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Cases and Materials

MARKUS D. DUBBER
SUNY Buffalo Law School



Wolters Kluwer

Law & Business

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To my family

Preface

Why a casebook on New York criminal law? Because American criminal law should be recognized, and taught, as the codified, jurisdiction-based subject that it has become.

In 1952, the American Law Institute started its work on the Model Penal Code, which was completed ten years later. Since then American criminal law has undergone dramatic changes, notably a period of widespread codification that has led to a splintering of the “common law” of crimes into the criminal law of fifty states (and federal law, plus the District of Columbia) based on the criminal code of each jurisdiction.

In a post-MPC world, it is no longer possible to teach criminal law as a common law subject. First, it no longer makes sense to speak of American criminal law as a single body of law, or—for that matter—as a subcategory of some larger body of “Anglo-American” common law with origins in, and increasingly tenuous connections to, English criminal jurisprudence. American criminal law today is jurisdiction-specific.

Second, American criminal law today is code-based. American courts have long surrendered their common law power to define crimes; even in the few jurisdictions that did not revise their criminal codes in the wake of the Model Penal Code, legislatures hold the monopoly in criminal lawmaking. American criminal law today is largely an exercise in statutory interpretation, rather than in common law judging.

Rethinking Criminal Law Teaching

Criminal law teaching in the United States should reflect the transformation of its subject matter in several ways.

Criminal law as codified. In general, American criminal law teaching today ought to reflect the fundamental significance of criminal statutes in general, and criminal codes in particular. In most American jurisdictions, courts today begin their analysis with the applicable criminal code, and so should teachers and students.¹ Modern criminal codes are more than collections of statutes; they set out a comprehensive, interconnected, and detailed system of criminal law, including the formal prerequisites and general principles of criminal liability (the so-called “general part” of criminal law) and the definitions of criminal offenses (the “special part”). Students need to learn how to read not only statutes, but codes. Traditional casebooks, which excerpt court opinions as self-standing sources of law, cannot capture the reality of American criminal law as a codified subject.

Domestic comparative law. Moreover, the basic introductory course in “criminal law” should be reconceived. American criminal law ought to be taught as a species of domestic comparative law, comparing and contrasting the criminal laws of the fifty states and federal criminal law — along with the District of Columbia, military criminal law, and Native American criminal law.²

Jurisdiction-based teaching. Finally and most important for our purposes, the revamped overview course in American criminal law should be supplemented by jurisdiction-specific courses. Law schools in the major jurisdictions should lead the way by offering courses on their respective jurisdiction’s criminal law, with law schools in other jurisdictions eventually following suit. (The development of jurisdiction-specific courses on criminal law in turn will result in a more nuanced comparative approach in the traditional overview course on American criminal law.) Criminal justice programs throughout the country have long recognized the importance of providing their students with training in the criminal law, and thus the criminal code, that they will be charged with enforcing and applying upon graduation. Why should a criminal defense attorney or prosecutor know less about her jurisdiction’s criminal law upon graduation from law school than a police officer, parole officer, or prison guard with a criminal justice education?

Some steps already have been taken in the direction of jurisdiction-specific criminal law teaching. Courses and accompanying coursebooks are now being offered on federal and California criminal law.³ Note, however, that these are the two most significant systems of criminal law in the United States where comprehensive modern reform efforts have failed. Federal and California criminal law thus represent the distinct minority of American jurisdictions, most of which have significantly revised their criminal codes in the wake of the Model Penal Code. The federal and California criminal codes are little more than collections of criminal offenses, listed alphabetically in one case and loosely grouped by protected interests in the other. Without a comprehensive general part that sets out the general prerequisites of criminal liability, they do not qualify as modern criminal codes — which is no surprise given that the federal criminal code is the result of a clerical effort in

1. For that reason, excerpts from applicable statutes are reproduced throughout the book, even where they are not quoted in the text of the opinion.

2. See generally Markus D. Dubber, “Criminal Law in Comparative Context,” 56 J. Leg. Educ. 433 (2007); see also see Markus D. Dubber & Mark G. Kelman, *American Criminal Law: Cases, Statutes, and Comments* (2005).

3. Peter W. Low, *Federal Criminal Law* (2d ed. 2003); Norman Abrams & Sara Sun Beale, *Federal Criminal Law and Its Enforcement* (4th ed. 2006); Myron Moskowitz, *Cases and Problems in California Criminal Law* (1999); Steven F. Shatz, *California Criminal Law: Cases and Problems* (2d ed. 2004).

1948 to assemble most existing federal criminal offenses in one place and that the California Penal Code is over 135 years old.

The Case of New York

The present coursebook on New York criminal law covers the most significant American system of criminal law that was substantially revised on the basis of the Model Penal Code. Other criminal law systems followed the Model Penal Code more closely (e.g., New Jersey, Pennsylvania), but none matches the national influence of New York criminal law.

New York drastically revised its criminal code in the wake of the Model Penal Code in 1967. Since then New York courts have developed a sophisticated and comprehensive criminal jurisprudence based on the state criminal code (the New York Penal Law), full of first-rate opinions exploring doctrine in great detail, carefully weighing the considerations underlying a particular rule—opinions that, in other words, make for good “teaching cases.” (It’s no accident that traditional first-year criminal law coursebooks feature a fair number of New York opinions.)

The significance of New York criminal law for American criminal jurisprudence is evidenced not only by the frequency with which courts in other jurisdictions cite criminal law opinions by New York courts but also by the influence of the New York Penal Law revision on criminal code reform efforts in other jurisdictions (including Delaware, Maryland, Texas, California, Kentucky, Michigan, and Connecticut).

The New York Penal Law and the Model Penal Code

Similarities and differences between the New York Penal Law and the Model Penal Code are highlighted throughout this coursebook. The current New York Penal Law is the result of a comprehensive revision of New York criminal law in light of the Model Penal Code project (L. 1965, ch. 1030, eff. Sept. 1, 1967). The Model Penal Code’s Chief Reporter, Professor Herbert Wechsler of Columbia Law School, also served on the New York Temporary Commission on Revision of the Penal Law and Criminal Code. The Commission was chaired by Richard Bartlett, a State Assemblyman; Richard Denzer, a longtime prosecutor, served as its executive director.⁴

The Model Penal Code was the first systematic American criminal code.⁵ The Code clarified that the legislature, not the judiciary, held the power to recognize and define offenses, enunciating the general principles of criminal liability in its “general part” and defining specific offenses in its “special part.”

4. See generally Richard Bartlett, “Criminal Law Revision Through a Legislative Commission,” 18 *Buff. L. Rev.* 213 (1968-1969); Richard Denzer, “Drafting a New Penal Law for New York,” 18 *Buff. L. Rev.* 251 (1968-1969).

5. See generally Markus D. Dubber, *Criminal Law: Model Penal Code* (2002); see also Paul H. Robinson & Markus D. Dubber, “The American Model Penal Code: A Brief Overview,” 10 *New Crim. L. Rev.* 319 (2007).

American criminal law before the Model Penal Code had no general part; it was content to leave the definition of many offenses to the “common law” courts. Moreover, state legislatures failed to systematize the offenses they did define, other than perhaps by placing them in alphabetical order.⁶ The Model Penal Code codified basic principles of criminal liability that apply to all offenses, like *actus reus*, *mens rea*, and causation, as well as defenses like necessity, self-defense, duress, infancy, and insanity. In its special part, the Code organized offenses by the interests they protected, including those of the person, property, family, public administration, and public order and decency.⁷

At times, the New York Penal Law, particularly in the general provisions of its general part (pt. 1), tracks the Model Penal Code quite closely. At other times, particularly in the specific offense definitions found in its special part (pt. 3), the Penal Law strikes out on its own, often retaining significant elements of previous New York law. Even in the special part, however, deviation from the Model Penal Code doesn’t necessarily imply rejection of its provisions, or its general approach. The Model Penal Code’s special part was limited in scope; it did not include any offenses “dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws.”⁸

In interpreting the Penal Law, New York courts frequently note, and debate the significance of, the similarities and differences between parallel provisions in the Penal Law and the Model Penal Code.⁹ In their analysis of Model Penal Code provisions, New York courts also often invoke the multi-volume Model Penal Code Commentaries, published by the American Law Institute in the 1980s.¹⁰

In areas where the New York Penal Law has not followed the Model Penal Code—by either leaving a particular issue uncoded or by intermingling earlier norms with Model Penal Code ones—New York courts have often struggled. The most obvious example here is the law of depraved indifference murder, a traditional category of homicide not found in the Model Penal Code that the New York Court of Appeals has had great difficulty integrating into the Penal Law’s MPC-based homicide and *mens rea* schemes.¹¹

Structure

The materials in this book follow the structure of the New York Penal Law. This organization highlights the book’s code-based approach. It also illustrates the code’s systematic structure. Following the Model Penal Code’s example, the Penal Law first sets out general principles of criminal liability, in Part One (General

6. The federal criminal code, Title 18 of the United States Code, retains this organization to this day, not having been revised in light of the Model Penal Code.

7. See, e.g., Markus D. Dubber, *Criminal Law: Model Penal Code* ch. 1 (2002).

8. Model Penal Code (Proposed Official Draft) 241 (1962).

9. See, e.g., *People v. Marrero*, 69 N.Y.2d 382, 507 N.E.2d 1068, 515 N.Y.S.2d 212 (1987) (ignorance of law).

10. American Law Institute, *Model Penal Code and Commentaries* (Official Draft and Revised Comments, 7 vols., 1980-85).

11. See, e.g., *People v. Payne*, 3 N.Y.3d 266, 819 N.E.2d 634, 786 N.Y.S.2d 116 (2004) (overturning depraved indifference murder conviction); Julia C. Mead, “At Home, Freed Killer Greets Friends and Wants Work,” *N.Y. Times*, Oct. 25, 2004, at B4, col. 1.

Provisions). Cf. Model Penal Code pt. I (General Provisions). Part Two (Sentences) of the Penal Law contains general provisions setting out the various sanctions that attach to the commission of offenses defined in the Penal Law's special part, Part Three (Specific Offenses), which makes up the bulk of the Penal Law. Cf. Model Penal Code pt. II (Definition of Specific Offenses). Part Four (Administrative Provisions) deviates from the Penal Law's systematic structure; it collects a panoply of disparate provisions, including both unrevised remnants of the old New York criminal code (such as sections on fireworks licensing) and recent add-ons (e.g., New York's version of various federal criminal statutes, such as RICO and money laundering).

Materials

The bulk of the materials in this book are drawn from opinions by New York appellate courts in criminal cases, with some lower court opinions and some unpublished ones thrown in for good measure. Statutory excerpts have been kept to a minimum, not because statutes are not important, but because, on the contrary, they are so important that their availability is assumed. While it is possible to use the present book as a self-standing coursebook, the use of a statutory supplement, including the relevant provisions in New York criminal law¹² and the Model Penal Code,¹³ is highly recommended. Excerpts from court opinions are occasionally accompanied by jury instructions—ordinarily taken from the excellent collection of model instructions published by the Office of Court Administration.¹⁴ These will prove particularly useful in areas of the law that are either uncoded (such as the law of causation) or muddled, or both.

A focus on the New York Penal Law, both in structure and in substance, should not obscure the fact that much of New York criminal law can be found outside the state's criminal code. While the Penal Law's general part applies to all criminal offenses, no matter where they may appear, the Penal Law's special part is by no means exhaustive. It is far more comprehensive than the Model Penal Code's and yet it does not cover the full scope and variety of New York criminal offenses. Criminal offenses, ranging from violations to misdemeanors and even felonies, appear in the following New York Consolidated Laws:

Abandoned Property, Agricultural Conservation & Adjustment, Agriculture & Markets, Alcoholic Beverage Control, Alternative County Government, Arts & Cultural Affairs, Assembly Rules, Banking, Benevolent Orders, Business Corporation, Canal, Civil Practice Law & Rules, Civil Rights, Civil Service, Cooperative Corporations, Correction, County, Court of Claims, Criminal Procedure, Debtor & Creditor, Defense Emergency Act 1951 784/51, Domestic Relations, Education, Election, Eminent Domain Procedure, Employers' Liability, Energy, Environmental Conservation, Estates, Powers & Trusts, Executive, Family Court, General Associations, General

12. See, e.g., *New York Penal Law and Related Provisions* (Markus D. Dubber ed., 2008).

13. See, e.g., Markus D. Dubber, *Criminal Law: Model Penal Code* (2002).

14. See New York Unified Court System, Criminal Jury Instructions 2d, <http://www.nycourts.gov/cji/> (visited Apr. 16, 2008).

Business, General City, General Construction, General Municipal, General Obligations, Highway, Indian, Insurance, Judiciary, Labor, Legislative, Lien, Limited Liability Company Law, Local Finance, Lost & Strayed Animals 115/1894, Mental Hygiene, Military, Multiple Dwelling, Multiple Residence, Municipal Home Rule, Navigation, New York City Civil Court, New York City Criminal Court, New York State Printing & Public Documents, New York Bond Act 649/92, Not-For-Profit Corporation, Parks, Recreation & Historic Preservation, Partnership, Penal, Personal Property, Port of Albany 192/25, Private Activity Bond 47/90, Private Housing Finance, Public Authorities, Public Buildings, Public Health, Public Housing, Public Lands, Public Officers, Public Service, Racing, Pari-Mutuel Wagering & Breeding Law, Railroad, Rapid Transit, Real Property, Real Property Actions & Proceedings, Real Property Tax, Religious Corporations, Retirement & Social Security, Rural Electric Cooperative, Second Class Cities, Senate Rules, Social Services, Soil & Water Conservation Districts, State, State Administrative Procedure Act, State Finance, State Technology, Statute of Local Governments, Surrogate's Court Procedure, Tax, Town, Transportation, Transportation Corporations, Uniform City Court, Uniform Commercial Code, Uniform District Court, Uniform Justice Court, Vehicle & Traffic, Village, Volunteer Ambulance Workers' Benefit, Volunteer Firefighters' Benefit, and Workers' Compensation,

as well as in these Unconsolidated Laws:

Boxing, Sparring & Wrestling, Bridges & Tunnels New York/New Jersey, Cigarettes, Cigars, Tobacco, Development of Port of New York, Emergency Housing Rent Control Law, Emergency Tenant Protection Act, Expanded Health Care Coverage Act, Facilities Development Corporation Act, General City Model, Local Emergency Housing Rent Control Act, Medical Care Facilities Finance Agency, N.Y. Wine/Grape, New York City Health & Hospitals Corporation Act, NYS Financial Emergency Act for the City of NY, NYS Project Finance Agency Act, Police Certain Municipalities, Port of New York Authority, Regulation of Lobbying Act, Special Needs Housing Act, Urban Development Guarantee Fund of New York, Urban Development Research Corporation Act, Urban Development Corporation Act, Yonkers Financial Emergency Act, Yonkers Income Tax Surcharge, and Medical Malpractice Reform.¹⁵

Note that these illustrative listings of sources of criminal offenses in New York, however long, make no effort to capture the criminal provisions generated by counties, cities, and other lower-level governmental entities in New York State, not to mention the rules and regulations backed by criminal sanctions that state executive agencies promulgate.¹⁶

Uses

This book is primarily intended for use as the main coursebook in lecture classes and seminars on New York criminal law. It can also be assigned as a primary

15. For an attempt at a comprehensive listing of offenses, as of 2000, see the appendix to *New York Penal Law and Related Provisions* (Markus D. Dubber ed., 2008); see also Buffalo Criminal Law Center, *New York State Criminal Offenses*, <http://wings.buffalo.edu/law/bclc/nycriminaloffenses.htm> (visited Apr. 16, 2008).

16. *New York Penal Law and Related Provisions* (Markus D. Dubber ed., 2008) aims to provide a more or less representative selection of New York crimes defined in the Penal Law and elsewhere.

text in general courses on American criminal law. Last but not least, scholars, students, and practitioners may find it to be of some use as a convenient collection of leading court opinions on the major issues in New York criminal law.

Markus D. Dubber

June 2008



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NEW YORK CRIMINAL LAW

Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxvii</i>
 Part I. Preliminary	 1
Chapter 1. Purposes of Punishment	3
Chapter 2. Legality Principle	13
Chapter 3. Jurisdiction	27
Chapter 4. Analysis of Criminal Liability	41
 Part II. General Part	 51
Chapter 5. <i>Actus Reus</i>	53
Chapter 6. <i>Mens Rea</i>	87
Chapter 7. Causation	109
Chapter 8. Liability for Another's Conduct	123
Chapter 9. Mistake and Intoxication	137
Chapter 10. Justification	159
Chapter 11. Excuse	205
 Part III. Special Part	 237
Chapter 12. Anticipatory Offenses	239
Chapter 13. Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation	281