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CASES AND MATERIALS ON
CRIMINAL LAW

Fifth Edition



Joshua Dressler

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Fifth Edition



By

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610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-20645-9

1st reprint—2010

*This casebook is dedicated to
Sandy Kadish, criminal law scholar, casebook author,
and mensch, who taught us all
and
My wife, who taught me what love means*

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PREFACE TO THE FIFTH EDITION

The response to the first four editions of this casebook has been gratifying. In preparing the new edition, therefore, I have followed the wise but grammatically poor adage, “if it ain’t (too) broke, don’t fix it (too much).” Previous adopters of the casebook will find no changes in its structure or in the general philosophy animating it (as set out in the Preface to the First Edition, reprinted *infra*). The casebook, I trust, will remain familiar and comfortable.

Outside reading materials. My recommendations from the first edition remain valid today. Two of the texts mentioned there are now in newer editions: my own treatise, *Understanding Criminal Law* (5th ed. 2009); and Wayne LaFave, *Criminal Law* (4th ed. 2003) (formerly, LaFave and Scott).

Personal acknowledgements. I had a lot of help on the new edition. Many users of the casebook (including students) provided advice and suggestions. Many suggestions found their way into the new edition, and even where they did not, I benefitted from the comments. Among those who have helped make the casebook better are: Dwight Aaron, Stephanos Bibas, Charles Bobis, Dennis Brathwaite, Sam Buell, Gerald Caplan, Stacy Caplow, Catherine Carpenter, Tony Dillof, Beth Farmer, Katherine Federle, Jeffry Finer, Stanley Fisher, William Fortune, Ken Gallant, Rick Garnett, Stephen Garvey, Laura Gomez, Abner Greene, Lenese Herbert, Michael Heyman, Jonah Horwitz, Cristopher Jones, Jeff Kirchmeier, Ellen Kreitzberg, Susan Kuo, Mary Leary, Paul Litton, Susan Mandiberg, Dan Markel, David McCord, Alan Michaels, David Miller, David Moran, Daniel Moriarty, Stephen Morse, Fred Moss, Janice Nadler, Camille Nelson, Molly O’Brien, Ellen Podgor, Ofer Raban, Sadiq Raza, Michael Rich, Katherine Ridolfi, Cliff Rosky, David Russo, Emily Sack, Michael Simons, Rick Singer, James Smith, George Thomas, Rachel Van Cleve, and Eugene Volokh. Due to poor record-keeping, I am sure I have omitted other deserving persons. My thanks and apologies to them, too.

Two students helped me prepare the fifth edition of the casebook: Sarah Grimm (’10) and Brian Stewart (’11). I thank them for their excellent assistance.

As before, my inspiration in life comes from my wife, Dottie.

JOSHUA DRESSLER

September 2009

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PREFACE TO THE FIRST EDITION

This casebook was prepared for use in a basic course on criminal law. Although it is designed for a three- or four-unit semester-long class, the casebook will also work well in a shorter course, with deletions, some lecturing, and/or use of outside readings.

As its "author" I bring to this casebook my own experiences and philosophies, but ultimately the book is intended for *your* use, and not simply to please me. Therefore, the cases and readings were selected, the Notes and Questions formulated, and the casebook organized, so that it can comfortably be used by teachers who do not share all, or even most, of my pedagogical goals.

My goals in teaching criminal law. I have taught Criminal Law for nearly twenty years, in five different law schools, to students with widely varied academic backgrounds and capacities, life experiences, and levels of interest in the subject. But, I have always been guided in my teaching by certain general principles:

—Doctrines matter. I use the term "doctrine" here broadly to mean that students ought to leave a course in Criminal Law with a substantial body of knowledge. In the context of this casebook, this means that students will become familiar with the general and the specific: primary attention is directed to the "general part" of the criminal law, i.e., the common law principles of criminal responsibility that serve even today as the core of Anglo-American criminal law; but, as the general cannot be understood except in the context of the specific, some of the most important crimes against persons and property are covered in detail, both in their common law and modern statutory forms.

—In understanding doctrine, penal theory matters. A course in Criminal Law offers students an opportunity to consider jurisprudential concerns more forthrightly than in other first-year courses. Therefore, I want students to put the criminal law in its philosophical context, in particular, to test the rules of criminal responsibility by the standards of retributivism and utilitarianism, in order to see if the criminal law is fair, rational, or even intellectually consistent. I teach my class, and this casebook is written, with the view that these principles of punishment can inform our understanding of the law and guide us in our efforts to reform it.

—In understanding doctrine, other things matter, too. Since the criminal law seeks to affect and to render judgments about human behavior, it seems prudent to take some note of the findings of the behavioral sciences, e.g., psychology, anthropology, and sociology. Students should also see that social, economic, and political forces inevitably shape the law. Often these forces are noncontroversial, but not always. Therefore, the materials in the casebook

invite discussion regarding social attitudes about such matters as race, gender, and sexual orientation, where they may have had a substantial impact on the development or application of the criminal law (e.g., rape law, self-defense, provocation, the death penalty).

—Statutes matter. Students start law school bewildered by the case method of study, yet they so quickly grow accustomed to it that many of them lose interest in statutes, even when good lawyering requires their attention. Consequently, I have selected materials that help students understand the rules of statutory construction and appreciate the lawyering skills relating to statutory interpretation. Also, the casebook emphasizes the Model Penal Code, in part so that students have ample opportunity to work with an integrated criminal code.

—Professional ethics matter. Even before they take courses on criminal procedure and professional responsibility, students should be sensitized to some of the ethical issues confronting criminal defense lawyers and prosecutors. I have selected various cases in part because they lend themselves to discussion of professional ethics, to the extent that the teacher wishes to follow this route.

—Controversy in the classroom is good if discussion of it is thoughtful, wide-open, and relevant. I want students to be angry—or pleased—with where the law may be going, because this means that they understand that the criminal law matters deeply in everyone's lives. Consequently, I want students to be aware of the "cutting edge" controversies in the criminal law. In support of this, the casebook is attentive to the Model Penal Code, since virtually all recently drafted penal codes are based, at least in part, on it, and because it provides a thoughtful alternative to the common law. The casebook also brings to the forefront—it does not shy away from—many present-day controversies, such as the death penalty, subjectivization of the objective "reasonable man" standard, "battered woman/child self-defense," suicide assistance and euthanasia, and acquaintance rape.

As I stated earlier, although this casebook is shaped by the preceding principles, it was prepared for use by teachers whose pedagogical goals may differ from mine. I do expect, however, that there will be at least one common link among adopters of this book: A belief that Criminal Law is an exciting subject to teach, in large part because it allows students to confront some of the Big Questions—questions about human nature, personal and social responsibility, and "right and wrong"—which philosophers, theologians, scientists, and poets, as well as lawyers, have grappled with for centuries.

Editing policies. I prefer students to read judicial opinions in largely intact form. Nonetheless, deletions are necessary. Because this book is intended for pedagogical use, rather than for serious scholarly pursuits, I have not followed all scholarly conventions in identifying omissions from the extracted materials. Therefore, users of the book should not quote directly from the extracts in legal or scholarly documents, but should instead go to the primary sources. Specifically, I have applied the following rules of thumb to extracted materials:

1. Footnotes and citations have been omitted, unless there was a sound pedagogical reason for their retention. Neither ellipses nor other signals have been used to indicate their omission. Asterisks or brackets have been used, however, to indicate deletions of other textual material.

2. Numbered footnotes are from the original materials and retain their original numbering. My own footnotes are designated by letters.

Outside reading materials. Students who wish to go beyond the casebook for additional study will find excellent references in various forms. Among "hornbooks," I recommend the following, in alphabetical order:

Joshua Dressler, *Understanding Criminal Law* (Matthew Bender & Co. 1987). This book, addressed to law students, focuses on the issues most commonly covered in criminal law casebooks. Obviously, it is especially suited for use with this casebook. A second edition will be published in the near future.

Wayne LaFare and Austin Scott, Jr., *Criminal Law* (West Publishing Co. 2d ed. 1986). The student edition is an abridgement of the authors' two-volume lawyers' treatise. Widely cited by courts and lucidly written, it emphasizes modern law and the Model Penal Code.

Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* (Foundation Press 3d ed. 1982). The late Professor Perkins, one of the foremost scholars of the common law of crimes, originated this treatise. It remains strong in setting out the common law definitions of crimes. There is no special student edition.

Glanville Williams, *Criminal Law : The General Part* (Stevens & Sons 2d ed. 1961). Written by one of England's paramount scholars, this is the classic English treatise on the general principles of the criminal law.

By far the best reference source regarding the Model Penal Code is:

American Law Institute, *Model Penal Code and Commentaries* (1980 and 1985). This six-volume reference contains all of the sections of the Model Penal Code and their supporting Commentaries. The Commentaries are exceedingly helpful in explaining pre-Code law and the method and rationale of Code provisions.

Among the best books dealing with the underlying theories of the criminal law are:

George P. Fletcher, *Rethinking Criminal Law* (Little Brown & Co. 1978). Building heavily on common law traditions and the views of Continental, especially German, legal theorists, the author has written "neither a hornbook nor a treatise, but a reformist, critical work." (Preface, xxiii.) This book has deservedly received substantial scholarly attention since its publication.

Jerome Hall, *General Principles of Criminal Law* (Bobbs Merrill 2d ed. 1960). Now a classic in the field, the author states as his goal, "to elucidate the basic ideas of criminal law in light of current knowledge and

to organize the law in terms of definite theory.” (Preface, v.) The book centers on the general part of the criminal law.

H.L.A. Hart, *Punishment and Responsibility* (Oxford University Press 1968). This book contains previously published essays by the author, then Professor of Jurisprudence at Oxford University, regarding theories of punishment and legal standards of responsibility. These writings have greatly influenced thinking on the subjects.

Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (University of Chicago Press 1987). Katz draws on insights from philosophy, psychology, and anthropology, as well as on well-known fictional incidents, to reflect on the basic concepts of the criminal law. Written for a general audience, the book provides considerable “food for thought.”

*Personal acknowledgements.*¹ Many people assisted me in producing this book. Various colleagues offered useful advice and specific suggestions (many of which found their way into the book), including: Peter Arenella (UCLA); Pamela Bucy (Alabama); Linda Carter (McGeorge); Deborah Denno (Fordham); Catherine Hancock (Tulane); Yale Kamisar (Michigan); Leo Katz (Pennsylvania); Larry Levine (McGeorge); Fred Lawrence (Boston University); Steve Morse (Pennsylvania); Michael Perlin (New York); Michael Vitiello (McGeorge); and David Yellen (Hofstra). Especially generous with their time were two of my colleagues from Wayne State University: Lee Lamborn, who gave me many leads on materials to include in the text; and Jessica Litman, who was amazingly patient as I hounded her with copyright law questions.

My student research assistants helped me search for cases, commented on early drafts of the manuscript, and did critical cite checking. From Wayne State, I thank Joseph Hart, Sarah Resnick, Ted Tow and Mark Zousmer; from McGeorge, my thanks go to Sidonie Christian, Debra Larson, and Barry deWalt.

Thanks also go to June Frierson (Wayne State), on whom I called often for assistance in typing and reproduction of the manuscript. She did this work for me promptly, well, and with good humor.

I must also mention a few people who have helped me in very special ways. John Dolan and Lee Lamborn (Wayne State) are, quite simply, *mensches*. No matter how busy they were, their office doors were open to me when my work on the casebook—or life in general—temporarily got me down. They were and are true friends.

Nobody has provided me with greater support and love over the years than my partner in life, Dottie Kridler Dressler. I am not exaggerating when I say that this casebook would not have been born without her presence by my side.

Finally, I want to acknowledge two other persons who have influenced me. The first is David Dressler, who during his too-short life was Chief of Parole for New York State, a professor of both sociology and criminology, a

1. Copyright acknowledgements are separately listed.

scholar and talented writer (many of us are the former, but few are the latter), and, most importantly, my father. He never said, "Be as I am" or "Look at me," but nobody has been a more powerful role model in my life than he.

The other person whose influence cannot be understated is Sandy Kadish, one of this country's most thoughtful criminal law scholars and legal educators. Nobody can look at this casebook without realizing his influence on it. And, how could it be otherwise? I studied criminal law from his casebook (Paulsen and Kadish; and then Kadish and Paulsen) and, for fifteen years, I taught the subject from his book (now, Kadish and Schulhofer). With the publication of my own casebook comes my professional bar mitzvah, but I can think of no higher accolade than if someone were to say of this book, "Why, it is a son-of-Kadish (and Schulhofer)."

JOSHUA DRESSLER

April 1994

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