JUSTICE ADMINISTRATION LEGAL SERIES

CRIMINAL LAW

JOHN C. KLOTTER

Second Edition

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CJ Criminal Justice Studies
Anderson Publishing Co.

CRIMINAL LAW, SECOND EDITION
Justice Administration Legal Series

Library of Congress Cataloging in Publication Data

Klotter, John C.
Criminal Law
(Justice administration legal series)
Includes bibliographical references and index.
1. Criminal law—United States I. Title.
II. Series.
KF9219.K56 1986 345.73 85-28705
ISBN 0-87084-502-0 347.305
Second Printing – July 1988

Preface

This book has been prepared primarily for those who are performing, or preparing to perform, duties related to criminal justice activities; including personnel who are, or intend to be, police, probation and parole officers, corrections officers, prosecutors, and judges. The book covers substantive criminal law rather than criminal procedure. While criminal procedure deals with the legal steps through which a criminal case passes, from the initial investigation of the crime to the determination of punishment, in this book the acts, the mental state, and the attendant circumstances that are necessary ingredients to the various crimes are given primary emphasis.

In the United States there has been a trend toward an ever-increasing uniformity in state and federal laws, but it is still necessary, and even imperative, that the readers familiarize themselves with the Constitution, statutes, and pertinent case decisions of the state in which they will practice. As many statutes have been rewritten in the last decade, criminal law instructors have found it difficult to explain the traditional common law crimes and elements and still develop an understanding of the contemporary offenses. Yet without a comprehensive knowledge of the rationale for the development of the offenses, it is difficult, and even impossible, to interpret and enforce the laws that exist today.

To demonstrate the similarities and differences in the laws of the various states, both state and federal decisions are included as examples in the text and in the footnotes. However, no effort has been made to use the local laws of any particular jurisdiction. As justice personnel will be responsible to observe and enforce the laws of the particular state in which they practice, it is suggested that each student be required to use the Penal Code of the State along with this book. As the specific offenses are covered in the book, corresponding laws of the state should also be analyzed.

Chapter 1 of Part I of the book deals with the sources, distinctions, and limitations in relation to criminal law and sets the stage for an understanding of the criminal law concepts. In Chapter 2, Part I, the principles of criminal liability, such as the criminal act requirements and the criminal state of mind, are promulgated in general terms. In Chapters 3 through 11, the crimes most frequently encountered are defined and explained. In Chapter 12 some of the possible defenses that can be claimed by defendants charged with crime are enumerated and explored.

In Chapter 3 through 11 the various offenses are categorized according to social harm, primarily for purposes of organizational discussion. In these chapters the format for designating, illustrating, and explaining the various offenses is:

A. Traditional Definition and Elements
   1. Definition
   2. Elements
B. Contemporary Definition and Elements
   1. Model Penal Code
   2. Other Statutes and Codes

The Model Penal Code, cited throughout the book, was prepared by the American Law Institute. The first draft was published in 1962, and a three-volume Part II of the Model Code in which the specific crimes are defined and comprehensively explained was published in 1980. This three-volume edition of the Model Penal Code and commentaries is a very worthwhile reference, especially for those who are teaching a course in criminal law. The Model Penal Code has stimulated widespread revision and codification of substantive laws in the various states. As the Code has had a great influence on contemporary statutes, specific sections are included with the consent of representatives of the Institute. The copyright acknowledgment is as follows:

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In Part II of the book leading decisions handed down by the United States Supreme Court, lower federal courts, and state courts have been included to give the reader an understanding of the application of the specific laws. These cases not only interpret the statutes and define terms used in the statutes, but familiarize the reader with the process used by the courts in reaching conclusions. The cases are included in Part II rather than immediately following the related discussion, as many of them have broader application than the subject matter of any one chapter. The decisions should be studied in conjunction with the respective chapters.

Where the book is used as a text, it is strongly recommended that the student be required to brief the cases as well as any additional cases which the instructor feels are of current importance. Criminal law is constantly changing. Only by reading and studying the latest pronouncements of the courts and legislative bodies can one keep up to date.

John C. Klotter
Louisville

PART I
TEXT

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Chapter 1
SOURCES, DISTINCTIONS AND LIMITATIONS

> The question, what behavior should be made criminal is, therefore, in part answered by rational analysis, common knowledge, empirical investigation, and an evaluation of the consequences of behavior in terms of some definition of the welfare of the state.
>
> Michael and Adler, *Crime, Law and Society* 353 (1933).

Section

1.1 Introduction
1.2 Criminal Law Theory
1.3 Determining Conduct to be Made Criminal
1.4 Common Law Crimes
1.5 Statutory Crimes
1.6 Classification of Crimes
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§ 1.1 Introduction

While a study of substantive criminal law primarily focuses attention on the various common law and statutory crimes and their elements, this complex body of law cannot be understood without a preliminary discussion of the sources of the law, the distinctions made, and the limitations placed upon those who make and enforce such laws. To attempt to understand criminal law without considering the theory and the history of the criminal law concepts as they developed in other countries and in the United States is to overlook an opportunity for a comprehensive understanding of that law and the purposes of the law.

In this first chapter the objectives of criminal law are stated and discussed along with alternatives that may be taken to protect society. To

set the stage for a later discussion of the specific crimes and their elements, the factors which determine what behavior should be made criminal are reviewed with a view toward developing an understanding of the process followed by the courts and the legislatures in determining what acts should be controlled.

As the substantive criminal law in this country developed over a period of many hundreds of years and had its immediate origin in the laws of England, the common law crimes as well as statutory crimes are considered and discussed. Because substantive criminal law is only a part of the legal process developed in this country to protect society, a distinction is made between crimes and torts.

Finally, the responsibilities of the various actors in the criminal law process such as the prosecutor, the judge, and the defense attorney are explained with emphasis on the "burden of proof"—the responsibility of the prosecution to prove the various elements of the crime.

§ 1.2 Criminal Law Theory

When one causes harm to the person or property of another not only the person harmed is concerned but also society and the state. Although the individual harmed may take action himself to recover civil damages from the person who engaged in the wrongful behavior, there still may be sufficient reasons for imposing criminal sanctions.

Criminal law then is that branch or division of law which defines crimes, traits of their nature, and provides for their punishment.[1] In a criminal case the sovereign is the plaintiff and the purpose of the prosecution is to preserve the public peace or redress an injury to the public at large.

Substantive criminal law is that which declares what acts are crimes and prescribes the punishment for committing them, as distinguished from procedural law which regulates the steps by which one who commits a crime is to be punished.[2]

As the purpose of criminal law is to protect society so that members of that society can be reasonably secure in carrying out their constructive activities, only behavior which is detrimental to the welfare of society should be made criminal. And as criminal law is generally stated in terms of imposing punishment for conduct not socially desirable rather than of granting rewards for good conduct, the emphasis is more on the prevention of the undesirable than on the encouragement of the desirable. To state this differently, criminal law aims to

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[1] 22 C.J.S. *Criminal Law* § 1 (1952).

[2] *Id.*

achieve a standard of conduct which society regards as desirable, and to prevent individuals from doing what society considers to be undesirable.

Criminal law is one weapon which society uses to prevent conduct which harms or threatens to harm public interests. In protecting society and the public interests the criminal law approach is a negative one. As there are more positive approaches, punishment for violation of criminal laws should be a last resort. For example, education as to the type of conduct that society considers good and bad and education which emphasizes the need to have rules and regulations in any organized society perhaps would limit the need for so many criminal laws. Also, the establishment of ethical and religious codes with emphasis on distinguishing between good and evil conduct would reduce the need for the enactment and enforcement of criminal laws.

Nevertheless, in modern times, as in Old Testament times, laws have been established with the threat of punishment to those who violate the laws.[3]

In a constitutional form of government the objective of criminal law is not only to protect society but in so doing to protect the rights of the individuals of that society. As a result, there is a continuing attempt to reach the proper balance between these two objectives. If this balance is not maintained, either society will not be sufficiently protected or the rights of the individual will be in jeopardy.

Specifically, the objectives of criminal law in a free society are to: a) make it possible for individuals to co-exist in the society, b) define the wrongs that are considered necessary to protect the individuals, c) define the method of determining guilt or innocence, and d) designate the type of punishment or treatment following conviction for violation of the laws of the society.

§ 1.3 Determining Conduct to be Made Criminal

Recognizing that standards of conduct must be established in any society, how do the representatives of that society go about determining what acts (or failure to act) should be made criminal? Who should have the authority for establishing standards? Should all acts which may be considered immoral also be made illegal?

In an article in 1933, the authors, Michael and Adler, listed three factors which determine what behavior should be made criminal:[4]

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[3] *Exodus*, 20:23.

[4] Michael & Adler, *The Law and Society*, 353 (1933).

1) the enforceability of the law, 2) the effects of the law, and 3) the existence of other means to protect society against the undesirable behavior. If the law is unenforceable, then the act probably should not be prohibited. A lesson learned during the Prohibition Era was that enactment of unenforceable laws only breeds contempt for the law.

If enforcement of a law results in more disadvantages than advantages, it is questionable whether the behavior should be prohibited. Empirical investigation will assist in determining if there are undesirable results. If another society has determined by empirical investigation that the positive effects of a law condemning certain conduct outweigh the disadvantages, then it would be more logical to prohibit that conduct in our society.

As society becomes more complex, additional laws—especially of a regulatory nature—are enacted. But, are there other means of protecting society than by making laws in an effort to further regulate conduct? Should, for example, consideration be given to more utilization of tort law as an alternative method of protecting society? In this country the legislative bodies are given the primary responsibility for determining what conduct is to be made criminal. Too often laws are enacted to meet some current demand without giving adequate consideration to the possible negative consequences. Nevertheless, criminal justice personnel are charged with enforcing these laws and must do so until they are repealed or declared to be unconstitutional.

§ 1.4 Common Law Crimes

Every civilization and every people have devised a system for protecting life and property of the citizens and in so doing mores, codes, laws, rules, and regulations have been established.[5] In some instances criminal laws are interrelated with religious commandments and some rules are established by a monarch or a dictator. Some codes are the product of the legislative body and in some instances the court or a judicial branch of government has established the criminal laws. The system of laws in the United States is especially difficult in that the criminal law is based upon the law that was developed in England over many centuries.

Most of the present-day crimes in the various states had their origin in the so-called "common law" of England. This was the law as developed in the early English case decisions. The English courts, having

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[5] *See generally*, Klotter, CRIMINAL EVIDENCE (4th ed. 1986), for a discussion of the methods followed in determining guilt or innocence in various cultures and civilizations.

decided that a certain act should be prohibited in that society, established this as a guide for future conduct. In addition to imposing these legal restrictions on human behavior the courts prescribed penalties for violations of these principles and restrictions. The judges held themselves bound to decide the cases which came before them according to those principles, and as new combinations of circumstances arose the principles were more and more fully developed and qualified. In England as the population increased and more problems arose, legislation supplemented the court-made law. As a result, there came to be a body of authoritative material most of which was not found in the statutes but as a result of judicial decisions. All of this body of English law, except that which was not applicable in the American colonies because of different circumstances and conditions, was brought to our shores by the colonists when they immigrated from England, and it became the starting point for our criminal law.[6]

In referring to "common law" some authorities hold that the common law, strictly speaking, is that court decision law of England as it existed at the time of the American colonies and does not include changes by the courts of this country. Other authorities are convinced that the common law includes changes brought about by early court decisions in the United States.[7]

Regardless of which approach is more persuasive, the study of the common law is still important. In those states that have not abolished the common law a few are still enforced. In some states it is essential to consult the common law in order to define the various crimes which are enumerated in the statute or code but are not defined. Even in those states which have abolished the common law crimes by statute, a study of the common law still serves a practical useful purpose.

§ 1.5 Statutory Crimes

While most of the present-day crimes in the various states had their origin in the common law of England, it can be safely said that most state law is now statutory law rather than common law. Statutes of many states specifically provide that conduct does not constitute an offense unless it is a crime or violation under the code or another statute of that state. Where such provisions have been adopted, the person's act or omission may go unpunished, despite the basic seri-

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[6] Patterson v. Winn, 5 Pet. 233 (1831).

[7] State v. McElhinney, 80 OhioApp 431, 100 N.E.2d 273 (Ohio Ct. App. 1950).

ousness or undesirability of such act or omission, unless the legislature has specifically decreed certain conduct or omissions to be criminal in nature. In the federal system there are no common law crimes as the Federal Government has only that power that is delegated to it by way of the Constitution.

When the legislative body—federal or state—determines that certain conduct is undesirable and should be forbidden, a bill is prepared describing which conduct should be prohibited, and this is introduced in the House of Representatives or Senate and voted upon by the elected members of the legislative body. If both houses of the legislature approve the bill, it then goes to the governor or President for consideration and approval. If the chief executive officer signs the legislation, then it becomes law to be enforced by those involved in the justice process. Even if the chief executive official refuses to sign (vetoes), the bill may become law if enough members of the legislative body approve it.

In drafting criminal laws the legislature has much freedom but certainly is not without limitations. There is a fundamental principle of criminal law that the legislation must not be vague and must not be so uncertain as to leave doubt as to its meaning. For example, the Court of Appeals of New York in the case of *People* v. *Munoz* held that:

> They (statutes) must afford some comprehensive guide, rule or information as to what must be done and what must be avoided, to the end that the ordinary member of society may know how to comply with its requirements.[8]

There the court held that a statute which provided:

> It shall be unlawful for any person under the age of 21 years to carry on his person or have in his possession, in any public place, street, or park any knife or sharp-pointed or edged instrument which may be used for cutting or puncturing.

was unconstitutional and void as too broad in scope and too vague. The court agreed that crimes may be created without intent as a factor other than intent to commit the prohibited act, but that there must be some reasonable relationship between the public safety, health, morals or welfare and the act prohibited.

But a federal statute which proscribes "mailing pistols, revolvers and other firearms capable of being concealed on the person" was not too vague.[9] Here the Supreme Court discussed the "void for vague-

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[8] 9 N.Y.2d 51, 172 N.E.2d 535 (1961).

[9] United States v. Powell, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975). *See* case in Part II.