2007

Legality and Discretion

Stephen C. Thaman
Saint Louis University School of Law

ENCYCLOPEDIA OF LAW & SOCIETY

American and Global Perspectives

David S. Clark
Willamette University
EDITOR

2

A SAGE Reference Publication
SAGE Publications
Los Angeles • London • New Delhi • Singapore

For information:

SAGE Publications, Inc.
2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

SAGE Publications Ltd.
1 Oliver's Yard
55 City Road
London EC1Y 1SP
United Kingdom

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Asia-Pacific Pte. Ltd.
33 Pekin Street #02-01
Far East Square
Singapore 048763

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Encyclopedia of law and society : American and global perspectives/editor David S. Clark.
p. cm.
Includes index.
ISBN 978-0-7619-2387-9 (cloth)
1. Comparative law—Encyclopedias. 2. Sociological jurisprudence—Encyclopedias. 3. Law—Social aspects—Encyclopedias. 4. Law and the social sciences—Encyclopedias. 5. Law—United States—Encyclopedias. 6. Law—Social aspects—United States—Encyclopedias. I. Clark, David Scott, 1944–

K583.E53 2007
340.03—dc22 2006032002

This book is printed on acid-free paper.

07 08 09 10 11 10 9 8 7 6 5 4 3 2 1

Publisher:	Rolf A. Janke
Acquisitions Editor:	Jerry Westby
Developmental Editor:	Paul Reis
Reference Systems Manager:	Leticia Gutierrez
Production Editor:	Astrid Virding
Copy Editors:	Bonnie Freeman, Carla Freeman, Robin Gold, Alison Hope, Jamie Robinson, Jackie Tasch, and Marjorie Toensing
Typesetter:	C&M Digitals (P) Ltd.
Proofreaders:	Scott Oney and Dennis Webb
Indexer:	Kathy Paparchontis
Cover Designer:	Ravi Balasuriya
Marketing Manager:	Carmel Withers

Clarke, Stevens H., and Gary G. Koch. (1976). "The Influence of Income and Other Factors on Whether Criminal Defendants Go to Prison." *Law and Society Review* 11: 57–92.

Emmelman, Debra S. (1993). "Organizational Conditions That Facilitate an Ethical Defense Posture Among Attorneys for the Poor: Observations of a Private Nonprofit Corporation." *Criminal Justice Review* 18: 221–35.

———. (1996). "Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking." *Law and Society Review* 30: 335–60.

——— (2003). *Justice for the Poor: A Study of Criminal Defense Work.* Burlington, VT: Ashgate.

Flemming, Roy B. (1986). "Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients." *American Bar Foundation Research Journal* 2: 253–77.

Hagan, John. (1974). "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint." *Law and Society Review* 8: 357–83.

Holmes, Malcolm D., Howard C. Daudistel, and Ronald A Farrell. (1987). "Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery." *Journal of Research in Crime and Delinquency* 24: 233–54.

Jankovic, Ivan. (1978). "Social Class and Criminal Sentencing." *Crime and Social Justice* 10: 9–16.

Lizotte, Alan J. (1978). "Extra-Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice." *Social Problems* 25: 564–80.

Mather, Lynn M. (1979). *Plea Bargaining or Trial?* Lexington, MA: Lexington Books.

McDonald, William F. (1985). *Plea Bargaining: Critical Issues and Common Practices.* Washington, DC: U.S. Department of Justice.

McIntyre, Lisa J. (1987). *The Public Defender.* Chicago: University of Chicago Press.

National Legal Aid and Defender Association. (2006). "History of Right to Counsel." http://www.nlada.org/About/About_HistoryDefender (orig 2004).

Platt, Anthony, and Randi Pollock. (1974). "Channeling Lawyers: The Careers of Public Defenders." *Issues in Criminology* 9: 1.

Skolnick, Jerome H. (1967). "Social Control in the Adversary System." *Journal of Conflict Resolution* 11: 52–70.

Sudnow, David. (1965). "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office." *Social Problems* 2: 255–75.

Wheeler, Gerald R., and Carol L. Wheeler. (1980). "Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice." *Crime and Delinquency* 26: 319.

Willick, Daniel H., Gretchen Gehlker, and Anita McFarland Watts. (1975). "Social Class as a Factor Affecting Judicial Disposition Defendants Charged with Criminal Homosexual Acts." *Criminology* 13: 57–77.

Legal Pluralism

See MPI for Social Anthropology Project Group Legal Pluralism

Legal Science

See Positivism and Legal Science

Legality and Discretion

Jurists have long perceived the inquisitorial model of penal procedure to be better suited to determine the truth because of its supposedly more scientific approach to gathering and analyzing evidence and its use of legally trained judges to determine whether the elements of the charged crimes have been proved. The system was designed to eliminate as much discretion as possible from decisions about charging crimes and from rendering judgments based on the evidence. Known as the *legality principle,* it is aimed at preventing the unequal application of laws. Police were required to arrest a person if they became aware of conduct that constituted a violation of the criminal law. Prosecutors were obligated to prosecute, and the judge was obligated to render a guilty judgment.

Further certainty is derived from the requirement of reasoned judgments. If the judge cannot show logically and convincingly the reasons why the evidence was sufficient to prove guilt beyond a reasonable doubt, or was so lacking as to allow the rendering of a not-guilty judgment, the judgment would be reversed on appeal by a panel of professional judges. In addition, there must be reasons to justify the particular sentence pronounced following a finding of guilt.

In such a system, the role of lay judges is problematic and one can understand why the jury was never fully accepted by judges and academic jurists in Europe, Latin America, and other countries with inquisitorial systems. However, because democracy seemed to require popular participation in all branches of government, the mixed court was preferred because judges could still influence the decisions of the lay judges and could still write the judgments to eliminate any perceived discrepancy between the proofs at trial and the judgment rendered. Even the inquisitorial systems that adopted trial by jury in the nineteenth century allowed appeals of jury acquittals and reversals by professional panels of judges who often showed little reticence in overturning what they thought were scandalous acquittals. The Russian Supreme Court, which reverses nearly half of all acquittals, carries on this tradition today.

For a jury to function as a true check and balance against the judiciary, that is, to render at times judgments different from those that legally trained judges would render, jury acquittals must be final. This lesson of Anglo-American history has been rejected by virtually all countries within the inquisitorial tradition, with the exception, perhaps, of France. Therefore, the inquisitorial principle of truth finding still trumps what seems to be the predominant ethic of the adversarial-accusatorial trial by jury: just and equitable resolution of criminal cases, with truth being only one (albeit important) factor to take into consideration.

The opposite of the legality principle is the principle of discretion, which civil law lawyers call the *opportunity principle.* The opportunity principle infuses Anglo-American common law. In the United States, for instance, the police have complete discretion to arrest or not to arrest, and prosecutors to prosecute or not. Because the steady rise in criminality makes it difficult for countries wedded to the legality principle to actually charge and adjudicate every criminal offense, the goal of strict legality has always been elusive.

The opportunity principle in the United States has allowed the system of plea bargaining to flourish and become the main vehicle for resolving criminal cases because the prosecutor is completely free to reduce otherwise valid charges to lesser offenses, or even dismiss them, as a result of a bargain reached with the defendant.

—Stephen C. Thaman

See also Consensual Penal Resolution; Discretion in Legal Decision Making; Juries; Lay Judges; Penal Court Procedures, Doctrinal Issues in; Plea Bargaining; Prosecutorial Discretion

Further Readings

Brown, Darryl K. (1997). "Jury Nullification within the Rule of Law," *Minnesota Law Review* 81: 1149–1200.

Fionda, Julia. (1995). *Public Prosecutors and Discretion: A Comparative Study.* Oxford: Clarendon Press.

Jescheck, Hans-Heinrich, and Rudolf Leibinger, eds. (1979). *Funktion und Tätigkeit der Anklagebehörde im ausländischen Recht.* Baden-Baden, Germany: Nomos.

Weigend, Thomas. (1978). *Anklagepflicht und Ermessen: Die Stellung des Staatsanwalts zwischen Legalitäts- und Opportunitätsprinzip nach deutschem und amerikanischem Recht.* Baden-Baden, Germany: Nomos.

Legislatures and Lawmaking

The term *legislature* was first applied to Parliament in the late seventeenth and early eighteenth centuries in England, thereby attributing lawmaking power to an institution that had existed since the twelfth century. Medieval parliaments were assemblies of the principal status groups in society convened irregularly by monarchs for consultation. Referring to Parliament as a legislature became momentarily widespread in Oliver Cromwell's (1599–1658) England, then in postrevolutionary France, and most widely in revolutionary America. Today, the use of the term legislature to designate the representative assembly is standard in the United States and in most of Latin America. Elsewhere, the representative assembly is most often called *parliament,* although there is a great deal of linguistic variation among the more than 250 representative assemblies in 185 countries for which the Inter-Parliamentary Union has data. Nearly two-fifths of these assemblies exist in bicameral systems.