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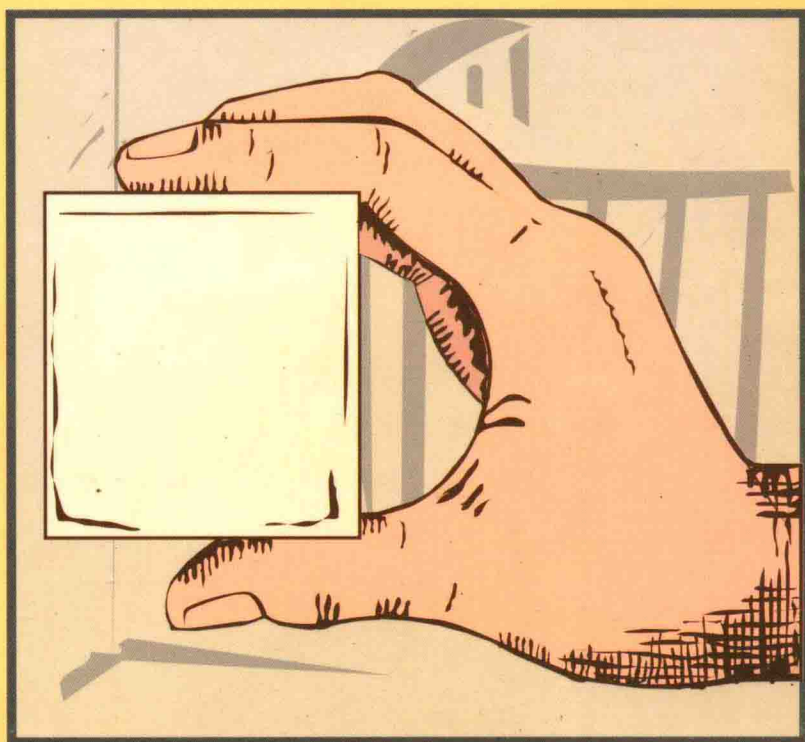
Criminal Law (Second Edition)

EXAMPLES & EXPLANATIONS

刑法

(第二版)

注译本



Richard G. Singer
John Q. La Fond / 著
王秀梅 杜晓君 周云彩 / 注

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总序

在人类文明的发展与进步中,中华民族以其悠久的历史传统率先开启了东方文明的大门,古老的中华文明不仅创造出人类历史上最悠久的法律文化,而且在法制思想、法制观念及法律人才的培养上进行了积极的探索与实践。自战国时代著名法家人物邓析开创私家教授法学的传统以来,数千年来,法律教育与法律训练一直为历朝历代所重视,如最早的封建王朝——秦朝就曾经在政府内专门设置执掌法学研究与法学教育的“律博士”,到了三国两晋南北朝时期,律学的发展更是带来了中国古代法律理论的进步和法律人才的大量涌现,隋唐以后,以律典、断案以及律学为“明法”科考内容的选拔官吏制度,充分反映了法学教育在社会中的地位与影响。

人类进入二十世纪后,随着西方法律思想的“西风东渐”,中国的法律教育体系也在融会中西的潮流下形成了一定规模。中华人民共和国成立以后,中央人民政府积极创办新中国的教育事业,发展完善中国的法学教育体制。1950年,国家创办了中国人民大学法律系,这是新中国建立的第一所正规的高等法学教育机构。随后,北京大学法律系、北京政法学院(现中国政法大学)、复旦大学法律系等高等政法院系次第复办和新建,新中国法学教育无论在规模、体系以及内容上均有了显著的发展。虽然在文化大革命期间中国法学教育受到很大冲击,但改革开放以来,随着政治体制和经济体制改革的日益深化,中国的法制建设得到了长足的发展,中国法学教育事业以前所未有的速度飞跃发展。一个从普法教育到专业法律人才培养的完整法律教育体系已经初步建立起来,目前,经教育部认可具有法律专业本科学位授予权的学校已达298所。

新中国法学教育是在国家改革开放的大环境下快速发展起来的,中国法学教育界始终以积极主动的姿态,以开放的胸襟,采取走出去、请进来的办法,不断加强与世界各国法律界、法学教育界的沟通、交流与合作,有效地推动了中国的法律教育不断迈向更高层次。其中“中美著名法学院院长联席会议暨中美法学教育的未来”学术研讨会(1998年6月)、“中国——欧洲著名大学法学院院长联席会议暨欧洲一体化与中欧法学教育合作”学术研讨会(2000年6月)、“亚洲法学教育改革与发展论坛”(2001年12月)等一系列国内外法学教育交流活动,在国内外产生了巨大影响,特别是2000年12月举行的“21世纪世界百所著名大学法学院院长论坛暨中国人民大学法学院成立五十周年庆祝大会”,是中国法学教育走向世界具有里程碑意义的国际法学教育盛会,不仅表明中国法学教育的蓬勃发展已为世界各国所肯定,而且架起了东

西方法学教育交流合作的桥梁。在中西法律文化的交流和碰撞中,中国法学教育兼收并蓄,不断吐故纳新,保持着永续发展的势头。

随着经济全球化的发展,特别是中国加入世界贸易组织后,培养精通外语、精通涉外贸易规则的复合型专门人才成为新世纪高等教育的重要目标。为了适应这种新形势,2001年教育部提出在我国高等教育中推行双语教学,无疑是一个具有前瞻性的重要举措。在中外法律文化交流和日益频繁的新形势下,推行法学领域中的双语教学有利于中国法制体制改革和法学教育的深化;有利于创造一个适应国际规则的中国法律人才成长的环境;有利于中外法律文化的相互吸收与借鉴。目前,全国法律院校纷纷开展双语教学的尝试和探索,并且取得了一定的成效。但是,由于国内尚无一套具有一定权威性和较高水准、可供高等法学教育直接使用的原版教材,使法学双语教育缺少有效的载体,在一定程度上影响了法学双语教学的进一步推行。中国方正出版社副社长、中国人民大学法学院在职博士研究生胡驰同志利用在美国哥伦比亚大学法学院作为期一年访问学者的机会,通过认真细致的调查并邀请专家论证,从美国排名前十位的法学院数十种法学教材中经过精心筛选,选择了一套适应我国法学教育实际的经典法学教材,并从美国以出版法学教材而著名的出版公司 Aspen 处购得版权,邀请专家加以注解,以全新的形式在国内出版,供各法学院校双语教学之用。

这套教材的英文原版部分,无论在内容、容量和形式上比较适合我国法学院校本科高年级学生和研究生研习美国法律和专业英语之用;特别是它每一章节所附的“释例和解析”部分(Examples & Explanations),是每一个作者吸收美国法院多年判例的精华总结整理出的理解和指导该法在实践操作中的精要之所在,因而也是该系列教材的特色之所在,值得我们国内的教材编写者借鉴学习。另外,中国方正出版社此次并没有简单地采用“影印版”的方式引进本系列教材,而是充分考虑到中国学生英美法知识背景相对薄弱、相应方面辅助读物有限等实际困难,特地邀请有关专家学者和一些有英美法留学背景的人士,为本系列教材中的关键词、核心概念和一些具有深远影响的法院判例做了翔实准确的注释,同时指引读者在中国法与美国法之间建立一定的联系,活学活用、融会贯通。此举更是为这套教材增添了可观的附加值,值得向各大法律院校的广大在校生和工作在司法第一线的法官、检察官们推荐。

在本套教材即将付梓之际,中国方正出版社嘱吾写几句话,该社襄助法学教育的义举值得赞赏,欣然援笔以为序。

曾宪义

2002年10月20日

(曾宪义教授担任中国人民大学法学院院长、教育部高等学校法学学科教学指导委员会主任委员、中国法学会法学教育研究会会长)

中文版导读：美国刑法简介

I. 美国刑法

每个社会都有犯罪行为存在。与其他国家一样,美国刑法旨在对各种犯罪行为做出界定,并对罪犯施以刑罚。我们的刑法还体现着弦们的基本价值观。美国人认为,政府的权力应当受到制约,且须尽最大可能避免无辜者受到追诉。因此,只有全民公选的立法机关有权界定何种行为构成犯罪;我们的国家宪法也对此有所限定。此外,被告人的罪名成立与否,需要经由社会中普通公民所组成的陪审团来认定。在大多数案件中,刑事被告人也有权得到律师的帮助;如果被告无力负担律师费,政府将承担这笔费用。政府对一个人有罪的证明必须超出合理怀疑的限度。

一个人一旦被证明有罪,便须接受刑罚。此人或会被判罚款、或者是社会服务,或会被判监视居住、乃至狱中服刑。如果此人犯下极其严重的罪行,甚至可能被判死刑。刑罚的严厉程度通常取决于罪行的严重程度和犯罪人个人的犯罪记录。

II. 实体刑法

本书为美国大学法学院一年级学生使用,主要讲解了美国的实体刑法(或者说关于刑事犯罪的实体法律)。大多数犯罪行为都具有相同的一些要件。通常,政府须在超出合理怀疑的限度之外证明:(1)被告人由于其明知的行为而造成了伤害结果;并且(2)被告人在犯罪时处于特定的精神状态下。前者通常被称为“犯罪行为”;后者通常被称为“犯罪意图”。

III. 联邦制,州政府与“美国”刑法

外国读者应当知道,美国并没有一个普遍适用或单一的刑法。在美国的早期历史中,经常可由法官来宣布某一行为构成犯罪;而现在,只有人民选举的代表组成的立法机关有权定义何种行为构成犯罪。他们将这些规定制订成成文法律并将之公布实施,这些法律被称为成文刑法;其内容通常只是对普通法的重申或是在普通法的基础上制订的。

美国是一个联邦制国家,联邦政府设在首都华盛顿,五十个州各设有其州政府。在该体系中,每个州的议会都具有独立的立法权,可将其认为危害了本州公民的行为定为犯罪,即使其他州并没有对相同的行为做出刑罚处罚的规定。此外,联邦的(国家的)立法机构也有制定刑事法规的权力。各州法院解释本州的刑

事法规;联邦法院解释联邦的刑事法规。每个法院的解释仅在自身的管辖区域内有效。因此,当本书谈及“美国刑法”的原理时,州与联邦、以及各州之间的刑法都各有差异。不过,由于各州拥有共同的历史和文化,各州的法律尽管不尽相同,但也是极其相似的。

此外,在过去的40年中,大部分的州(尽管不是全部)都在美国联邦《模范刑法典》的基础上制定了自己的刑事法规。《模范刑法典》由美国法律学会(American Law Institute,一个由律师和法官组成的私立机构)所编写。由于这部模范法典中的一般原理已被许多州所采纳,因此我们使用这部法典作为一个标准,学生可以通过它评估各个司法辖区的法规。

IV. 怎样使用本书

本书各章既解释了犯罪的基本概念(例如,每一个犯罪行为的成立要件都包括一种精神状态的证明),又阐述了某个特定的罪行(例如杀人或者强奸)的构成形态。同时本书还对这些犯罪的行为人处以刑罚的社会政策进行了说明。虽然其他国家的刑法可能和美国刑法有显著差别,但我们希望我们的政策分析可以带动有关对美国刑法体系与其他国家刑法体系之间异同点的生动讨论和辩论。

在每章介绍了法规和相关刑事政策后,我们编撰了大量的“案例”,读者可以通过阅读和分析这些案例将所学习到的法规应用到实际的案情中,判断嫌疑人犯下哪宗(些)罪,何种辩护可能成功地避免当事人被判有罪并被处以刑罚。然后,我们将在普通法和《模范刑法典》的基础上,给出上述案例的参考答案或解释,读者可以将他/她的答案和我们的参考答案进行一番对比,从而测试他/她对本章的内容是否已经理解透彻。因此,读者通过阅读本书,既可以学到美国刑法的基础知识,又能够了解到如何在具体情况下实际运用这些法规,这将有助于读者对这门学科有一个全面的理解。

我们衷心希望您喜欢本书,并从中获益!

Richard G. Singer

John Q. La Fond

2003年3月

(胡河/译)

CRIMINAL LAW

Examples and Explanations *Second Edition*

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To Karen : For the laughter , and the love
—— *R . G . S .*

To my mother , Dorothy Quinn La Fond
—— *J . Q . L .*

Preface

Criminal law forces us to confront the most important moral dilemmas of our times. More than most law school courses, criminal law engages our emotions as well as our intellects. This book will encourage that engagement. Many of our examples are taken from current topics of intense public debate such as euthanasia, abortion, rape, and black rage. But the underlying normative challenge of the criminal law—justifying the coercive use of state power against individuals—transcends particular controversies. Indeed, this debate has challenged great thinkers of the past like Plato, Socrates, Aquinas, and Kant. And it will certainly challenge us and future generations. This text keeps that tension in sharp and continuous focus.

This book seeks to help students master a broad range of criminal law doctrines. But it does not merely present a collection of “rules.” It also explains and analyzes those doctrines and the problems they generate in a cohesive and comprehensive way. Where there are ambiguities—either theoretical or practical—we discuss them. Not to do so would mislead students and trivialize the criminal law. By recognizing how complex the tapestry is and how interwoven are its various threads students can appreciate the rich nuances of its doctrine and policy. This book examines that complexity, while remaining easy to read and to understand. Its sole purpose is to help students learn.

We were attracted to the format of the *Examples and Explanations* series long before we began work on this book. The format fits the typical law school classroom experience by posing challenging problems first (without answers of course!), followed by proposed solutions. We also enjoyed the humor evident in some other volumes in this series. Learning is serious business—but no business is so serious that it cannot be approached with an occasional smile. We have tried to sprinkle humor generously throughout the book.

From all reports, students have found the First Edition of this book very helpful not only for mastering criminal law, but also for learning what is expected of them on law school exams. We are pleased that the First Edition was successful. We have maintained the same basic approach, but we have thoroughly updated the Second Edition. New material has been added on important and current topics like sexual predator laws, stalking statutes, and the Federal Sentencing Guidelines. Examples drawn from newspaper

headlines, such as the Columbine High School massacre and high-tech computer crimes, will interest and challenge you. We think that you will enjoy this book and that it will help you, as it has evidently helped many other students, to succeed in your criminal law course.

Finally a plea for your help. This book can only be successful in helping students if the authors know what works—and what doesn't. We are anxious for your comments—negative and positive—on the piece, either on specific topics or hypotheticals, or generally. Please write us at our email addresses and give us your criticisms and comments. We can't promise we'll respond directly, but we can promise that we'll consider every point as we move toward a third edition.

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To all who read this book, we hope you learn from it and enjoy it.

Richard G. Singer

John Q. La Fond

February 2001

Acknowledgments

This book bears the name of its “authors.” But it required the hard work, assistance, and sacrifice of many people. Our students contributed helpful comments on many of the examples in this book, thereby saving future students the foibles found in earlier versions. Research assistants, particularly Laura Anglin, Jenifer Hanlon, Tara Manley, and Anne-Marie Sargent at Seattle University School of Law, and Seawn Hersini and Katherine Schoofs at the University of Missouri-Kansas City School of Law, made significant contributions to the manuscript. Moral support was provided by our respective Deans—Roger Dennis, Jim Bond, and Burnele Powell. The tedious and frustrating job of reading our scribbles and making sense of them fell to wonderful and indefatigable secretaries: Noreen Slease at Seattle University, Norma Karn at the University of Missouri-Kansas City School of Law, and Mary Ann Purvenas at Rutgers University. We wish especially to thank our respective spouses, Karen Garfing and Evelyn La Fond, for their continuing tolerance and patient support.

We wish to thank the following copyright holder who kindly granted permission to reprint excerpts from the following material:

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