

CASES AND PROBLEMS IN CRIMINAL LAW

FOURTH EDITION

MYRON MOSKOVITZ

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MYRON MOSKOVITZ

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Preface

A client comes to a lawyer with a difficult legal problem, involving a complex set of facts. The lawyer then researches the legal issues, finding a cluster of cases and statutes—almost all from the jurisdiction in which the problem arises. In order to advise the client (and—if necessary—to litigate the case), the lawyer must analyze, distinguish, reconcile, and interrelate the authorities in the cluster, seeing them as a group indicating the direction of that state’s law, as well as seeing them separately.

This book is an attempt to recreate that experience for the law student, and to help the student learn how to handle it. To learn to do something practical, one needs three things: a task, some tools, and a teacher. This book supplies the task and the tools. The task is the Problem at the outset of each chapter. The tools are the statutes and cases which follow. To make the experience more realistic, each statute and case in the chapter is from the jurisdiction in which the Problem arose. Following each case is a note giving the student a hint as to how the case might be used to help analyze the Problem.

I have tried to select cases which have interesting facts, raise issues that tend to be central to the topic of the chapter, and which contain readable—though not always “correct”—analyses by the courts. I have edited the cases severely to make them even more readable.

This book is primarily a tool for learning skills, rather than for learning all the intricacies of each doctrine of criminal law. While the materials should enable the professor to explore many basic principles of criminal law, greater breadth of coverage can be obtained from a good treatise or hornbook. I usually suggest that my students read LaFave & Scott, *Criminal Law* (West, 2d ed.), which I consider the best of its kind. The LaFave and Scott, *Criminal Law* material appearing throughout this work has been reproduced with the permission of the authors and West Publishing Company.

While I believe that the approach taken by this book is pedagogically sound, I have another, more selfish reason for using this approach in my teaching: it is fun to play lawyer. My students usually agree, and I think this in itself enhances their learning. This approach does demand more work from them. Not only must they read the cases, but they must try to apply them to the Problem. I also ask them to prepare an outline of an analysis of the Problem, based on the authorities in the chapter. All this takes more time and effort, but they do it and seem to enjoy doing it. They know that they are reading the cases as a lawyer would, for a specific purpose: to answer the Problem. I hope you enjoy it, too.

Myron Moskovitz

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Problem B

Sample Answer to Problem A

Sample Answer to Problem B

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Introduction

I. An Overview of the Criminal Process

This book is about “substantive criminal law”—the definitions of certain basic crimes and defenses, and the underlying reasons why we define certain conduct and mental states as “criminal.” You will learn about “criminal procedure” in a separate course (using a separate book) which will deal with the various constitutional restrictions of police arrests, searches, and interrogations, and with the several stages of the criminal case as it proceeds through the courts.

Nevertheless, to help you follow procedural matters which appear in the cases in this book—and to set the substantive issues in their procedural contexts—here is a brief overview of the whole process in felony cases, as it usually operates in federal courts and most state courts.¹

Suppose the police believe that Dan has committed a series of four bank robberies. They arrest Dan and “book” him (write the charges and biographical data about Dan in a book), and they send a report of the case to the prosecutor’s office (“United States Attorney” in the federal system, “District Attorney” in most states). The prosecutor considers the strength of the evidence against Dan and other factors in determining what charges to file, and then files a *complaint* against Dan in court. The complaint is similar to a complaint in a civil case. Each count (i.e., each separate charge) in the complaint states that on a certain date, Dan committed certain acts which violated a specified penal statute, at a location within the jurisdiction of the court.

Within a few days, Dan will be *arraigned* before a magistrate of the court (who does not have as much authority as the judge who will later preside at the trial of the case). At the arraignment, the magistrate will read the charges to Dan and ask him to enter a *plea* of guilty, not guilty, not guilty by reason of insanity, or *nolo contendere* (i.e., a default), to each charge. If Dan does not have a lawyer with him to advise him on what plea to enter, the magistrate will usually give Dan some time to hire one, or, if Dan is indigent, time to arrange for the services of a public defender. If Dan pleads guilty to any charge, the magistrate will sentence him or refer him to a judge for sentencing.

¹ This overview is taken from Moskowitz, *Cases & Problems in Criminal Procedure: The Courtroom*. Copyright 1998 by Matthew Bender & Co., Inc. Reprinted with permission. All rights reserved.

Suppose that, after consulting with counsel, Dan pleads not guilty to all charges. The magistrate will then set a date for a *preliminary hearing* (sometimes called a *preliminary examination*), to be held before the magistrate, unless Dan waives his right to a preliminary hearing. The magistrate will also consider whether Dan should be released on *bail* (or on his “own recognizance”), pending the preliminary hearing.

The preliminary hearing is intended to permit the magistrate to decide whether there is “probable cause” to hold Dan for trial on each count. This is a screening device, meant to save Dan the expense and anxiety of a trial on a weak case, and meant to save the courts the expense of a trial which is unlikely to lead to a conviction. At the preliminary hearing, the prosecutor will put on a somewhat skeletal case, with a minimum of witnesses—enough to show probable cause but not enough to let defense counsel see the whole prosecution case. The defense will seldom put on witnesses of its own, but will cross-examine prosecution witnesses in an effort to undermine probable cause and to try to “discover” as much of the prosecutor’s case as possible, in preparation for trial.

The magistrate’s decision may take several forms. She may dismiss some or all charges against Dan. She may also reduce some or all charges to “lesser-included” crimes. (For example, she may find probable cause to believe that Dan stole the money, but no probable cause to believe that he used force or threats—so a robbery charge should be reduced to larceny.) If the magistrate finds probable cause as to any charge which is a felony, she will “hold the defendant to answer” the charges at trial, and she will order the defendant “bound over” to the court for trial on these charges. The prosecutor will then file an *information* in the trial court. The information is similar to the complaint, setting out the remaining charges.

In federal court and in a few states, the prosecutor must obtain an *indictment* from a grand jury (unless Dan waives indictment, in which case an information may be filed). The grand jury may indict only if it finds probable cause to believe that Dan committed the crimes, based on evidence presented in secret by the prosecutor to the grand jury. (Defense counsel is not present before the grand jury, and no cross-examination of witnesses occurs.) Usually, if the prosecutor obtains the indictment before the date set for the preliminary hearing, the preliminary hearing will not be held, as the purpose of the preliminary hearing—to determine “probable cause”—will already have been served.

After the indictment or information is filed, Dan will be arraigned before a trial court judge, and Dan will enter a plea of guilty or not guilty to the remaining charges. If Dan pleads not guilty, the judge will set a date for the trial. The judge may also decide whether Dan should be released on bail pending trial. Before trial, both the prosecutor and defense counsel may be given certain rights to *discover* each other’s case—although these rights are much more limited than discovery rights in civil cases.