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MODERN CRIMINAL LAW

CASES, COMMENTS AND QUESTIONS

Fifth Edition

Wayne R. LaFave

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To Marissa Grace

"Perfect love sometimes does not come until grandchildren"

~ Welsh proverb

Preface to the Fifth Edition

This new fifth edition of *Modern Criminal Law* is being published just five years since the fourth edition became available. During that interval, in part as a result of my work on a new fifth edition of my *Criminal Law* hornbook and on annual pocket parts to the second edition of my three-volume *Substantive Criminal Law* treatise, it became apparent to me that many very recent cases and commentary could well be used to further enrich this collection of materials.

This fifth edition thus differs from its predecessor largely in the addition to the Notes and Questions throughout the book of many excerpts from newer cases and law review writings. These additions, it must be emphasized, have not been undertaken simply to replace previous material with other material, whether cases or secondary authority, of more recent vintage. On the contrary, older materials were retained except when the substituted (and, typically, more recent) item appeared to better serve the objectives of this book (further discussed herein). Summaries of over seventy new cases were added where they exposed and examined new problems, where they reexamined old problems in an interesting new way, or when the problems considered were presented in a more contemporary context, thus making it easier for students to appreciate their exact nature and current importance. More than sixty new article excerpts were added so that students could benefit from the illuminating and provocative writings that, collectively, make up a very impressive body of contemporary criminal law scholarship.

For the most part, the principal cases appearing herein are the same as those in the fourth edition; only five of the principal cases are new. Also, the basic organization of the Book has not changed, except for reversing the order of the last two sections in Chapter 6. While approximately ten per cent of the contents of this Book is new material, by selective deletions and judicious editing it has been possible to keep this fifth edition about the same size as its immediate precursor.

This casebook is intended for use in a basic course on the substantive criminal law, which at most law schools is a required part of the first year curriculum. In selecting, editing, and organizing these materials, I have sought to bring together a collection of cases and secondary sources which will serve what I perceive to be the primary functions of such a course. These are: (1) together with the other first-year courses, to provide training in the case method and techniques of legal analysis; (2) also with the other first year courses, to afford the student with new insights into the fundamental question of how and to what extent the law can be effectively utilized as an

instrument of social control; (3) to compare and evaluate the actual and potential contributions of legislatures (through codification), courts (through the common law and by "interpretation" of statutes) and administrators (by certain enforcement policies) in defining and grading crimes; (4) to provide the fundamental information and impart those skills which are the necessary foundation for criminal law practice, either as a prosecutor or defense counsel; (5) to provide an awareness of the inherent difficulties in trying to control antisocial behavior through the criminal law without encroaching upon basic democratic values, an appropriate matter of concern to all members of the legal profession.

This Book does not attempt to cover both substantive criminal law and criminal procedure. This is not to suggest that criminal procedure is unimportant. Rather, the assumption here is that both subjects are important parts of the law school curriculum, and that neither substantive criminal law nor criminal procedure should be shortchanged by compaction into a single course. There has been a growing realization that there is no particular advantage in teaching the two subjects together (any more than, say, combining torts and civil procedure); in recent years more and more schools have chosen to offer them separately.

It is important, however, for the student studying criminal law to have a general understanding of how the criminal process works. Thus, I have included herein textual material on that subject (Chapter 1, Section 1). Also, there are some aspects of substantive criminal law that simply cannot be meaningfully understood unless they are considered together with certain matters which, literally speaking, fall within the realm of criminal procedure. When this is the case, I have included the relevant procedural material.[1] Thus, for example, Chapter 6, dealing with mental disease or defect, treats incompetency to stand trial (which often is a "substitute" for an insanity defense) and various procedural aspects of the insanity defense.

The reach of the substantive criminal law is constantly expanding, and thus today's law student is much more likely than his counterpart of some years ago to find himself engaged to some extent in the practice of criminal law after graduation. This practice may involve the prosecution of or defense against charges of such familiar crimes as robbery, battery and rape; it may instead or in addition be concerned with the increasing body of regulatory crimes which have been enacted in response to such contemporary concerns as consumer protection and environmental control. An adequate preparation for such practice requires an *understanding* of the fundamental bases of our system of substantive criminal law, rather than *knowledge* of the precise definitions of the growing list of crimes. Consequently the major emphasis in this casebook is upon what is usually referred to as the "general part" of the criminal law: mental state (Chapter 3) and act (Chapter 4); responsibility

1. On the other hand, I have not covered the subject of entrapment in this Book. Though strictly speaking it is a matter of substantive criminal law, it is more meaningful studied in the context of that part of criminal procedure dealing with restrictions up on police investigative practices.

(Chapters 6 and 7); justification and excuse (Chapter 8); inchoate crimes (Chapters 10 and 11); and liability for the conduct of another (Chapter 12).

It is my belief that imparting detailed information about many different crimes is not the goal of a basic course in criminal law. It is sometimes useful, however, to focus upon certain specific crimes or a category of crimes, which is why three of the twelve chapters in this casebook take such an approach. Chapter 2 looks mainly at cases concerning the so-called "crime against nature"; Chapter 5 has to do with criminal homicide; and Chapter 9 examines the law of rape. In each instance the focus serves to advance inquiry into matters of considerable importance—respectively, the sources, purposes and limits of the criminal law; the challenge in drawing meaningful differentiations between related crimes; and the dilemmas confronted in undertaking law reform of the substantive criminal law.

Over the years, the so-called "crime against nature" has been the subject of frequent and intense litigation about the meaning of this common law crime, about often-ambiguous statutes replacing or adding to the common law offense, and about the proper role of courts in broadening or elaborating upon either the judicially-or legislatively-created version of the crime. In more recent times, constitutional considerations have often played a part; the due process void-for-vagueness doctrine has been invoked in an effort to have some of these statutes invalidated, and various provisions in the Bill of Rights have been relied upon in an effort to support the claim that the conduct covered by certain "crime against nature" formulations cannot constitutionally be made punishable at all or in a certain degree or manner. As judicial elaborations and legislative reformulations of the "crime against nature" have occurred, there has naturally arisen the additional question of whether either detrimental or beneficial changes in either the definition of the crime or the extent of authorized punishment can or should be applied retroactively. So too, this offense has not infrequently been the object of litigation concerning the respective authority of state, federal and local lawmakers. What all the forgoing issues have in common is that they have to do with the sources and limits of the criminal law, which is why Chapter 2, aimed at those problems, relies mainly upon the "crime against nature" offense category in dealing with this array of problems.

With regard to Chapter 5, focusing upon criminal homicide, the rationale here is that it is important for students of the criminal law to consider not only the question of what conduct should be made criminal, but also the question of how various forms of criminal conduct should be classified into separate crimes so as to reflect their respective seriousness. Although this problem of classification arises in a great many areas of the criminal law, undoubtedly the courts and legislatures have experienced the greatest difficulty in articulating intelligent classifications in the area of homicide. Moreover, study of homicide provides a useful background to consideration of certain doctrines which come into play almost exclusively in a homicide context (e.g., the insanity defense) or which raise the most difficult issues in that context (e.g., the defenses of duress or self-defense).

In order to demonstrate some of the difficulties encountered in efforts at reform of the criminal law, Chapter 9 looks at the crime of rape, the focus of a great many reform efforts in the last decade or more. Both feminists and other law reformers have raised serious questions about the traditional substantive and procedural law on the subject of rape; they have complained that this body of law (a) reflects perspectives about the crime which have no contemporary legitimacy, and (b) contributes to low rates of arrest, prosecution and conviction for this offense. Much useful reform has occurred on the procedural side, and some has also occurred with respect to the substantive law of rape as well, although the changes there tend to be more controversial. The question of just how the substantive law of rape ought to be stated remains a live topic in many jurisdictions. Chapter 9, using highly controversial principal cases enriched with a great many excerpts from critical commentary, mostly from just the past few years, takes a look at the three areas of major continuing conflict: (i) what nature and degree of imposition—force, other coercion, fraud, or what—should be suffice? (ii) when should either consent or nonconsent be presumed, and in other cases what should be taken to constitute a sufficient manifestation of nonconsent? (iii) what mental state, if any, should be required for the crime, especially with respect to a defendant mistaken belief in consent?

In Chapter 9 as well as elsewhere in this Book, I have attempted to place special emphasis upon the actual and potential contributions of the legislative branch in resolving the difficult policy questions which exist in the field of criminal law. (The matter is first confronted in Chapter 2, but is a recurring theme in the rest of the Book as well.) This emphasis takes proper account of the contributions which legislatures have made to the criminal law in recent years; a total of thirty-eight states have adopted new substantive criminal law codes.[2] Moreover, this emphasis aids in presenting the first-year student, often preoccupied with the common law in his other courses, with a more balanced picture of our legal system. Thus, while it is my belief that this Book is readily adaptable to a wide range of teaching styles, it is especially suited to those professors who have found it useful to require their students to work intensively with the Model Penal Code (major portions of which appear in the Appendix) and/or with the code of some particular jurisdiction.[3]

Although the subject of criminal law has not been "constitutionalized" to the same extent as criminal procedure, it is fair to say that there is some degree of overlap between the law school subjects of constitutional law and substantive criminal law. This gives rise to the very difficult question of how much constitutional law to include in a first-year criminal law course, which

2. Efforts directed toward similar reform have been undertaken but have faltered in some other states and on the federal level.

3. I have not infrequently required my students to have and work with the Illinois Criminal Code, not because I want them to learn the specifics of the law in this state, rather because I want to give them some experience in working closely with a *real* criminal code. (The Illinois code, like that in many of the states that heavily influenced by the Model Penal Code, but has over the years taken on considerable additional baggage as a result of frequent legislative revision.) Examination of such a warts-and-all code, I have found, presents the students with an experience closer to real life than exclusive examination of the Model Penal Code.

the authors of extant casebooks have resolved in quite different ways. It is my judgment that the constitutional limits on the substantive criminal law cannot be ignored in a criminal law course, for without some appreciation of those limitations the student cannot evaluate in a meaningful way alternative legislative proposals for dealing with various issues. On the other hand, it is hardly appropriate to subsume most of constitutional law into the criminal law offering, if for no other reason than that the beginning law student would probably be overwhelmed as a consequence. I have attempted to strike a fair balance. As noted earlier, I have in Chapter 2 focused on "crimes against nature" in inquiring into the constitutional limits of penal legislation. Beyond this, I have included a few Supreme Court decisions (e.g., *Powell v. Texas; Montana v. Egelhoff*) that raise very basic issues about the permissible reach of the substantive criminal law.[4]

The introductory chapter concludes with an inquiry into the purposes of the criminal law and, in particular, the considerations which ought to bear upon the imposition of a criminal sentence. This is done by a close examination of the sentencing decision in a pre-Sentencing Guidelines case by a federal judge who had theretofore written thoughtfully about the subject; the case is then revisited in light of procedures once mandated under the Guidelines, and then capped off by some sharp differences of opinion on the respective merits of Guidelines and pre-Guidelines sentencing law. Some sentencing issues are occasionally raised later in the Book, but in the main the matter of sentencing—Or, indeed, the broader subject of corrections—is not given major emphasis in this Book. This reflects the fact that the law of corrections has developed to the point where at many law schools it has become the basis of a separate course.[5] Where such an offering is not available, an expanded treatment of corrections within the context of these materials can be readily achieved by examination of relevant parts of the Model Penal Code or some state penal or corrections code.

In selecting the major cases which appear in this Book, I have included those which, in my judgment, are most likely to stimulate an interesting and profitable classroom dialogue. That is, inclusion of a particular case does not necessarily rest upon the conclusion that it was rightly decided or that the court analysis was in all respects sound, but rather is grounded in the belief that the facts or the analysis or both provide a useful vehicle for classroom discussion.[6] The book is intended as a teaching tool, not a research tool, and

4. One important constitutional limitation unique to criminal law is the requirement that the prosecution prove the defendant's guilt beyond a reasonable doubt.Consequently, I have given attention at several points in these materials to the constitutionally of putting some proof burdens on the defendant (i.e., the impact of *Mullaney v. Wilbur* and its progeny) or of "lightening" the prosecutor's burden by resort to inferences and presumptions (i.e., the impact of *Barnes v. United States* and related cases). However, a professor who feels that these matters should be reserved until later in the student's legal education will find it easy to omit the aforementioned cases and the few others of the same character without interrupting the flow of the remaining material.

5. Teaching materials on the subject are available. See, e.g. Lynn S. Branham & Michael Hamden, *The Law and Policy of Sentencing and Corrections* (8th ed.2009).

6. I have been less than successful over the years in convincing even my own students that this is the case, for some of them view a casebook as some collection of ultimate truths. Indeed, I've had difficulties of this kind with some professors as well!

thus the primary objective throughout has been to provide the teacher and student with a common source of material upon which they may interact in the classroom. As for the notes and questions following the principal cases, their purpose is not to upstage the teacher, but rather to direct the student's thoughts down certain avenues prior to class so that the class time may be utilized more effectively and efficiently. Sometimes this supplementary material will summarize another case either reflecting a somewhat different approach or point of view or presenting a somewhat different fact situation for "testing" the doctrines accepted in the principal cases.[7] On many occasions the supplementary material consists of excerpts from illuminating or provocative writings in the law reviews, which either elaborate upon the doctrines of the principal case or present a different perspective on the matters at issue. Here again, there has been no attempt to select only excerpts that completely square with my own thinking about the topics under discussion.

Students desiring to do additional reading on the subject may wish to consult other sources. Many materials written specifically for students are available; I would mention here Wayne R. LaFave, *Criminal Law* (5th ed.2010), a 1,293–page hardcover text with considerable footnoting, which understandably matches up most closely with the coverage of this casebook; Wayne R. LaFave, *Principles of Criminal Law* (2d ed.2010), a more succinct and footnoteless 765 pp. paperback treatment; Joshua Dressler, *Understanding Criminal Law* (5th ed.2009), a 606–page paperback text with limited footnoting; Arnold H. Loewy, *Criminal Law in a Nutshell* (5th ed.2009), a 387–page paperback; and Paul H. Robinson, *Criminal Law* (1997), an 853–page hardcover text with footnotes. Also very useful are the many outstanding articles on a variety of substantive criminal law topics appearing in the four-volume Encyclopedia of Crime and Justice (2d ed.2001). On the question of how the problems discussed herein may best be dealt with through recodification, a primary source is the updated *Model Penal Code and Commentaries* published by the American Law Institute commencing in1980 and ending in 1985.

Case citations in opinions and footnotes of the courts and commentators have been omitted without so specifying. Numbered footnotes are from the original materials; my footnotes are lettered.

I wish to extend my thanks to the many users of the prior editions of this Book who provided helpful advice and suggestions; to the many copyright holders who graciously permitted me to include herein excerpts from various works (see list of Acknowledgments on pages following); to Dean Bruce P. Smith and others at the College of Law, University of Illinois, for continuing support of my research endeavors; and to my wife Loretta, without whose ongoing support and encouragement I would not have completed this Book

7. Not infrequently, there will be an inquiry as to what the result should be on the facts stated, followed by or footnoted with a citation to the case containing those or similar facts. This is not intended to suggest that it is either necessary or desirable that the student consult the cited case in preparing for class. An evaluation of the fact situation provided should be possible on the basis of the immediately preceding material in this Book.

(or, for that matter, much of anything else), and who would have this Book dedicated to her but for the fact that I have chosen a much younger lady to whom we are both devoted.

Wayne R. LaFave

January, 2011

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