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**CASES AND MATERIALS**

**NINTH EDITION**

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## Preface

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This edition, while preserving continuity with its predecessors, introduces several changes in the content and sequencing of the material. We have retained the basic organization, tone, and perspective of the book. We have replaced relatively few of the major cases and have maintained the intellectual framework and concrete questions and problems that so many of our colleagues have found helpful vehicles for successful teaching. This Preface discusses the basic goals of the course before turning to the specific changes made for this edition.

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

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, judge 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. 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).

**Revisions for the ninth edition.** As mentioned, this edition maintains the organization, intellectual perspectives, and pedagogical tools that have proved successful in previous editions. We reinforced the steps we took in the eighth edition to improve the book's organization and the accessibility of its notes and questions, in order to provide greater clarity and ease of teaching. For example, we have completely reorganized Chapter 7, on group criminality, one of the more difficult topics in criminal law, to aid students' understanding of this material. The chapter begins with accomplice liability, then tackles conspiracy, and concludes with corporate liability, an order we believe will facilitate comprehension and mastery of the material. We similarly reorganized and updated Chapter 5 to include a completely revised section on felony murder, in order to make it more accessible to readers. And throughout

the book, we have included more roadmaps to guide students in their reading and to explain what the cases are designed to illustrate.

Beyond these revisions related to the presentation, our main substantive focus throughout the ninth edition has been to emphasize *contemporary* legal issues. In our consideration of *what* to punish, in Chapter 2, we now use bullying and emotional harm to raise questions about the appropriate scope of criminal law. In Chapter 4, on rape, we have added new material to address where the contemporary debates over consent are taking place, and we have added new sections on male rape victims and human trafficking. Chapter 7 has an updated section on corporate criminal liability that includes a new section on sanctioning corporations, including an analysis of deferred prosecution agreements and non-prosecution agreements and a principal case that raises the issue of how to approach sanctioning a company. Chapter 9, on theft, retains the traditional cases but streamlines that material to allow for more consideration of modern theft crimes such as honest services fraud and to include new examples and problems that test students' understanding of traditional theft offenses as applied to modern technology and intellectual property.

We have also included new principal cases and discussion material to reflect *advances in the doctrine*. Chapter 3's look at proportionality includes recent Supreme Court case law, including *Graham*, a new principal case on sentences of life without the possibility of parole for juveniles. Chapter 9's analysis of honest services fraud includes the Supreme Court's treatment of the issue in *Skilling*. Chapter 2 now analyzes the issue of sentence length by using Bernard Madoff's sentencing (replacing the Michael Milken material that previously covered this topic).

This edition also places greater emphasis throughout the book on the latest *empirical* research. Chapter 1 continues to provide an overview of the criminal justice system, with updated statistics on what that system looks like. Chapter 4's materials on rape similarly contain new data on the incidence and prevalence of this offense, including data on the often-overlooked problem of prison rape. Chapter 5's materials on the death penalty provide a wealth of new empirical information, including a more detailed look at the relationship between racial disparities and the death penalty. Chapter 10's analysis of discretion similarly provides up-to-date data on plea bargaining and sentencing.

The ninth edition also continues the eighth edition's efforts to acclimate the students with developments in the field of *international human rights*. We do not seek to examine this complex topic systematically, but we believe it is possible and desirable to give students an introduction to this increasingly significant area through one example (the rape case of *M.C. v. Bulgaria* that was in the eighth edition), along with shorter references elsewhere in the book.

Finally, the ninth edition continues to emphasize the importance of discretion in the criminal justice system. Chapter 10's materials on charging, plea bargaining, and sentencing have been expanded and updated. Because of major changes to sentencing jurisprudence at the federal level, we have

included a more recent principal case, *Deegan*, that provides an illustration of the post-*Booker* sentencing regime as well as classic problems in sentencing, such as the tension between individualization and the desire for uniformity. We have added a new case on mandatory minimums and a section on cooperation. We believe this material grounds the study of criminal law in real-world institutions that should not be ignored.

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 an 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 remains the focus of acute controversy because of changing perceptions and changing social values. The theme of the chapter on homicide is the task of legislative grading of punishment in a particularly challenging area. The chapter on theft 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 ninth edition, we have sought to edit the materials to avoid significant surplusage for the average course, without preempting 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 Teacher's 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 helpful to the student:

*American Law Institute, Model Penal Code and Commentaries* (1980-1985). This is a six-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* (J. Dressler ed., 2d ed. 2002). 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.

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

Wayne LaFare, *Criminal Law* (5th ed. 2010). A widely used hornbook; comprehensive and heavily footnoted.

Joshua Dressler, *Understanding Criminal Law* (5th ed. 2009). A shorter textbook, available in paperback; its coverage largely focuses on the subjects covered in this casebook.

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

George Fletcher, *Rethinking Criminal Law* (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* (1998).

H.L.A. Hart, *Punishment and Responsibility* (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* (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* (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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