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Book Review. Dession, G. H., Criminal Law, Administration and Public Order

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REVIEWS


Professor Dessen, long numbered among our ablest scholars of the criminal law, has written a distinguished casebook. That he devoted years of careful research to the preparation of the book is eloquent testimony of his estimate of the importance of criminal law and legal education. In order to appreciate the significance of his contribution, it is necessary to give at least a passing thought to the present state of the law school as it is revealed through the prism of the criminal law course. In no other single course can the measure of American legal education be so readily and accurately perceived. The over-all tendency, with salient exceptions, has been to deny expansion and even to diminish the course hours devoted to criminal law. The sophisticate may dismiss the entire matter as inevitably determined by personal interests. One can hardly believe that it is the result of studied evaluation of the place of criminal law in the legal curriculum.

The chief avowed reason for restricting the course is that the graduates will not engage in the practice of criminal law. In the all-too-brief three years, why not concentrate on the fields of actual practice? The unchallenged acceptance of a simple, rather uniform answer to that difficult, ambiguous question (e.g., what is meant by "concentrate" and by "actual practice"?) is a clear index of the state of our legal education. It also supports the opinion of thoughtful observers in and out of law schools, that the level of prevailing thought and instruction is superficial and narrow, that it amounts to no less then a renunciation of the potentialities of the ablest youth of the land. May one therefore be forgiven for intimating that the law schools, long afflicted with tinkering curriculumitis, have hardly begun to recognize the problems which challenge the distinctive competence of legal theorists? May one suggest that the law schools are still the victims of, rather than leaders in, the cultural milieu? Many lawyers, in contrast to doctors, shut their eyes to the needs of the indigent. And persons accused of criminal offenses—unless they are Whitneys or Insulls—are barred from the better firms. Although few would deny that prestige and emolument are proper professional objectives, that they should have been allowed to become the major determinants of law school curricula must surely be of deep concern to any educator.

The prospective practice of the student is assuredly among the law school objectives. But not only do many lawyers outside the largest cities engage in the practice of criminal law as prosecutors, defense counsel, judges, legislators, and legal reformers but in addition, as Professor Dessen points out in his Preface, the criminal law in the recent past has rapidly expanded in the state, nation, and world. As he notes, penal and other similar sanctions are frequently and increasingly met in trade and commerce, in labor-management relations, in
ideological conflicts, and in connection with national and international security. One need not be too surprised if pressure from the metropolitan offices finally persuades law school faculties that a decent share of their effort should be devoted to the development of lawyers who can function effectively in the present-day world of criminal practice. If this seems a bit far-fetched, at least there are enough known data to require a re-examination of the assumption that the course in criminal law should be designed not for future practice but only to supplement the general education of an enlightened citizen. Quite apart from the indicated expansion of the criminal law into areas of lucrative practice, so long as the statistics of criminal prosecutions bear in on us there can be no comfort in such a standoffish view—none at least for those who recognize the criminal law as the chief day-by-day safeguard of the common citizen's elementary rights. There is plenty of work to be had and done in the criminal law field, and the assumption that the successful practitioner will never soil his hands with it is hardly to be made by, and indoctrinated in, the law school.

But the more important implication is that the law school should strive to broaden horizons, deepen thought, stimulate altruism, and provide the best possible intellectual basis for a practice which satisfies urgent human needs and simultaneously exhibits the functioning of the professional skills on the highest levels. The body of knowledge commonly designated "law" or the "study of law" is a rational-empirical-social discipline. Within the confines of law school objectives and opportunities, the soundest criterion of time and energy allocation is therefore the intellectual content of the various courses. If that is the soundest standard, there can be no doubt of the importance of the study of criminal law—at least for those who are willing to examine the problem dispassionately. That, it seems to me, is the attitude which has guided Professor Dession in the construction of his casebook, and it has sustained him in the years of arduous labor devoted not to winning personal prestige—else he had done better to have worked in property, corporations or constitutional law—but in an honest effort to make a maximum contribution to the intellectual development of his students. His casebook provides specific answers to the general question raised concerning the quality of the content of the criminal law course.

The book represents an approach which, by ordinary standards, but not by those representing the best teaching of this subject, is unconventional. It is divided into five parts: Part I. Crime, Sanction and Policy; Part II. Initiation of Proceedings: Distribution of Power and Participation; Part III. Theories of Action; Part IV. The Criminal Proceeding; Part V. Penal Administration. In effect, the materials are divided into six divisions, five of which consist of approximately 200 pages each; the sixth division (Penal Administration) consists of 40 pages. The total space is almost equally divided between substantive law and criminal procedure (including administration).

In the first division Professor Dession deals with those fundamental questions that relate to what may, without, I hope, depreciating the book, be
termed the philosophy of criminal law. The materials comprise a sort of pro-
legomenon to the study of the criminal law. Specifically, they concern a theory
of the nature of crime and sanction and a rationale of the relevant value prob-
lem, i.e., questions of "policy." The materials include cases and text, and there
are copious summaries of, and references to, social science, foreign penal codes,
and international law in addition to the traditional professional literature. The
nonlegal materials are not set out extensively but that is no defect except for
those who cling to the dogma that law students, alone, of all advanced students
are incapable of studying more than a single book. The materials, even as
abridged, illuminate the problems under investigation. They are skillfully em-
ployed so that the student learns not only the conventional black letter rules of
law, but, in addition, derives a genuine insight into their meaning. He accumu-
lates a range of data which he will remember because of their rational juxta-
position to central legal problems. And he is initiated into the nature of for-
eign legal systems with concomitant increase in the understanding of his own.

The chapter on sanctions exhibits a wide array of "evils," raising pertinent
questions regarding the simplicism that all legal sanctions are penal or "non-
penal." It demonstrates that the criminal law course, as interpreted by Profes-
sor Dession, carries much of what should be a burden more evenly distributed
among first year courses—namely, the nature of legal liability. Finally, Part
I is concerned with the difficult problems of policy and technique. Included are
constitutions, cases involving civil liberty and constitutional issues, material
suggesting the limitations and advantages of a legal regime, and, lastly, the use
of penal sanctions to effectuate "policy." It is apparent that Part I repre-
sents thoughtful analysis of the relation of law to nonlegal disciplines, a sensi-
tivity to the dependence of national and international order on expert knowl-
dge of municipal criminal law, a free manner of inquiry, and a range of
thought and method that is thoroughly admirable. It is equally evident
that Part I merits painstaking study which will be abundantly rewarding
in the best educational sense.

Having posed the most fundamental preliminary questions, locating the
whole of criminal law in a defensible area within the broad framework of "law
and society," Professor Dession shifts in Part II from the most abstract phases
of theory to the consideration of concrete and practical issues. The materials
bring into direct focus the jobs, limitations, and objectives of officials engaged
in the primary tasks of catching offenders, finding the evidence, and instituting
action before the proper tribunal.

Part III includes the core of the substantive law of crimes. It is divided into
a general and a specific part, the latter consisting of 182 pages. This seems
much too condensed, but it should be noted that many additional pages in other
parts of the book are devoted to specific crimes. Noteworthy, also, is the in-
clusion of a chapter on political offenses.

In Part IV, Professor Dession deals with the more traditional phases of
criminal procedure, a subject which has greatly increased in practical impor-
tance. Here, ample use is made of the new Federal Rules, and the compilation
profits from the experience of the Editor as a member of the Supreme Court
Committee. Finally, Part V deals with usually unexplored but nonetheless im-
portant matters such as the rights of convicts and release procedures. It is the
fitting conclusion of a casebook devoted to the study of that branch of law
which, if the intellectual content of a discipline and concern for elementary
human needs and safeguards provide the soundest measure of time and energy
expenditure, must surely be counted among the most important courses in the
law school curriculum.

In a Toynbee phrase, Professor Dession has successfully responded to a se-
rious challenge. It is a challenge that is more onerous than it should be be-
cause many legal educators are excessively inhibited in their inquiries and be-
cause the impact of irrational influences clouds their vision—with consequent
discouragement of creative work in the law schools. Teachers of criminal law
will appreciate the magnitude of the task undertaken by Professor Dession no
less than they will the scholarly casebook which represents an important con-
tribution to American law school education.

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CASES AND MATERIALS ON CONSTITUTIONAL LAW. By Henry Rottschaefer.

It has become commonplace these days to cry that the Constitution is dead,
the old landmarks gone. Justices of the Supreme Court have "given up" or
have said that the law is like a "restricted railroad ticket." And it is not enough
that Those Men in that Marble Building destroy so much. They also quarrel
in public. The fratricidal warfare of the brethren has reached such alarming
proportions that even the American Bar Association Journal has broken down
and admitted that the present state of affairs justifies discussion of the work
of the sacred temple.²

In the midst of all this Professor Rottschaefer’s new casebook on Constitu-
tional Law comes as a breath of clean, fresh air.

It is evident that Professor Rottschaefer is determined to restore Constitu-
tional Law to its once exalted status. This he does by emphasizing the LAW
in Constitutional Law and by ignoring the Supreme Court and their unseemly

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U.S. 649, 669 (1944).

2. See Palmer, Supreme Court of the United States: Analysis of Alleged and Real
Causes of Dissents, 34 A.B.A.J. 677 (1948). And see the somewhat apologetic editorials
about discussing the Court, 34 A.B.A.J. 584, 700 (1948).