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第七版 Seventh Edition

刑法与刑事诉讼法

CRIMINAL LAW AND ITS PROCESSES

案例与资料
Cases and Materials

[美] 桑福德·H·卡迪什 (Sanford H. Kadish) / 著
斯蒂芬·J·舒尔霍弗 (Stephen J. Schulhofer)



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刑法与刑事诉讼法: 案例与资料

XINGFA YU XINGSHI SUSONG FA ANLI YU ZILIAO

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化,评介人才标准将国际化,教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器,维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则,也不单单是说理论道的公平教义,还是具有可操作性的精细的具体专业技术。像医学专业一样,这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出:“为适应经济全球化和科技革命的挑战,本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业,以及为适应我国加入WTO后需要的金融、法律等专业,更要先行一步,力争三年内,外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业,可以对部分课程先实行外语教材、中文授课,分步到位。”

引进优质教育资源,快速传播新课程,学习和借鉴发达国家的成功教学经验,大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求,中信出版社与外国出版公司合作,瞄准国际法律的高水平,从高端入手,大规模引进畅销外国法学院的外版法律教材,以使法学院学生尽快了解各国的法律制度,尤其是欧美等经济发达国家的法律体系及法律制度,熟悉国际公约与惯例,培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书,作者均为富有经验的知名教授,其中不乏国际学术权威或著名诉讼专家,历经数十年课堂教学的锤炼,颇受法学院学生的欢迎,并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门,以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括:

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书,是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是:内容精炼,语言深入浅出,独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领,浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析,归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著,这套丛书历经不断的修改、增订,吸收了最新的资料,经受了美国成熟市场的考验,读者日众。

这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

CRIMINAL LAW AND ITS PROCESSES
CASES AND MATERIALS



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PREFACE

We have tried in this edition to freshen the material while at the same time maintaining close continuity with it. Thus we have left unaltered the basic organization, tone, and perspective of the book. We have replaced relatively few of the major cases, only doing so to improve teachability or to introduce new developments. Most of the changes have been in the reorganization of some chapters and in the Notes and Problems, where we try to present the most interesting ideas in the non-case literature, as well as new issues of importance.

Why *substantive criminal law*? We conceive of a criminal law course as serving the ends of both general legal education and training in the criminal law in particular. There are, as we see it, three chief ways the course can contribute to the general legal education of the law student. One way is to provide a vehicle for the close reading of statutory texts — primarily the Model Penal Code, but also state statutory formulations — to help balance the emphasis on case law in the first-year curriculum.

The second way is to introduce the student to the operation of a system of rules and principles designed to apportion blame and responsibility in accordance with our moral norms, subject to the practical restraints of a functioning system. While the criminal law is the primary institution serving this function, fault and wrongdoing each play a role in determining liability throughout the law. Hence some understanding of the analytical elements in assessing blame for a person's conduct or for the conduct of another, and of the concepts of excuse and justification, is an important element in a lawyer's legal education.

The third way the criminal law course serves the purposes of general legal education is by enlarging insight into the potentialities and limitations of the law as an instrument of social control. We have in mind the hard problems encountered in using the law for this purpose: the difficulty of giving legal form to the compromises made necessary when goals conflict; the creation of institutional arrangements — judicial and administrative — appropriate to the goals sought; the limitations — moral and practical — on the use of the law as a means of social control; the relation of legal controls to other social processes.

The substantive criminal law provides an unusually suitable introduction to these pervasive problems of the law. The ends criminal law serves involve social and human values of the highest order. Its means, entailing the imposition of brute force on the lives of individuals, are potentially the most destructive and abusive to be found within the legal system. The issues it raises and the setting in which it raises them are compelling and vivid. Its institutions are acutely controversial and often controverted. And one of its underlying themes is the momentous issue of the reconciliation of authority and the individual. As Professor Herbert Wechsler has written:

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.¹

What of the course's narrower purpose of training students in the criminal law in particular? Here there are two main pedagogic objectives. One is to furnish a solid foundation for those who will, in greater or lesser degree, participate directly in the processes of the criminal law. This foundation does not require mastery of the full range of technical skills and information held by the practicing criminal lawyer or administrator, but rather the development of confidence in handling principles and rules — judge-made or statutory — through knowledge about the larger implications of the doctrines and institutions of the criminal law. The second purpose is to create in law school graduates who will have little occasion to practice criminal law an understanding of the problems of the criminal law. As influential members of their communities — and more directly as judges, legislators, or teachers — lawyers versed in the principles of criminal law can bring an informed intelligence to the challenge of solving some of the most vexing problems of our times.²

Revisions for the seventh edition. In the procedural sections (Chapter 1), we have streamlined the materials but have retained those fundamentals of criminal trial procedure that we consider essential for understanding the issues in substantive criminal law (rules of evidence, burden of proof, presumptions, and the role of the jury). These topics can now be covered in several classes. We believe that a brief but intensive treatment of this material at the outset of the course adds immeasurably to the student's appreciation of the concrete setting in which substantive law issues arise and the practical considerations that so often influence those debates. We have retained in Chapter 1 a substantial but more tightly edited section dealing with the ethical responsibilities of the criminal defense attorney. The themes of this section are central to the study and practice of law, and we believe that students can profit from exposure to these themes early and often in their legal education.

The growing complexity and importance of sentencing procedure and sentencing guidelines pose a dilemma for an introductory criminal law course. The subject is too important to be ignored but too complex to be covered comprehensively. We have sought to strike an appropriate balance by providing in Chapter 2 both a textual summary of current sentencing procedures and a principal case that can serve as a focal point for discussion in class. Though brief and tightly edited, the material is sufficient to illustrate for students the mechanics of how guidelines work, as well as the tough jurisprudential issues underlying them.

1. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1087-98 (1952).

2. For a fuller discussion of the role of the criminal law course in a law school curriculum, see Sanford H. Kadish, *Why Substantive Criminal Law — A Dialogue*, 29 Clev. St. L. Rev. 1 (1980).

In the substantive sections we have updated the cases, added Notes and Problems dealing with issues of current concern, and done some reorganization of the material. For example, we have tried in the provocation section and the mental disorder chapter to tighten (as well as lighten) the presentation of material, and in the rape chapter to cover some of the expanding issues, as well as to permit sustained attention to statutory drafting and interpretation. Among the new principal cases are *City of Chicago v. Morales* (vagueness and new strategies of policing); *Commonwealth v. Fischer* (mistake of fact in rape); *State v. Guthrie* (premeditation); *People v. Kevorkian* (assisted suicide and causation); *Public Committee Against Torture v. State of Israel* (necessity defense); and *Washington v. Glucksberg* (euthanasia).

As in previous editions, the substantive materials continue to focus on imparting an understanding of what is often called the “general part” of the criminal law — that is, those basic principles and doctrines that come into play across the range of specific offenses (for example, *actus reus*, *mens rea*, and the various justifications and excuses). We believe that mastery of the detailed elements of many particular crimes is not an appropriate goal for a basic criminal law course. Nevertheless, we have found that understanding of the basic principles is enhanced by testing their applications and interactions in the context of particular offenses. Accordingly, we examine in detail three offense categories: rape (Chapter 4), homicide (Chapter 5), and theft (Chapter 9). The chapter on rape provides an opportunity to focus on the definitional elements of a major crime in a context that has become the focus of acute controversy because of changing perceptions and changing social values. The theme of the homicide chapter is the task of legislative grading of punishment in a particularly challenging area. The theft chapter explores the significance of history and the continued impact of old doctrinal categories on the resolution of thoroughly modern difficulties in defining the boundaries of the criminal law.

Use of the materials in diverse teaching formats. Over the years, law schools have experimented with a variety of formats for the basic criminal law course. Although the year-long five- or six-hour course remains common, some schools offer criminal law as a four- or even three-hour course, and some schedule the course in the first or second semester or even in the second or third years. Under these circumstances, a short book designed to be taught straight through, without adjustments or deletions, is bound to prove unsatisfactory for many users. In preparing the seventh edition, we have sought to edit the materials tightly enough to avoid significant surplusage for the average course, but we have not attempted to preempt all possible judgments about inclusion and exclusion. Rather, we thought it essential to allow for teachers to select topics that accord with their own interests and with the curricular arrangements at their own schools. Thus, we have aspired to create a flexible teaching tool, one that reflects the rich diversity of the subject. For the five- or six-hour, year-long course, the book can be taught straight through, perhaps with some minor deletions. For a four-hour course, and especially in the case of a three-hour course, substantial omissions will be necessary. The Teachers Manual presents detailed suggestions for appropriate coverage and focus, together with specific suggestions for sequencing and class-by-class assignments.

Collateral Reading. There are a number of useful readings for students interested in pursuing further the questions developed in this casebook. Some of the

suggestions that follow may no longer be in print, but they are available in virtually all law libraries.

Comprehensive Works: The following publications should be of considerable use to the student:

American Law Institute, Model Penal Code and Commentaries (1980-1985). This is a 6-volume set containing the text and supporting commentaries of the Model Penal Code. The commentaries constitute the most comprehensive available examination of the American substantive criminal law.

Encyclopedia of Crime and Justice (S. H. Kadish ed., Macmillan and Free Press, 1983). This work contains relatively short treatments, written by experts for the general lay reader, on virtually all the subjects covered in this casebook. It should prove particularly helpful for orientation and perspective. A second edition is in preparation under the editorship of Professor Joshua Dressler.

Textbooks: There are several conventional textbooks that are useful for review purposes:

Wayne LaFare, *Criminal Law* (West Publishing Co., 3d ed. 2000). A widely used hornbook; comprehensive and heavily footnoted.

Joshua Dressler, *Understanding Criminal Law* (Matthew Bender, 2d ed. 1995). A shorter textbook, available in paperback; its coverage largely focuses on the subjects covered in this casebook.

In addition, students may wish to consult English materials. Professor Glanville Williams has written two outstanding accounts of the criminal law: *Criminal Law: The General Part* (2d ed. 1961) and *Textbook of Criminal Law* (2d ed. 1983). The latter addressed specifically to law students.

Monographs: The following books deal selectively with aspects of the criminal law:

George Fletcher, *Rethinking Criminal Law* (Little, Brown, 1978): A comparative and theoretical treatment of the criminal law that is critical of dominant thinking in the field. See also Fletcher's more recent *Basic Concepts of Criminal Law* (Oxford Univ. Press, 1998).

H. L. A. Hart, *Punishment and Responsibility* (Oxford University Press, 1968): A collection of powerfully argued essays that have had a great influence on contemporary thinking concerning issues of punishment and excuse.

Sanford H. Kadish, *Blame and Punishment—Essays in the Criminal Law* (Macmillan, 1987): Authored by one of the editors of this casebook, a collection of essays, most of which grew out of the experience of teaching prior editions.

Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, 1968): A classic treatment of the problems of criminalization and the theory of punishment.

Style. Citations in the footnotes and text of extracted material have been omitted when they did not seem useful for pedagogical purposes, and we have not used ellipses or other signals to indicate such deletions. Ellipses are used, however, to indicate omitted text material. Where we have retained footnotes in readings and quotations, the original footnote numbers are preserved. Our own footnotes to excerpts and quotations from other works are designated by letters, while footnotes to our own Notes are numbered consecutively throughout each chapter.

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