# Cases and Problems in Criminal Law

Fourth Edition

Myron Moskovitz

# CASES AND PROBLEMS IN CRIMINAL LAW

FOURTH EDITION

MYRON MOSKOVITZ
Professor of Law
Golden Gate University School of Law

ANDERSON PUBLISHING CO.
CINCINNATI, OHIO

**NOTE TO USERS**

To ensure that you are using the latest materials available in this area, please be sure to periodically check Anderson Publishing's web site for downloadable updates and supplements at www.andersonpublishing.com

CASES AND PROBLEMS IN CRIMINAL LAW, FOURTH EDITION
MYRON MOSKOVITZ



Second Printing–December, 2000



Anderson Publishing Co.
2035 Reading Road / Cincinnati, Ohio 45202
800-582-7295 / e-mail: lawschool@andersonpublishing.com / Fax 513-562-5430
www.andersonpublishing.com

ISBN: 0-87084-244-7

# ANDERSON'S
## *Law School Publications*

**Administrative Law Anthology**
Thomas O. Sargentich

**Administrative Law: Cases and Materials**
Daniel J. Gifford

**An Admiralty Law Anthology**
Robert M. Jarvis

**Alternative Dispute Resolution: Strategies for Law and Business**
E. Wendy Trachte-Huber and Stephen K. Huber

**The American Constitutional Order: History, Cases, and Philosophy**
Douglas W. Kmiec and Stephen B. Presser

**American Legal Systems: A Resource and Reference Guide**
Toni M. Fine

**Analytic Jurisprudence Anthology**
Anthony D'Amato

**An Antitrust Anthology**
Andrew I. Gavil

**Appellate Advocacy: Principles and Practice, Third Edition**
Ursula Bentele and Eve Cary

**Arbitration: Cases and Materials**
Stephen K. Huber and E. Wendy Trachte-Huber

**Basic Accounting Principles for Lawyers: With Present Value and Expected Value**
C. Steven Bradford and Gary A. Ames

**A Capital Punishment Anthology (and Electronic Caselaw Appendix)**
Victor L. Streib

**Cases and Problems in Criminal Law, Fourth Edition**
Myron Moskovitz

**The Citation Workbook: How to Beat the Citation Blues, Second Edition**
Maria L. Ciampi, Rivka Widerman, and Vicki Lutz

**Civil Procedure Anthology**
David I. Levine, Donald L. Doernberg, and Melissa L. Nelken

**Civil Procedure: Cases, Materials, and Questions, Second Edition**
Richard D. Freer and Wendy Collins Perdue

**Clinical Anthology: Readings for Live-Client Clinics**
Alex J. Hurder, Frank S. Bloch, Susan L. Brooks, and Susan L. Kay

**Commercial Transactions Series: Problems and Materials**
Louis F. Del Duca, Egon Guttman, Alphonse M. Squillante, Fred H. Miller, Linda Rusch, and Peter Winship
- Vol. 1: Secured Transactions Under the UCC
- Vol. 2: Sales Under the UCC and the CISG
- Vol. 3: Negotiable Instruments Under the UCC and the CIBN

**Communications Law: Media, Entertainment, and Regulation**
Donald E. Lively, Allen S. Hammond, Blake D. Morant, and Russell L. Weaver

**A Conflict-of-Laws Anthology**
Gene R. Shreve

**Constitutional Conflicts**
Derrick A. Bell, Jr.

**A Constitutional Law Anthology, Second Edition**
Michael J. Glennon, Donald E. Lively, Phoebe A. Haddon, Dorothy E. Roberts, and Russell L. Weaver

**Constitutional Law: Cases, History, and Dialogues**
Donald E. Lively, Phoebe A. Haddon, Dorothy E. Roberts, and Russell L. Weaver

**The Constitutional Law of the European Union**
James D. Dinnage and John F. Murphy

**The Constitutional Law of the European Union: Documentary Supplement**
James D. Dinnage and John F. Murphy

**Constitutional Torts**
Sheldon H. Nahmod, Michael L. Wells, and Thomas A. Eaton

**A Contracts Anthology, Second Edition**
Peter Linzer

**Contracts: Contemporary Cases, Comments, and Problems**
Michael L. Closen, Richard M. Perlmutter, and Jeffrey D. Wittenberg

**Contract Law and Practice**
Gerald E. Berendt, Michael L. Closen, Doris Estelle Long, Marie A. Monahan, Robert J. Nye, and John H. Scheid

**A Copyright Anthology: The Technology Frontier**
Richard H. Chused

**Corporate Law Anthology**
Franklin A. Gevurtz

**Corporate and White Collar Crime: An Anthology**
Leonard Orland

**A Criminal Law Anthology**
Arnold H. Loewy

**Criminal Law: Cases and Materials**
Arnold H. Loewy

**A Criminal Procedure Anthology**
Silas J. Wasserstrom and Christie L. Snyder

**Criminal Procedure: Arrest and Investigation**
Arnold H. Loewy and Arthur B. LaFrance

**Criminal Procedure: Trial and Sentencing**
Arthur B. LaFrance and Arnold H. Loewy

**Economic Regulation: Cases and Materials**
Richard J. Pierce, Jr.

**Elements of Law**
Eva H. Hanks, Michael E. Herz, and Steven S. Nemerson

**Ending It: Dispute Resolution in America**
**Descriptions, Examples, Cases and Questions**
Susan M. Leeson and Bryan M. Johnston

**An Environmental Law Anthology**
Robert L. Fischman, Maxine I. Lipeles, and Mark S. Squillace

**Environmental Law Series**
Jackson B. Battle, Robert L. Fischman, Maxine I. Lipeles, and Mark S. Squillace
- Vol. 1: Environmental Decisionmaking: NEPA and the Endangered Species Act, Second Edition
- Vol. 2: Water Pollution, Third Edition
- Vol. 3: Air Pollution, Third Edition
- Vol. 4: Hazardous Waste, Third Edition

**Environmental Protection and Justice**
**Readings and Commentary on Environmental Law and Practice**
Kenneth A. Manaster

**European Union Law Anthology**
Karen V. Kole and Anthony D'Amato

**An Evidence Anthology**
Edward J. Imwinkelried and Glen Weissenberger

**Federal Antitrust Law: Cases and Materials**
Daniel J. Gifford and Leo J. Raskind

**Federal Income Tax Anthology**
Paul L. Caron, Karen C. Burke, and Grayson M.P. McCouch

**Federal Rules of Civil Procedure, 1998-99 Edition**
Publisher's Staff

**Federal Rules of Evidence Handbook, 1998-99 Edition**
Publisher's Staff

**Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority**
**1998-99 Edition**
Glen Weissenberger

**Federal Wealth Transfer Tax Anthology**
Paul L. Caron, Grayson M.P. McCouch, Karen C. Burke

**First Amendment Anthology**
Donald E. Lively, Dorothy E. Roberts, and Russell L. Weaver

**The History, Philosophy, and Structure of the American Constitution**
Douglas W. Kmiec and Stephen B. Presser

**Individual Rights and the American Constitution**
Douglas W. Kmiec and Stephen B. Presser

**International Environmental Law Anthology**
Anthony D'Amato and Kirsten Engel

**International Human Rights: Law, Policy, and Process, Second Edition**
Frank C. Newman and David Weissbrodt

**Selected International Human Rights Instruments and**
**Bibliography For Research on International Human Rights Law, Second Edition**
Frank C. Newman and David Weissbrodt

**International Intellectual Property Anthology**
Anthony D'Amato and Doris Estelle Long

**International Law Anthology**
Anthony D'Amato

**International Law Coursebook**
Anthony D'Amato

**Introduction to the Study of Law: Cases and Materials**
John Makdisi

**Judicial Externships: The Clinic Inside the Courthouse, Second Edition**
Rebecca A. Cochran

**A Land Use Anthology**
Jon W. Bruce

**Law and Economics Anthology**
Kenneth G. Dau-Schmidt and Thomas S. Ulen

**The Law of Disability Discrimination, Second Edition**
Ruth Colker and Bonnie Poitras Tucker

**The Law of Disability Discrimination Handbook: Statutes and Regulatory Guidance**
Ruth Colker and Bonnie Poitras Tucker

**Lawyers and Fundamental Moral Responsibility**
Daniel R. Coquillette

**Mediation and Negotiation: Reaching Agreement in Law and Business**
E. Wendy Trachte-Huber and Stephen K. Huber

**Microeconomic Predicates to Law and Economics**
Mark Seidenfeld

**Natural Resources: Cases and Materials**
Barlow Burke

**Patients, Psychiatrists and Lawyers: Law and the Mental Health System, Second Edition**
Raymond L. Spring, Roy B. Lacoursiere, and Glen Weissenberger

**Preventive Law: Materials on a Non Adversarial Legal Process**
Robert M. Hardaway

**Principles of Evidence, Third Edition**
Irving Younger, Michael Goldsmith, and David A. Sonenshein

**Problems and Simulations in Evidence, Second Edition**
Thomas F. Guernsey

**A Products Liability Anthology**
Anita Bernstein

**Professional Responsibility Anthology**
Thomas B. Metzloff

**A Property Anthology, Second Edition**
Richard H. Chused

**Public Choice and Public Law: Readings and Commentary**
Maxwell L. Stearns

**Readings in Criminal Law**
Russell L. Weaver, John M. Burkoff, Catherine Hancock, Alan Reed, and Peter J. Seago

**Science in Evidence**
D.H. Kaye

**A Section 1983 Civil Rights Anthology**
Sheldon H. Nahmod

**Sports Law: Cases and Materials, Third Edition**
Ray L. Yasser, James R. McCurdy, and C. Peter Goplerud

**A Torts Anthology**
Lawrence C. Levine, Julie A. Davies, and Edward J. Kionka

**Trial Practice**
Lawrence A. Dubin and Thomas F. Guernsey

**Unincorporated Business Entities**
Larry E. Ribstein

## *FORTHCOMING PUBLICATIONS*

**Cases and Materials on Corporations**
Thomas R. Hurst and William A. Gregory

**Cases and Materials on the Law Governing Lawyers**
James E. Moliterno

**Cases and Problems in California Criminal Law**
Myron Moskovitz

**Environmental Decisionmaking: NEPA, and the Endangered Species Act, Third Edition**
Jackson B. Battle, Robert L. Fischman, and Mark S. Squillace

**International Civil Procedure Anthology**
David S. Clark and Anthony D'Amato

**International Taxation: Cases, Materials, and Problems**
Philip F. Postlewaite

**Resolution of Private International Disputes**
David D. Caron

**A Torts Anthology, Second Edition**
Lawrence C. Levine, Julie Anne Davies, Edward J. Kionka

# CASES AND PROBLEMS IN CRIMINAL LAW

FOURTH EDITION

# 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

# Table of Contents

# 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 Moskovitz, *Cases & Problems in Criminal Procedure: The Courtroom*. 

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.