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CRIMINAL LAW

Homicide and Exculpation

Wolters Kluwer

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CRIMINAL LAW: HOMICIDE AND EXCULPATION

Daniel B. Yeager
Professor
California Western School of Law

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To my wife, Shelly, whom I love with all my heart,
with all my soul, with all my might;
and to my sister, Stephanie, whom I will miss
down to the last drop of my existence.

PREFACE

Twenty-five years into full-time teaching, I have written a casebook. The occasion is my finally acknowledging that my non-trivial differences with the prominent text I had been using since 1991 began to place a sort of drag on my teaching. That I seemed constantly to be cutting against the book frustrated my students more than a little as I attempted to locate the editors' methods within my own way of thinking, writing, and talking about criminal law. My intended audience is primarily first-year law students, whose professors would adopt this book for their required, one-semester course on criminal law. A secondary audience is undergraduates in pre-law programs, where courses in criminology, sociology, or political science include a course in substantive criminal law. Below, I elaborate the three areas in which this casebook departs from typical casebook conventions: 1) its structure; 2) the way in which cases are presented; and 3) the function and focus of questions and note materials.

1. STRUCTURE: THE INTERNAL RELATION OF ACCUSATIONS AND DEFENSES

The basic convention of casebooks in criminal law is to warm up with chapters on courts, justifications of punishment, proof beyond a reasonable doubt, legality, prosecutorial discretion, and other topics that are both relevant and of personal interest to the editors. After that, there is a striking sameness to the structure of criminal law casebooks, which tend to stick to the following order: 1) the general part of criminal law: action, nonaction, and inaction, followed by sections on mens rea; 2) the special part of criminal law: grave crimes (murder, manslaughter, rape); 3) more on the general part of criminal law: causation, attempt, group criminality, justifications, and excuses; and 4) more on the special part of criminal law in the form of a smattering of other crimes. This is the setup not only of, for example, *Kadish and Schulhofer*, but at least a dozen other major-press offerings that have fashioned themselves after that leading text.

The basic convention gets off to a confusing start by indicating that the early sections on the voluntary-act requirement, omissions, and mens rea are somehow distinct from the later sections on

justifications (self-defense, necessity) and excuse (intoxication, insanity, duress). But they are not; nonaction, inaction, and lack of mens rea *are* excuses. Thus it is never made apparent just how the beginning and ending sections of the leading texts from the major presses relate either to each other or to the rest of the material within the texts themselves.

To correct what I take to be a structural problem with the basic convention, I avoid any indication that the exculpatory and inculpatory aspects of criminal law are distinct. Rather than treat crimes and defenses as "tubs on their own bottoms" (as Duncan Kennedy might put it), I present the defenses *within* the crimes. In other words, I structure the book to bring out that crime occurs only in the absence of fully or partially successful exculpatory pleas. Indeed, the book is built upon the law of homicide, which brings out the various exculpatory pleas as part of, rather than apart from, what counts as a homicide. Although homicide is the crime that organizes the book, the elements and scope of other crimes are presented within the law of homicide. For example, comprehension of assault, burglary, arson, kidnapping, mayhem, robbery, and rape is crucial to the cases I use to present the law of felony murder. Those crimes are analyzed in the cases, questions, and notes sufficiently to provide the students with competency in the grammar of those crimes. If as the course nears its end any doubt about the efficacy of such an emphasis remains, the final chapter poses a chance to map those skills acquired in such a close study of homicide onto the law of non-forcible theft, an exercise that will as a by-product provide a high payoff in preparation for the Bar exam of any state.

To illustrate what I mean when I say I present defenses *within* crimes, the first two cases in my book do bring out the defenses of nonaction and inaction (and the narrow exceptions to those defenses); not, however, in a way that divorces the notions of nonaction and inaction from the specific criminal accusations in which their meaning is raised. The basic convention is to present human action as an *introductory* matter: an essential element of crime that operates in all cases except those where liability is based on an omission; that is, where one can be held responsible for doing nothing. The basic convention is to convey the central concepts of the general part of criminal law with no attempt at thematic unity. *Kadish & Schulhofer*, for example, relies on statutes criminalizing, inter alia, public drunkenness, child abuse, eloping, and malicious destruction of

property as the vehicles for expressing the concepts of action, inaction, and mens rea. One gets the impression from this assortment of criminal prohibitions that the crimes are both separate from and subordinate to the generalized concepts on which they depend.

My approach, contrariwise, confronts the notions of action, inaction, and mens rea as aspects of negligent homicide, manslaughter, or murder. Whether an accused has done something or can be held responsible for doing nothing are questions that arise within, not apart from, crime. Put slightly differently, the notions of action and inaction are both inculpatory and exculpatory and have no real point in criminal law apart from cases in which there is some question about whether an action really did occur (or whether a duty-based omission can, on those facts, substitute for action). Moreover, by tying the different concepts that make up the general part of criminal law to modes of homicide rather than to a hodgepodge of unrelated crimes (that are then promptly dropped from further discussion within the text), the internal relation of the general part of criminal law to the special part can be more successfully conveyed to students.

As my casebook progresses through the law of homicide, it progresses through the defenses which determine whether a homicide, or what type of homicide, has been committed. On the one hand, the casebook is ordered to allow students to absorb the elements or grammar of negligent homicide, involuntary manslaughter, implied-malice murder, express-malice murder, premeditated and deliberate murder, provoked killings, and killings done in both imperfect and perfect self-defense. On the other hand, those modes of homicide make no doctrinal sense apart from the role that actions and intentions play in criminal responsibility. The law of homicide *is* the law of mens rea; they are not two separate spheres of doctrine that could somehow be studied in isolation. Accordingly, throughout the homicide materials are sustained analyses of accident and mistake, which together account for the bulk of pleas that harm was brought about unintentionally. So too is homicide well-suited to the study of intentional harm as well as harm that is neither intentional nor quite unintentional—that is, harm brought about by what lawyers call "recklessness."

2. CASES: DOING AWAY WITH STICK-FIGURE ACCOUNTS OF FACTS

The basic convention of all casebooks—not just casebooks in criminal law—is to present heavily edited appellate opinions from all over the place, followed by note material that poses more questions and, in turn, alludes to more appellate opinions from all over the place. The typical rhythm or balance of the books is, for each segment of material, to put in three or four opinions of two or three pages each, followed by blurbs on about double that number of cases in notes and questions. Due to a widespread habit of over-editing, the cases feature stick-figure accounts of the facts, followed by (also edited) statements of the controlling legal rules at stake, which are then applied to the facts to produce a ruling. The notes and questions tend to present contrary rulings with no explanations, statutes whose relation to the case in question goes unexplained, and a series of new questions (to which no answers are provided), some implied by the case and some entirely peripheral. Not infrequently, the questions will change a single fact from the case, ask what outcome this should obtain, and then cite a case, again without elaborating. Interspersed is a dose of the musings of this or that professor, whose attempts to summarize a complex area of law are usually reduced to a few sentences. These grenades are continually lobbed over the wall throughout the text.

After reading over-edited cases and lengthy note materials, students are often in a fog as to what exactly they have just learned. Are they to take from their readings that statutes are so textually open that just about any interpretation is plausible? Or is the message that the law is all over the lot and, as a result, students must memorize a half-dozen approaches to each question? Whether a case or statute is representative in any sense is rarely stated. Instead, the intention of the editors seems to be to get as many plausible positions shoe-horned into the cases and notes as possible.

To correct this difficulty with the way cases are selected and presented, my manuscript relies on full-text opinions (though I have redacted some digressions and dissents whose ramblings stymie the momentum of the case) preceded by an introductory summary of the law that the case will address. In the selection of cases, my strong preference is for courts that attempt to reconcile their opinions with a view of criminal law that is thematically unified, respectful of the history of legislative and common-law development of the doctrine in question, yet open to reconsideration and refinement. By presenting

the whole case as opposed to a bare-bones version, in-class study of the case can be much more sensitive to the facts, which, when unedited, are both lengthier and harder to decode than ready-made versions, which do too much of the students' own dirty work for them. Because we have only one case to master per session, however, the extra time spent in class on facts is available. As for the payoff of more facts, to my mind it is only a full factual account that makes agreement *or* disagreement with an opinion possible. With stick-figure accounts of facts, neither praise nor criticism of the opinion seems in order. Indeed, on stick-figure facts, conventional texts emit a vibe more consistent with a hornbook than a casebook: rules get stated, but not applied in a specific context in which their application can be fully appreciated.

Another payoff of full-text opinions is that by including issues that may be peripheral to the narrow question meant to be isolated for study, they reveal to students how appellate litigation features multiple issues and how to integrate, prioritize, and juggle those multiple issues in a single discussion. For example, cases herein do often feature, as they must, challenges to the factual sufficiency of the evidence and challenges to a trial judge's choice and phrasing of jury instructions. But in addition to those essential bases of criminal appeals, cases in this book include challenges to the admissibility of evidence (based on, e.g., unduly prejudicial content, physician-patient or spousal privilege, a confession coerced from defendant by police), claims of perjury on the part of a prosecution witness, or alternative theories of liability that were covered earlier in the course or have yet to be covered. This way, students learn the whole case, not just a boiled-down version, while benefitting at once from review of familiar material and sneak peeks at future material that can be made easier by repeated passes at the same ideas, though with different levels of intensity.

Finally, full-text opinions confront standards of review in ways that heavily edited opinions slough off. For instance, when reviewing a trial court's ruling on probable cause to charge a defendant, or the factual sufficiency of a jury verdict, appellate opinions sometimes devote significant energy to evaluating not merely whether the ruling below was erroneous, but whether it was *plainly* erroneous. Indeed, much disagreement in cases that generate separate opinions is not merely about whether the jury was right or wrong, but about whether the jury, if wrong, was nonetheless rational in its application of the

facts to the instructions. As crucial as standards of review are to appellate litigation, their importance is easily diminished by over-edited opinions.

3. CASEBOOK AS TEACHING TOOL: QUESTIONS AND NOTES

One frustration in teaching any audience is the gap between the intended and actual progress made by the class. Too often the discussion bogs down at levels that are below the professor's expectations, which, as a result, are consequently adjusted downward. But in some instances the under-performance of the class owes to the students' difficulties in anticipating or preparing for the more difficult content, which too often is not made explicit in the cases, or is just elided in the questions and notes (in a way I referred to in Part 2 above as lobbing grenades over the wall).

A. Questions: Raising the Bar by Scripting Class Dialogue

Once the facts, procedural history, and disposition of the case are brought out in dialogue with students, I pose the questions that follow each case to the students in the order in which they appear in the text. This takes away, favorably in my view, much of the mystery of the in-class discussion, which is more likely to flourish when the students have prepared their answers to the questions. If the questions are sensibly ordered and pitched at the right level of specificity and sophistication, discussions will elevate rather than leave students, who otherwise may feel that the questions come from out of nowhere, to attempt to decode the questions on the fly.

The answers to most of the questions are in the cases. The process of extracting that information will in the end make the students better and closer readers; so too will the students begin to pick up on the sorts of questions that count in close readings of cases. By design, some of the questions are real softballs, lobbed in to highlight key information and also to provide some momentum in the question–answer dialogue, which will inevitably snag at least a little on some of the harder questions. The answers to the harder questions are not in the cases. They require a different sort of effort, which repays not just an attentive reading of the cases, but careful thought about the question and equally careful study both of the introductory materials preceding the cases and of the notes that follow.

B. Notes: Elaborating, Not Repudiating, the Cases and Questions

Following each set of questions is a set of notes. There I provide information and explanations that will help the students see the doctrinal implications of the cases. In addition, the notes attempt to put into context the legal maneuverings and procedural niceties with which students are likely to be unfamiliar. These notes are intended to provide, little by little, a sufficiently detailed depiction of police investigation, charges, pre-trial motions, verdicts, judgments, post-trial motions, sentencing, and appeals that permit the cases to make sense procedurally in their live adversarial context rather than function as hornbook proclamations about legal rules. More specifically, the book contains sufficiently complete discourses on procedural matters such as: charging (probable cause, complaints, informations, preliminary hearings, grand juries), pre-trial motions, double jeopardy and other doctrines of past adjudication (as in issue preclusion), rights to counsel and trial by jury, trial courts' sua sponte obligations, interlocutory appeals, general v. special verdicts, a range of sentencing matters (determinate v. indeterminate, concurrent v. consecutive, executed v. suspended, first-offender v. recidivist, incarcerative v. probationary, probation v. parole, proportionality), harmless error, burdens of proof (including presumptions), direct appellate v. collateral attacks on convictions or sentences (and, accordingly, the operation of discretionary review and removal jurisdiction) to name just a few. Indeed, I try to take nothing for granted regarding what is being taught or absorbed in other classrooms: there are notes elaborating, for example, the meaning and operation of case captions, differences between civil and criminal litigation, and the functions of trial judges and magistrates.

Rather than blurbs taken from dozens of cases, statutes, and academic commentary, the notes usually include a detailed version of just one pertinent case, the function of which is always set forth. As for statutes, they are included or embellished in the notes only when they add something to the cases themselves, which may or may not include statutory texts. For example, a case may set forth a relevant statute, but if the statute is terse, or makes no mention of punishment, then jury instructions or additional statutory material will appear in the notes. Frequently California decisions, for example, allude to the Model Penal Code (though California law is largely based on its own 1872 Penal Code), as do the New York decisions, given that the

revised New York Penal Code of 1967 was a reaction to the first official draft of the Model Penal Code. But I do not reproduce every Model Penal Code provision in the notes or elsewhere. Because there is no payoff for saddling students with the responsibility of absorbing superfluous data, I present only those Model Penal Code provisions whose take on the law diverges in a remarkable way from the approach presented in the principal case at hand. In place of academic commentary, the secondary materials I provide in my notes are to my mind more immediately pertinent to the cases after which they appear. They contain, for example, excerpts from the trial transcript and intermediate appellate court ruling (in cases that are in the state's high court), subsequent legislative and precedential history of the case in the event that the ruling is reversed or modified, and, periodically, gossip about the litigants, whose post-ruling lives are always of interest to the students.

This book is considerably shorter than the conventional books in introductory criminal law, which are more than twice its length and, as such, impose more than twice the reading load that can be accomplished in a 15-week, three-credit course. The excess bulk of those texts leads to teacher's manuals that propose a series of alternative syllabi, each omitting more than half the book's content from the plan. While that sort of cover-all-bases approach is popular, it does indicate a lack of thematic unity to the books, which in place of unity are meant to be flexible enough to accommodate the intentions, preferences, and limitations of whoever is teaching from them. This book, on the other hand, proposes just one structure, and is meant to be read in its entirety in a series of 15-page assignments set forth in a single syllabus presented in the accompanying teacher's manual.

Textbook Resources

The companion website for *Criminal Law: Homicide and Exculpation*, available at www.aspenlawschool.com/books/yeager_crimlaw, includes additional resources for instructors.

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NOTES ON EDITING CASES

The cases herein indicate redacted material by ellipses, except for the redaction of supporting authorities and footnotes, which are not indicated. Footnotes that are retained within the text of cases retain their original numbering. Editor's footnotes appear outside the cases and are numbered consecutively throughout the text. For uniformity, citation forms within the cases have been conformed largely to the Bluebook; parallel cites are redacted. References to the California Penal Code and California Jury Instructions (Criminal) are to the West imprint, specified by year of publication. References to the Model Penal Code and Commentaries are to the 1985 Official Draft unless otherwise noted.