

CRIMINAL LAW
AND
PROCEDURE
CASES AND MATERIALS

James Vorenberg

American Casebook Series



**CRIMINAL LAW
AND
PROCEDURE
CASES AND MATERIALS**

By

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PREFACE

The central dilemma in preparing a book for a basic criminal law course is whether to seek comprehensive coverage of issues and areas in the field or to focus more intensely on some and omit others. There is no perfect solution, especially if one accepts the view discussed below as to the length of the book. My own choice has been to seek fairly comprehensive coverage, because for some students the basic course may be their only criminal law course, and for others it can serve to develop and guide their interests into specific areas of advanced work. The inclusion in appendices of the American Law Institute's Model Penal Code and Model Code of Pre-Arrest Procedure gives students a comprehensive view of criminal law and procedure and enables them to deal with issues and problems not covered by the case materials.

A few observations about the order and coverage of material in Parts I and II and about possible use of the Code materials in the appendices may be helpful.

Chapter 1 provides brief introductory material on the criminal justice system, on crime, and on the goals of penal sanctions. I believe that despite their necessary brevity, these materials provide important ground work for what follows. Chapters 2, 3, 4 and 5 deal with basic issues as to the appropriateness of criminal sanctions. I am indebted to my colleague, Professor Alan Dershowitz, for his suggestion, which I adopted in my teaching materials several years ago, of including a substantial portion of the record in *Robinson v. California* at an early point. Its inclusion at the beginning of Chapter 2 provides a brief introduction to procedural issues such as bail, arrest, search, interrogation and the role of the jury that serve as helpful background to the chapters on substantive criminal law. It also shows how an important Supreme Court case begins on the street and in the lower court.

In broadest terms, Chapters 6, 7 and 8 deal with the fundamental questions of what should be criminal and how the seriousness of misconduct should be judged. Students should assume the role of legislators in considering in Chapter 6 whether various activities should be made criminal, and Section F on prostitution is designed to be treated as a legislative problem case on the issues raised by the chapter as a whole. The remaining chapters of Part I deal with the basic questions of causation and of justification and excuse and with inchoate crimes and group crimes.

PREFACE

The inclusion as Appendix B of the complete substantive law provisions of the ALI Model Penal Code permits students, working on their own, to apply what they have learned from analyzing an issue in the context of one type of crime to the provisions of the Code relating to other crimes. Thus, while homicide is used in Chapter 7 as the focus of the study of grading the seriousness of crime, reference to the Code's provisions in such areas as theft and fraud, sex crimes, and bribery and corruption, will deepen understanding on grading issues and will at least introduce students to issues relating to other substantive crimes. It is useful and important for students early in the course to familiarize themselves with the Code (which is the basis of code revisions in many states), or with the code of their own state if those are used in the course they are taking, and to refer to it as issues arise that are common to many specific crimes. In some places in Part I there are questions or problem cases that may help in that process, and at Page 384 there is a comprehensive problem case that may be useful as a practice exam question and a review of the preceding material. While this book is not designed to be used in conjunction with a text book, students seeking fuller coverage or more authorities on a particular substantive law subject may find it helpful to refer to LaFave and Scott's excellent Hornbook on Criminal Law.

As with substantive law in Part I, Part II seeks a comprehensive presentation of major issues of criminal procedure. Heavy reliance is placed on United States Supreme Court cases because the Court has occupied much of the field. Where the Court has not done so, lower court cases, commission reports, and other sources are relied on to provide at least the basis for analyzing issues and problems.

The organization of Part II is straightforward. Chapters 13 and 14 deal with problems of federalism and the exclusionary rule—raising issues that recur throughout the remainder of Part II. Thereafter, the chapters proceed more or less chronologically through the criminal justice system from first police contact, search, interrogation and other investigation, through the prosecution, preliminary proceedings and trial. Some of the procedural issues relating to sentencing are dealt with in Chapter 8 of Part I and it may be helpful to review that chapter after Chapter 28. The book concludes with a brief chapter on legal issues in the correctional process.

The ALI's Model Code of Pre-Arrest Procedure is included as Appendix C primarily because it represents a comprehensive attempt to incorporate the many constitutional rules enunciated by the Court into a criminal justice system that can deal with an enormous case-load. The Code's provisions fill in many of the areas not covered by Supreme Court rulings and thus may add to an understanding of the criminal process. The Code should thus be subjected to close and critical scrutiny as to its constitutional validity, its soundness in policy judgments, and the quality of legislative drafting. It is worth-

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while stopping to ask at many points: "If we were a legislature, would we adopt this particular ALI provision and, if not, what would ours say"?

The inclusion of both ALI Codes serves another purpose. They permit the analysis of both substantive and procedural issues against the background of a specific statute. In the context of cases included in the book, of other cases discussed in class, or of hypothetical questions, it is worthwhile asking how specific factual situations would be resolved under the specific statutory language. A few problem cases are included as examples. The intense interest in criminal law questions tends to obscure recognition that often the starting point is close examination of a statutory provision. Thus, the criminal law course can serve as an introduction to the task of statutory interpretation that is a large part of the lawyer's job.

* * *

In order to hold the book to what I regard as a reasonable size for a basic course, it has been necessary to leave out materials that some might want to see included, to be ruthless in the editing of cases, and to include concurring and dissenting opinions only when they seemed crucial to an understanding of important issues. However, where I have used text material from articles, books or government reports, I have sought to include a large enough segment to give a context for consideration of the issue involved. Some chapters necessarily provide only an introduction to large and important areas of the law—such as criminal trial procedure or the law of corrections—which have become the basis for separate courses. I have omitted citations and footnotes from cases and other materials without indicating deletions and have taken other minor liberties in the interest of brevity and readability when I have believed nothing of substantive significance was involved. Footnotes from cases and other sources appear with their original numbers; my footnotes are lettered.

I believe the effort to hold the body of the book to less than 1000 pages is worthwhile because, particularly through the use of the Code material, deep understanding of issues in this field can better be achieved by intense, close and personal reflection on the difficult intellectual and policy questions presented than by immersion in a great quantity of cases or notes. It is important that students take the time to reflect on how they would decide these questions, if the decision were all theirs—as judge, prosecutor, or legislator.

* * *

I am grateful to the American Law Institute for permission to include as Appendices the Model Penal Code and the Model Code of Pre-Arraignment Procedure (for which I served as Chief Reporter) and to include portions of the Commentary to those Codes in the text.

PREFACE

Part I of the book is based on teaching materials I have used in changing form each year for several years at Harvard Law School, and I am thus indebted to successive criminal law classes for improvements as I have gone along. I used Parts I and II last year with a specific request for reactions and my major final adaptations reflect many suggestions from students. My wife, Betty, persuaded me to do the book and worked with me on Chapter 6. Mark A. Dickerson and Kate S. Pressman, students at Harvard Law School, helped me assemble and prepare materials, and my father-in-law, Joseph L. Weiner, Esq., read proof on the entire book. Rosanne Kumins kept the whole project organized.

JAMES VORENBERG

Cambridge, Mass.
May, 1975

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