing subsequent crimes? It is in this area of criminology (termed penology) that criminologists have had their greatest influence on criminal law and procedure: in the classification of convicts into corrigibles and incorrigibles, and into professionals and casuals, for penal treatment; the establishment of procedures for probation and parole; the indeterminate sentence; the treatment of juvenile delinquency as non-criminal; and to some extent the treatment of alcoholics, drug addicts and sex offenders as sick rather than criminal.

(b) The Concern of Lawyers. Lawyers no less than criminologists are interested in preventing socially undesirable conduct. Their principal weapon in the war on crime is the criminal law. They too are interested in the question of what forms of anti-social conduct should be punished as criminal (i.e., what should be the scope of the substantive law of crimes). And they conceive of punishment for violation of the criminal law as a device for preventing such conduct—by deterring prospective offenders by threat of punishment and by preventing repetition by incapacitating and if possible reforming those who have already committed crimes (see § 1.8). But lawyers also play a part, outside of the criminal law, in the area of crime prevention through laws designed to improve social and economic conditions—those relating to public housing, zoning, public health, industrial working conditions, minimum wages, unemployment compensation and such matters.

In recent years particularly, lawyers have become more conscious of the need for law reform in the administration of criminal justice. This concern has been reflected in several ambitious projects sponsored by the organized bar and other professional groups or otherwise participated in by members of the legal profession.

In the realm of substantive criminal law, by far the most significant development has been the completion of the American Law Institute's Model Penal Code, to which frequent reference is made in this book. The Code is organized into four main parts: (1) the general provisions, which set forth the basic principles that govern the existence and the scope of liability; (2) the definition of specific offenses; (3) provisions governing the processes of treatment and correction; and (4) provisions on the organization of correction. The commentary to the Code, prepared in a desire to place the systematic literature of our penal law upon a parity with that of well-developed legal fields, is in itself a major contribution.

It must be emphasized that the American Law Institute has produced a *model* code, not a *uniform* code. Uniformity is of less importance in penal law than in other fields, such as commercial law. It is appropriate that the several states should have significant variations in their penal laws, based upon differences in local conditions or points of view. The principal contribution of the Model Penal Code is that it represents a systematic re-examination of the substantive criminal law. It identifies the major issues which should be confronted by the legislature in the recodification process and articulates and evaluates alternative methods of dealing with these issues. The intention was to provide a reasoned, integrated body of material that would be useful in such legislative effort.

Perhaps because of the lack of such guidance in earlier years, the criminal codes of most states long suffered from neglect. As one commentator noted in 1956: "Viewing the country as a whole, our penal codes are fragmentary, old, disorganized and often accidental in their coverage, their growth largely fortuitous in origin, their form a combination of enactment and of common law that only history explains." In many codes, some of the most significant crimes (such as murder) were not defined, and it was not uncommon for basic doctrines concerning the scope of liability to have little or no reflection in the statutes. Prior to the time that the work on the Model Penal Code began to be circulated, only two states, Louisiana and Wisconsin, had accomplished over-all reform of their substantive criminal law. But now, largely stimulated by the labors of the American Law Institute, there are a total of thirty eight states which have adopted new substantive criminal law codes. Efforts directed toward similar reform have been undertaken but have faltered in some other states and on the federal level. (The Model Penal Code has also had a substantial impact upon the judiciary; courts have frequently relied upon provisions in the Code when formulating substantive criminal law rules.)

The legal profession has longer shown interest in the realm of criminal procedure. This is reflected in the fact that a number of efforts directed toward reform of criminal procedure antedated the

Model Penal Code project. In 1930, the American Law Institute produced a procedure code. The Federal Rules of Criminal Procedure were adopted in 1946, and they have since served as a model for procedure rules in a number of states. In 1952, the National Conference of Commissioners on Uniform State Laws published its Uniform Rules of Criminal Procedure.

This is not to suggest, however, that meaningful reform came earlier in the area of criminal procedure. None of the procedure "models" mentioned above accomplished for the field of criminal procedure what the Model Penal Code has done for the substantive criminal law. The basic defect is that they did not identify and constructively deal with many of the major issues in criminal procedure. In part, this may be attributable to the fact that courts, particularly the United States Supreme Court, have played a leading role in certain procedural areas, such as search and seizure. But, whatever the reason, one characteristic of all the earlier procedure "models" is that they tend to concentrate upon the formal, in-court procedures to the exclusion of other problems of equal or greater importance but of lower visibility. More recently, however, efforts have been made to construct "models" dealing with these problems. One noteworthy effort is the American Law Institute's Model Code of Pre–Arraignment Procedure. Another is the American Bar Association's Standards Relating to the Administration of Criminal Justice. Yet another is the Commissioners' more recent version of Uniform Rules of Criminal Procedure.

As noted earlier, essential to law reform are the identification of major issues and the articulation of alternative ways of dealing with those issues. This, in turn, can be accomplished only through careful scrutiny of existing practices. Such empirical research has been undertaken through the years, but it has been sporadic and sometimes misdirected. A flurry of crime surveys were published in the 1920's and 1930's, and in 1931 a major national survey by the federal government was completed. However, as one writer has aptly pointed out, "the early crime surveys did not produce any clear conception of the kinds of administrative problems which ought to be of greatest concern to legal research." More recently, there has been a renewed interest in the study of the actual processes of criminal justice administration for the purpose of uncovering and analyzing critical problems with which the law ought to be concerned. One of the most ambitious studies is the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. The President's Commission on Law Enforcement and Administration of Justice also sponsored considerable research into the actual workings of our criminal justice systems.

§ 1.2 Characteristics of the Substantive Criminal Law

The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct. It includes the definition of specific offenses and general principles of liability.

"Conduct" in the above statement is used in a broad sense to cover two distinct matters: (1) the act, or the omission to act where there is a duty to act (discussed in ch. 5); and (2) the state of mind which accompanies the act or omission (discussed in ch. 4). Thus the definition of a particular crime will spell out what act (or omission) and what mental state is required for its commission. Furthermore, as we shall see, the definition of a particular crime may require, in addition to an act or omission and a state of mind, something in the way of specified attendant circumstances; and with some crimes the definition also requires a specified result of the act or omission. As the above definition of substantive criminal law implies, conduct cannot be called "criminal" unless a punishment is prescribed therefor.

(a) Specific Crimes and General Principles. The substantive criminal law is to a large extent concerned with the definitions of the various crimes (whether defined by the common law or, far more commonly, by statute)—what conduct, including what state of mind, is necessary for guilt of murder, or rape, or burglary, etc. The definition of specific crimes is dealt with in chapters 13–16 of this book. But the substantive criminal law is concerned with much more than is found in the definitions of the specific crimes, for there are many general principles of the substantive criminal law which apply to more than a single crime—for instance, the principle that an insane person cannot be guilty of any crime, or that one coerced into committing what would otherwise be criminal conduct cannot be guilty of most crimes. Thus criminal battery is sometimes defined as "the intentional or reckless application of force to the person of another, directly or indirectly." The definition does not continue: "... by one who is not legally insane; not legally too young; not too intoxicated to have the necessary state of mind; who was not coerced by threat of immediate death or great bodily harm; and who was not justified because he acted in self-defense, or pursuant to domestic authority, or because the other person consented," and so on.

The general principles of the type represented by insanity, infancy, coercion and self-defense all have to do with *defenses to liability* which, if applicable, negative the commission of the specific crime. It is customary to distinguish between two different catego-

ries of defenses, justification and excuse (see § 8.1 for more on this distinction and on other categories of defenses). Simply stated, the distinction between the two is that "justified action is a morally appropriate action," while excused conduct "is not warranted, but the person involved is not blameworthy." In the case of justification, the harm caused is "a legally recognized harm," but under the circumstances giving rise to the justification "is outweighed by the need to avoid an even greater harm or to further a greater societal interest." In the case of an excuse, on the other hand, the deed is wrong but the actor is excused because suffering from "an abnormal condition * * * at the time of the offense" which creates a condition "that renders him blameless for his conduct constituting the offense." In this book, those defenses commonly thought of as being of the justification type are discussed in chapter 9, while those defenses most likely to be characterized as excuse defenses are discussed in chapters 6 and 8. It should be noted, however, that the Model Penal Code does *not* make use of the justification/excuse distinction, reasoning that "the effort to establish precisely in each case whether that conduct is actually justified or only excused does not seem worthwhile, especially since, in regard to the difficult cases, members of society may disagree over the appropriate characterization."

There are other general principles of criminal liability of an *affirmative-liability* sort, which cut across the various specific crimes and which therefore may properly be called "general principles." One type of affirmative-liability general principle concerns the three "inchoate crimes" of attempt, conspiracy and solicitation. Though these crimes are in one sense three specific crimes, yet in another sense they concern all the other specific crimes; thus with attempt the issue may be attempted murder or attempted rape or attempted burglary, etc.; and so with conspiracy to commit murder or to commit embezzlement, and with solicitation to commit any one of the many specific crimes. These inchoate offenses are the subject of chapters 10 and 11 of this book. The second type of general principle of affirmative criminal liability concerns parties to specific crimes, including the liability of accessories as well as of principals—for instance, the liability for murder not only of the one who fired the fatal bullet, but of the other person who urged him to do it, or who supplied him with the gun. Such liability is discussed herein in chapter 12 of this book.

(b) Nature of Criminal Law—Basic Premises. The substantive law of crimes consists primarily of (1) the definitions of the various specific crimes, from murder on down to such minor offenses as speeding, (2) some broader general principles of the substantive criminal law applicable to more than a single crime and so not made a part of the definitions of specific crimes, as just noted