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# THE ORGANIZATION OF A COURSE OF STUDY IN CRIMINAL LAW

NEWMAN F. BAKER<sup>1</sup>

If the reader were dropped into a modern and progressive law school and given the task of organizing the course of instruction in criminal law, how would he go about it? What should be the content of the course or courses offered? How would he combine both theory and practice? How would he include general criminological topics along with the technique of criminal procedure? Much has been written and more has been said concerning the study of crime in law schools, most of it unfavorable to the usual methods of study. But the modernization of the criminal law curriculum is a thing not easy to accomplish. The purpose of this paper is to present to criminologists certain ideas of the author which he is attempting to work out at the present time. It is realized that many will disagree with the changes in organization and the points of emphasis, but the subject has suffered from a lack of experimentation and that may serve as an excuse for the changes made even if they may prove unsatisfactory to some.

What should be the content of the general course in criminal law? There is no subject in the law school curriculum which is more interesting to the ordinary citizen, the physician, the economist, the criminologist, the sociologist, the welfare worker, the psychiatrist, the political scientist, the State's official and the general practitioner. All look at the field of crime through differently colored spectacles. All have their own ideas as to the degree of emphasis to be given to various topics which fall within the field of crime. All criticize the law school course, as heretofore given, as being out of date and as presented from the wrong point of view. Before classifying the topics to be considered in a new course in criminal law and attempting its reorganization, it is a logical step to inquire into the *particular interests* in the subject of widely different groups of professional men and scholars.

If a *physician* were asked to declare the proper approach to the field of crime, he would declare his interest to be in the physiological factors involved in the "making" of criminals, *e. g.*, physical environ-

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ment; heredity and eugenics; physical defects, diseases and deformities, and their relation to criminal acts; alcoholism and the use of drugs; mental and sexual abnormalities or disorders and the resultant question of sterilization of defectives; the mixture of races and its effect on crime; race riots, the mulatto, etc. Every library containing a section of books on crime contains scores of books on such topics.

On the other hand, the *economist* is interested in the economic factors in the "making" of criminals; also the economic loss due to crime, and the cost of the necessary agents for crime prevention. He would stress housing and working conditions: the slums, non-support, vice and poverty; economic organization of criminal groups; the economic factors involved in offenses against property and habitation; economic factors involved in "mercenary crimes," such as fraud, confidence games, gaming, embezzlement in general, insurance losses and bankruptcy; unemployment and crime; labor disputes, racketeering, extortion, and illegal combinations; the cost of crime: (a) the cost of detection and prevention, (b) the cost of administering criminal justice, (c) and the cost of operating prisons, reformatories and parole machinery.

The *professional criminologist* probably will present a more individualistic classification. He would have us study criminal classes; the juvenile offender, the adult offender, the female offender, the recidivist, the gangster and organized crime, the vagrant, the political offender, *i. e.*, the agitator or anarchist, and the religious fanatic. He is interested in criminal types, and criminological libraries are full of such studies, quite often illustrated by case histories. But he may use other methods of classification: age, sex, and marital conditions; race and nationality; or geographical distribution of crime.

Separating the *penologist* from other criminologists, we find his special interests devoted to the general subject of punishment of the convicted offender. He studies the aims of punishment, *i. e.*, group revenge vs. correction or rehabilitation; correctional institutions, *e. g.*, prisons and prison administration, discipline, the trusty system, educational work in prisons, health, and convict labor; jails, houses of correction, reformatories and juvenile institutions, and homes for delinquents; the release from treatment, pardons, paroles, and the indeterminate sentence; and probation, its legal basis, administration and results. Here we have the chief interest in the offender himself and not confined to factors which produce crime.

While it is impossible, accurately, to separate the *sociologist* from the criminologist and the penologist, still it might be said that, in general, the sociologist would approach the field of crime by emphasizing the social factors present in the "making" of criminals. The works in this field published by sociologists generally contain studies of crime and the home; the immigrant's home, the degenerate's home, the overcrowded home; education and crime; community influences and delinquency areas; religion and crime; vendettas, feuds, and class hatred.

The *social welfare-worker's* interest may be said to be confined to crime prevention and rehabilitation. He studies the work of child-guidance clinics; industrial and vocational education; isolation or sterilization of mental defectives; child-labor and juvenile protective work; mental and sex hygiene; recreational work, playground associations, boy and girl scouts, campfire groups; after-care work, such as the prisoners' aid societies and the Central Howard Association; and preventive police work.

The *psychiatrist* is interested in the mental factors which may be productive of the violation of criminal laws. He would center his study in the offender as a person, and he would examine his mental aberrations, *e. g.*, dementia praecox, paranoia, paresis, etc.; his mental conflicts due to disease, shock, sex thoughts and experiences; and his suppressed desires, because the blocking of wishes often leads to anti-social conduct. The psychiatrist would tell the lawyers that, in the classification of crime and punishment by statute, the approach is from the wrong direction. To him, the proper approach comes through the study of the individual case, with mental factors stressed. He would make the criminal, and not the crime, the first object of consideration; to him the criminal act is only indicative of a "symptom," but the mental condition which impels the offender to do the act is of primary importance.

The *political scientist* is interested in the *structural organization* of the machinery of criminal justice. He studies administration by local governmental bodies, States and the Federal government of police; the courts, and probation and parole; the defects in the administration of criminal justice, as shown by crime survey statistics and recommendations; the alliance between crime and politics, justice and the poor and justice and the negro; reform in the administration of criminal justice, legal aid societies and public defenders; new codes of criminal procedure, *i. e.*, reform through legislation; better records of

crimes and criminal statistics; and comparative analyses of criminal justice in other countries.

Although the *State's officers* should have the same interests as the political scientist, it is the usual thing to find them stressing the machinery for *enforcement* of criminal laws. This official class is interested in the police and its organization; personnel problems, selection and salaries, maintenance, powers and liabilities in police work, women as police officers, special police, such as secret service operatives, State police, Federal officers, traffic, park and highway police. Also, the official is interested in methods of detection; the "third degree," drag nets and scientific methods; and after detection, the matter of identification, finger prints, photography (rogues' gallery) and handwriting. New and better methods of enforcing arrests are being studied; firearms, tear-bombs, police cars, and police radios. But all enforcement not being by the police, the powers of sheriff, constable coroner and self-constituted organizations, like the Ku Klux Klan, vigilantes, "secret sixes," crime commissions, and bankers' protective associations, are of particular interest.

It is difficult to classify the *layman's* interest in crime, as that depends upon his intelligence and civic consciousness. It is believed, however, that the "best citizen" is interested primarily in protection. He wants legislation which will expand the already too numerous statutory definitions of crimes; he wants reform of criminal procedure to insure speedy conviction and adequate punishment; and, above all, he desires police efficiency and honest enforcement of present laws. But the "average citizen" seems to confine his interests to the specific types of crimes, being most interested in the crimes of violence, sex crimes and political disorders, being less interested in larceny, ordinary burglary, arson, and the usual felonies, and being least interested in frauds, gaming, embezzlement, and *mala prohibita*. The others are interested in the bizarre and notorious crimes—the human interest crimes of the tabloids, and his interest depends upon many factors, *e. g.*, the attractiveness of female defendants, the prominence of parties involved, the brutality, depravity, or the cleverness and ingenuity of the crime, the boldness of execution, and the closeness or remoteness of the effect of the crime upon himself.

The "non-legal" groups listed above, by no means include all who are interested in various phases of crime. But enough has been stated to show that the field is large, and there are many avenues of approach dependent upon the point of view or emphasis of interests.

Is it proper to stress any of the above interests in presenting the subject of criminal law to law students in a professional course? While recognizing the importance of social forces in the study of criminal law, and believing that law may well be considered a social science in itself, the course in criminal law should remain a course in *law* and not a general course in *crime* including a treatment of the chief special interests. If any interests are given emphasis, they should be those of the *lawyer*. And what are the lawyer's interests?

The *professional criminal lawyer* is employed to prepare some means of protecting the rights of his client from the unrestrained operation of the enforcing machinery. Therefore, he might classify his special interests on the basis of *defenses*. He makes a study of all possible legal defenses and all of the "tricks of the trade." He considers ignorance of the law or mistake of fact; effect of command, coercion, necessity or duress; consent by the injured party; alibi; religious belief; defense of self, others and property; acts done in the prevention of felony or in avoiding illegal arrest; insanity, drunkenness and use of drugs; double jeopardy; jurisdiction; dilatory pleas; continuances; pardon and parole; and many special defenses, such as those which arise in abduction, seduction, assault, false imprisonment, etc.

The *general practitioner* as distinguished from the professional criminal lawyer, generally is interested in the technique of criminal procedure. He would classify his interests along the lines where his services are of most importance. He must know the use of *habeas corpus*; how to secure the discharge of the client at preliminary hearings; what indictments are defective and how the grand jury works; pleading in great detail; trial, including the selection of favorable jurors, criminal evidence, conduct of counsel and the judge; how to prepare instructions, motions for arrest and new trial; preparation of the record and briefs on appeal. He studies his local Supreme Court decisions to find a list of errors to be taken advantage of in later cases; he wants to get a line on instructions held good or bad; he attempts to harmonize conflicting opinions; and he attempts to distinguish opinions apparently in accord.

The *legal scientist*, or jurist, is interested in judicial organization, *i. e.*, the court system. He studies coroners' inquests; inferior criminal courts, justice of peace, police or municipal courts; courts of general jurisdiction, delays, errors, miscarriage of justice; appellate courts, grounds for reversal or affirmation; the Federal court system and questions of jurisdiction; the grand jury, and the indictment vs.

the information; the trial jury and the abolition or retention of jury trial; court officers—judges, prosecutors, reporters, clerks, bailiffs, counsel, including professional ethics, conduct of defense, and the public defender; special courts, such as the courts of conciliation, domestic relations, morals, night, and juvenile courts.

All who are interested in the teaching of criminal law will admit that the object of instruction should not be limited to the *defenses* employed in assisting clients to *escape* the rigor of criminal laws. But the student expects to get something from the course which will help him in his general practice, and he should. The limits of the course, however, should not be set by the extent of present day rules of practice, as the subject is susceptible to change, and many of the problems now faced only by the "legal scientist" are bound to confront the criminal lawyer of tomorrow. Much of this branch of the subject must be included, or at least touched upon, but not too much. It is very easy for the teacher of criminal law to stress reform and underemphasize present practice, whether it be good or bad.

*Legal "scholars"* have attempted for years to classify the criminal law. One outstanding example is the "Report of Committee D of the American Institute of Criminal Law and Criminology" (5 J. Crim. L., pp. 807, 822), presented by Professor Freund, which classified the field on the basis of the interest attacked or endangered, also as to the forms of delinquency and circumstances mitigating or aggravating guilt. Nothing much has come from such attempts, and a surprising dissimilarity is found in practically all statutory attempts to classify crimes and criminal procedure. In the case books and text books on criminal law, however, there has developed an orthodox treatment of the subject largely based upon a *classification of concepts*. By a concept is meant a notion, a thought, or mental impression, or an idea. Many of these concepts are expressed by rules or counter-rules. Take any book on criminal law and one may expect to find from one-third to two-thirds of the book devoted to such concepts as the nature of crime in general; intent; capacity; the criminal act, attempt, solicitation, conspiracy, consent, entrapment; parties to crime; and the like. Then follows, generally, a brief treatment of some of the specific offenses—but, by no means, all of them—nor the most recently developed offenses. This orthodox method may be found to have started with the 1856 edition of Bishop on Criminal Law.<sup>2</sup>

<sup>2</sup>The present edition of Bishop (9th, 1923) has one volume entitled "General and Elementary," of 918 pages, covering the concepts. The second volume takes up the specific crimes. Clark and Marshall (1927 ed. by Crane) devotes 238 pages of a small volume to concepts. The case books follow the same

But anyone who has returned from practice to law teaching will ask, "Why did this method ever develop anyway? Why study various concepts if they are of little value in practice?"

The result of "pursuing the concept" is a sort of legal theology—a species of scholasticism. We are led through a tortuous maze of "ideas"—intent, general intent, specific intent, constructive intent, motive, malice, responsibility, culpability, negligence, omission, repentance, ignorance, justification, concurrence, ratification, causal relation, probable consequences, wantonness, etc. Such pedantry makes the course (1) confusing, with fine spun theories, and hard to master, unless the student is willing to accept the instructor's "ideas" as the Gospel; (2) uninteresting in class, because the time is used largely in comparing ideas, and the student feels instinctively that he is not getting what he came to law school to get, *i. e.*, the skill of the craftsman in the use of all of the "tools" of his chosen profession, and (3) unbalanced, in that it quite often happens that so much time is devoted to the concepts that little is left for specific crimes, and no time is found for such topics as statutory interpretation or criminal law administration.

It is believed that at present there is little relation between the ideas usually current in the criminal law class and the living realities of actual practice. The apologetic statement frequently is made, "Law schools should train students to think, and should not be in-

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organization. Mr. Beale in his *Cases on Criminal Law* (1907, 2d ed.) spends 650 pages on concepts and 450 pages on the specific crimes. He gives 31 pages to homicide and 254 pages to larceny, and it is interesting to note that the Third Decennial Digest has 550 pages on homicide (50 more than "contracts") and only 106 pages on larceny. Mr. Beale has only one 4-page case on the subject of rape. He has nothing for the separate topics of mayhem, abduction, kidnapping, false imprisonment, malicious mischief, extortion, racketeering, bigamy, adultery, seduction, abortion, vagrancy, obscenity, prostitution, libel, deadly weapons, bombing, gaming, bribery, perjury, contempt, or misconduct in office. Sayre's *Cases* follows Beale's example, and 728 pages are devoted to concepts such as "modifying circumstance," "culpability," "privileges," "excuse," "parties," etc., and there are left 339 pages for specific crimes. Of the pages given to specific crimes, only 69 pages are devoted to offenses against the person, larceny receiving 134 pages. Altogether he has extracts from about 700 cases in 1000 pages. Mr. Derby in his *Cases on Criminal Law* (1930) has about 350 pages on specific offenses out of a book of 865 pages. His specific offenses cover only offenses against person, property, and habitation. Mr. Mikell's *Cases on Criminal Law and Procedure* gives approximately one-half of the 800 pages to concepts and the other half to specific offenses. The most recent case book on Criminal Law is by Professor Waite of Michigan. He devotes about half of the book to concepts and the remainder mainly is spent on "Proceedings Before Trial." He does not treat any specific offenses at all. In all the books framed under the orthodox method, "Criminal Intent" receives great emphasis, and, while this may not be an accurate basis for comparison, it is of interest to note that the Third Decennial Digest has 2921 pages on "Criminal Law," but only 105 pages are devoted to *all* the usual concepts, "Criminal Intent and Malice" being covered in 2/4 pages.

terested in turning out mere craftsmen." The writer is inclined to believe that it is the first duty of law teachers to present the law as it is, not only in teaching it as a profession but in studying its administration. At least in the general courses, there should be laid as a ground work the description of court structure, an analysis of cases, and a study of the judicial process in handling such cases. "Concepts" as such, will receive attention in any course in criminal law, but they should be recognized as devices utilized by the courts as occasion demands, rather than as fundamental in importance.

In general, it is submitted that the courses devoted to criminal law should be treated as follows:

(1) The old distinction between criminal law and criminal procedure should be dropped. It is believed that the two topics cannot be separated. What is criminal law? And what is criminal procedure? When one stops to think, he finds that they are so interwoven that an attempted separation results in repetition and faulty case analysis. Instead, the practice should be followed of placing a general emphasis upon the whole judicial process in the administration of criminal cases, and the artificial line between substantive and adjective law should be ignored.

(2) Recent cases should be used wherever possible. Recent cases stimulate the class discussion by offering the opportunity for the introduction of the modern views of the sociologist, penologist, legal scientist, etc., to be examined without getting away from the legal classification; they illustrate modern crimes, such as gang killings, extortion, bombing, confidence games, or racketeering; they make possible the introduction within the course of modern methods of crime detection; for example, the scientific identification of firearms; they raise questions of current interest, such as the question of high bail bonds, recently illustrated by the *Sammons* Case in Illinois. In general, class interest increases according to the lateness and notoriety of the case. However, care is taken to avoid neglecting landmark cases; but where a recent case properly reviews the landmark cases and makes a modern application, it may be used.

(3) In almost all instances, the entire decision should be included and studied. Extracts from cases commonly are used where a conceptual classification is followed, but the application of the case method should mean more than the study of clippings arranged to fit a text-book outline. Emphasis should be placed upon the fact situation; how the case was handled below by court and counsel; how the case was decided upon appeal and, above all, the factors which

influenced the decision. In all cases studied the chief discussion in class should be upon the topic, "Why did the court decide as it did?" rather than, "What is the rule of the case?" A process in government is to be unfolded, rather than a body of principles, and the factors behind the decision should be treated as worthy of as much attention as the decision itself.

(4) The courses should be expanded far beyond the usual courses on criminal law, but the temptation to emphasize subjects within the field of criminology at the expense of law, must be avoided. It is easy to be a "reformer" before a class of students of criminal law. It is difficult to forego the resultant class interest which comes from an attack upon existing criminal law administration. The primary purpose of a professional school, however, is to give instruction in the highest use of the tools of the profession. The emphasis should fall upon the present status of the law, rather than upon past development or predictions of desirable changes for the future. But by widening the scope of study and by using recent cases, the contributions which are offered from the various branches of social science will not be neglected.

The first year's course in criminal law administration, as given by the writer, is a required course for the entering class. It is designed to cover the so-called crimes "*mala in se*," and the topics of practical value commonly covered in the usual courses in criminal law and criminal procedure are included. At the outset, portions of the stenographic report of the trial of *Sacco and Vanzetti* are studied, the class examining the selection of the jury, opening statements by counsel, the testimony of selected witnesses, arguments of counsel, Judge Thayer's instruction to the jury, and the verdict. This is done immediately before the examination of appellate opinions. During the year the student receives special training in the progress of the criminal trial, particularly the framing of instructions. A great deal of time is spent on the subject of homicide, and the interpretation of homicide statutes and the trial of homicide cases occupy most of the first semester's work. The reason is that in that type of case all known defenses are employed and all the steps in the proceedings below are illustrated by a wealth of appellate opinions.

Along with the formal class work, there is conducted an extra-curricular course of lectures. The members of the Staff of the Scientific Crime Detection Laboratory, under the direction of Colonel Calvin Goddard, present their technique to the class in six or eight lectures, and in addition, there are speakers obtained from the State's

Attorney's office and from the various crime study agencies of the city of Chicago. No examinations are given upon the subject-matter of the lectures, but they are well received by the students, as they give pictures of criminal law administration from various points of view.

The first year's course covers the work regarded as essential for the practice of criminal law, but it by no means covers the entire subject. As a result, a second year course has been developed, which enters a field which has been somewhat neglected in the law school curriculum. This course deals with topics which fall midway between the old courses in criminal law and constitutional law, covering the broad field of the police power and centering on the crimes commonly called "*mala prohibita*." The instructor presents cases involving nuisances, licenses, quarantine, health regulations, extradition, protection of fish, game and public property, pure food and drug laws, restrictions on vice and immorality, blue laws, prohibition, legislative control of business and labor, trade combinations, building laws, and municipal ordinances in general. In two important places the second year's course in criminal law is unique and forward-looking. In the first place, the Federal law of crimes and the procedure used by the Federal Government in prosecuting offenses against its statutes are given careful treatment. And, secondly, in this course is found a study of equitable restraints used in the prevention of criminal offenses. In the ordinary curriculum there is no place for a study of these topics, but a cursory examination of any volume of current reports will demonstrate that this field is growing in importance and cannot be neglected. It may be argued that this encroaches upon the course in constitutional law, but it is submitted that the course in constitutional law should be restricted largely to the structural machinery of administration, leaving many of the topics commonly treated in that course to separate courses in taxation, municipal corporations, Federal court system, administrative law and criminal law. This organization will avoid repetition.

In the second year's course there is begun the transition to individual studies. The problem method is used throughout and the students take opposite sides of debatable topics, which are argued before the instructor, following the rules of appellate practice.

In the third or fourth year, the law student should be ready for individual work. This may take the form of participation in the criminal clinic or research work on special topics under the personal supervision of the instructor. The importance of clinic work cannot

be overstated. In a properly conducted clinic the student actually will handle cases in court (as far as possible under the law), and that involves a study not only of court procedure but all steps preliminary thereto. Work in a criminal clinic is far more instructive to the student than any form of moot court work. The common criticism of leading American law schools, that they teach only theory, is answered by the training given in a well organized criminal clinic. Research work on special topics for advanced students is a drain upon the time of the instructor, but is of great value both to instructor and student. During the past year intensive work by mature students was evidenced by contributions on such topics as "The Juvenile Court System in Illinois," "The Insanity Defense," "Blue Sky Laws," "The Admission of Ballistics Testimony," etc. The instructor may receive considerable assistance in studying various systems of local law by relying upon student research, and the student may satisfy his urge specially to prepare himself in a particular field while still at law school.

One other topic should be mentioned, and that is the encouragement of student writings upon current criminal cases. Of all the work which the student does, law review work commonly is recognized as the work of most value. It combines training both in case analysis and in topic research, and when joined with clinic work, is designed to turn out men thoroughly trained in theory and practice.

As stated above, the purpose of this paper is to present certain ideas relating to the organization of the law school work in criminal law. The reader may conclude that the chief idea merely is to expand the work beyond the limits of the ordinary law school facilities. The aim is to expand, but also to drop out all the useless pedantry of the past, and the expansion will not be at the expense of other courses. By placing the emphasis upon administration, rather than upon concepts, much time is saved. By combining criminal law and procedure much repetition is avoided. As to the second year's course, the general topic of the police power in "*mala prohibita*" logically falls in the field of criminal law administration, and by placing it there much time may be saved for the course in constitutional law.

Criminal law is a changing subject. The ideas expressed above merely are current ones. They may be revised, and probably will be, if the subject keeps in the spotlight of general criticism. It is a field which challenges experimentation, and it is only through constant trial and error that the law school work in criminal law may be developed to a point where it trains law students both in practical technique and in constructive theory.