

Criminal Law

Criminal Law

Cases, Statutes, and Lawyering Strategies

FOURTH EDITION

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*We dedicate this edition to the memory of our friends
and coauthors Neil Cohen and Penny Pether.*

David Crump
John Parry

Additional Dedications

*From David Crump:
To Susanne.*

*From John Parry:
To my family*

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Preface

We Wanted to Create a Different Kind of Criminal Law Casebook from those that are already on the market. But at the same time, we wanted a familiar organization, with all of the subjects that are part of a traditional casebook.

Traditional Organization and Coverage. This casebook contains all of the subjects that ought to be covered in a first course in Criminal Law. The elements of crimes, actus reus and mens rea receive thorough coverage. The basic crimes, including homicide, sexual assault (or rape), theft, and related offenses, are there. The book covers multiple party crimes and preparatory offenses. Sentencing receives a major chapter. And the justification and legality of the criminal law, including constitutional limits on crime definition and the relationship between crimes, harm, and morals, are all covered.

There is one important innovation in our organization. We have designed the book so that the professor can start the course either with homicide or with the elements of crimes. Various casebooks on the market reflect each of these starting points, but we believe ours is the only one consciously designed to provide the professor with a choice. Some of us, the authors, believe in starting with a concrete body of crime definitions, and this group prefers to begin with homicide. On the other hand, some of us prefer to begin with crime elements, or in other words, with the framework of mens rea, actus reus, circumstances, causation, and harm, before going to specific crimes. Either way makes sense, and either way is convenient with this casebook.

At the very beginning of the book, there is a short introductory chapter on “Fundamentals” that facilitates either the homicide-first or the elements-first approach. That chapter (Chapter 1) briefly provides tools for understanding the rest of the book. Chapter 2 (the first major chapter) is about homicide, and those who want to consider homicide first will proceed in that order. Chapter 3 covers elements of crimes, concentrating on mens rea and actus reus, and those who want that approach will skip from Chapter 1 to Chapter 3, and they will take up homicide, in Chapter 2, after Chapter 3. The book is set up so that either approach is easy.

Special Features: Introductions, Explanations, Current Cases, Statutes, Cutting-Edge Problems, Useful Notes, Newspaper Review Cases, and Simulation Exercises — All in a Compact Book. Traditional coverage and organization were important to us, but they definitely were not all that we wanted. Our casebook contains many features that are unusual, as well as some that are unique. We think that these features will enable the professor to do more for students: To develop the theoretical aspects of the

subject in greater depth, while at the same time showing how Criminal Law really works. Here are some of the features that make this casebook special:

1. ***Compactness.*** This casebook is one of the shortest casebooks on the market. We achieved this feature by carefully editing the cases so that they contain the full background that is needed but so that unrelated material is excised. And we did the same with our introductions, explanations, notes, and problems. We wanted our materials to be lean and effective, and we worked hard to keep them concise.
2. ***Cutting-Edge Problems.*** A professor can use the problem method in teaching from our casebook, as well as using cases. Most chapters cover each important topic with problems that challenge the student to put together doctrines from groups of cases and to answer questions about current, controversial situations. The more advanced problems are based on real cases: reported decisions, newspaper articles, and cases that the authors handled. Each problem has a “tease” in its heading that alerts the reader to both the legal issues and the factual context.
3. ***Current Cases, Carefully Edited.*** This casebook emphasizes recent cases. We have tried, when possible, to use decisions from the 2000’s, and failing that, we have preferred cases from the 1990’s. Usually, recent cases exhibit various pedagogical advantages: more relevant situations, more current policy conflicts, and modern language. Students seem to appreciate cases that were decided after they were born, and we want students’ interest to ascend to the highest level possible. Furthermore, it usually is not necessary to sacrifice the development of the law when using up-to-date cases, because the better examples of recent cases (the ones we have selected) usually summarize historical concerns when relevant, as well as the governing principles of today. We have not, however, concentrated only on recent cases. Sometimes a slightly older opinion is better, and then, that is the one we have put in the casebook. Also, there are some much older cases that still are foundations of the law: *M’Naghten’s Case* in the insanity coverage; *Pinkerton v. United States* in the conspiracy and accomplice materials. Those cases are included, of course. But unless there were reasons to the contrary, we selected current cases.
4. ***Reading Statutes: Assistance and Encouragement.*** Our casebook encourages students to read statutes and concentrate on their elements, because criminal law is statutory in most states today. Chapter 1 explores the differences that this statutory basis makes. Later chapters contain problems that require students to break statutes down carefully into their elements. An appendix to the elements chapter (Chapter 3) develops the logic of statutes, as well as examples of interpretive methods. Excerpts from the Model Penal Code are contained in an Appendix (“Appendix A”); throughout the book, conspicuously formatted instructions direct the reader to study sections from the MPC corresponding to the subjects at hand. Experience shows that this casebook will prompt

students to concentrate on statutes and to read them with a different method than cases.

5. *Introductions and Explanations.* Class meetings are better if students have understood and absorbed the basics before they come to class. The professor need not spend valuable class time in establishing simple propositions, and everyone can advance to more interesting subjects: current issues, ambiguous situations, and lawyers' strategies. For this reason, our casebook introduces every subject with explanations of the underlying principles, the history, and the doctrinal ambiguities. Students need not rely solely on ancient cases to absorb the distinctions among larceny, false pretenses, and embezzlement; the cases are there, to illustrate the differences and to provide challenges, but so are the history and theory, explained in clear text. We have included the same kinds of explanations about the structures of homicide laws, the ingredients of actus reus, and the determinants of sentences; and in fact, we have tried to precede every important doctrine by a textual introduction with explanations.
6. *Optional Simulation Exercises That Can Develop Strategic Thinking.* Each coauthor of this book has had experience as a criminal lawyer. Some of us were defense lawyers, some were prosecutors, and some have practiced on both sides. We are familiar with the distinct kinds of thinking that guide lawyers in strategy decisions: in papering an indictment, for example, or in attacking it. A good criminal lawyer knows how to deconstruct an appellate opinion, but a good criminal lawyer also knows that case law is only the starting point. Decisions about strategy cannot be made solely from reading cases. For that reason, we have included twelve lawyering strategy puzzles that (for want of a better name) we have called "Simulation Exercises."

The Simulation Exercises call for various lawyering competencies. They range from attacking a Pre-Sentence Report to delivering a jury argument and from arguing a Motion for Judgment of Acquittal to drawing up a proposed court's charge. The Simulation Exercises are keyed to "Case Files," which contain materials based on actual cases. The Case files are available online. Please go online to <https://caplaw.com/sites/cl4/>. The Case Files feature murder, burglary, rape, and white-collar bank fraud charges. Students who use these Case Files will be exposed to the realities of Criminal Law. The homicide Case File, for example, reproduces police reports, an autopsy report, laboratory results, statements, and a confession. In designing these Simulation Exercises, we made sure to reflect a variety of chapters, from the homicide coverage to the sentencing materials, and we also wanted to develop differing lawyering activities, from document analysis and counseling to fact argument and negotiation.

We need to stress, however, that the Simulation Exercises are optional. A professor can decide to use none of them, simply by directing students to omit them. They appear at the ends of chapters and are not integral to the rest of the materials. We think many professors, however, will want to use several of

them, and some professors may use them all. There is no substitute for the expanded awareness, newly developed abilities, and genuine excitement that students gain from successful use of these Simulations. Furthermore, students who perform the Simulations tend to understand the other materials in the book better, including the most highly theoretical coverages.

7. *“Newspaper” Review Cases.* Each major chapter contains a set of review problems at its end, requiring the student to put the chapter together and to apply the principles learned from it. Because students respond well to situations that are real, these problems are all based on recent reports from newspapers. Questions accompany each newspaper report to focus attention on doctrines relevant to the case. This is a powerful device for helping students to consolidate and apply what they have learned, and usually, the newspaper review problems are among the high points of a given chapter.
8. *Useful Notes, with Descriptive Headings.* The functions of notes that follow a case are to facilitate understanding of the case, to provide variations or new information, or to challenge students with targeted questions. We have tried our best to make our notes useful for these functions. In particular, we have tried to avoid what we call the “question cloud” method of writing notes: arrangements of disconnected questions that do not make their relationship to the surrounding materials clear.

We tried instead to target our notes so that they help develop understanding and retention. Every note begins with a brief but descriptive heading that tells what it is about. The notes are self-contained. We adopted the convention of explaining every case cited in the notes sufficiently to make it meaningful, without assuming that the student will do legal research to understand each note. Also, we tried to focus each note around one or two targeted questions, rather than producing “question clouds.” In summary, we hope that we have written our notes so that they are useful.

Expanded Coverage: The Burden of Proof, Sentencing Law, Controlled Substances (Drugs), White Collar Offenses, Terrorism, Domestic Violence, Stalking, Plea Bargaining, Victims’ and Survivors’ Interests, Non-Criminal Crime Reduction, and Other Subjects. In addition to these special features, our casebook contains expanded coverage of subjects that many casebooks omit or treat only briefly. Here are some examples:

1. *More Extensive Coverage of the Requirement of Proof Beyond a Reasonable Doubt.* The burden of proof is a transforming aspect of the criminal law. It is possible, for example, for a legislature to enact a statute that “looks good” on paper but that is ineffective, because the crime it defines cannot be proved in court in accordance with the rigorous standard that controls criminal trials. Conversely, a well written statute is one that has been designed with the proof burden as a major consideration. Unfortunately, this phenomenon is not easy to understand. Students come to the Criminal Law course having already

heard the phrase, “beyond a reasonable doubt,” but its meaning remains surprisingly elusive. The fictional crime shows or books that furnish most people’s background knowledge rarely depend on proof standards, because fiction must reflect dramatic compression. Consequently, if the full implications of the burden of proof are not carefully developed, students will emerge from the course with poor understanding of either theory or reality. Therefore, we devote a chapter—not one of our longer chapters, but a serious chapter nonetheless—to the meaning and implications of the burden of proof. Students find this chapter fascinating, first because of counterintuitive examples of real crimes that remain unprovable, then because of the puzzles that accompany the definition of the burden of proof, next because of the ethical dilemma that the burden represents, and finally because each of the familiar types of evidence used to prove crimes exhibits serious flaws. All of these issues are treated compactly but meaningfully.

2. *Sentencing Law, as Well as Sentencing Philosophy.* We also provide expanded coverage to the law of sentencing. James Q. Wilson famously observed that in most criminal cases the real question is sentencing, not guilt or innocence. It follows that without serious attention to the law of sentencing, a casebook will produce only a partial exposure to Criminal Law even if its definition of crimes and defenses is sound. Most Criminal Law casebooks today, including this one, cover sentencing philosophy—deterrence, incapacitation, rehabilitation and retributive justice—but most contain little coverage of the law of sentencing. Our casebook certainly exposes students to sentencing philosophy, but it covers the law of sentencing, too. It develops the sentencing options that are available, such as probation, probation conditions, fines, incarceration, parole, diversion, clemency, and other variations, and it illustrates the legality and use of these options with cases and problems.

We also wanted to include thorough coverage of the comparison between determinate and discretionary sentencing. Along with that, we wanted our casebook to contain coverage of the Federal Sentencing Guidelines, coverage that went beyond a note announcing their existence. Therefore, our coverage shows how the Guidelines work and allows students to learn how to compute a sentence under the Guidelines as well to interpret their ambiguities. The Guidelines are advisory today, but courts still must consult them, and most actual sentences comport with the Guidelines. Our aim is to produce students who not only understand sentencing philosophy, but also can argue about conditions of probation, propose an alternative sentence to a judge that will minimize incarceration, and understand the promises and perils of determinate models.

3. *Contraband: Controlled Substances (Drugs) and Other Prohibited Items.* A short and optional—but also important—chapter in this casebook covers crimes involving contraband such as drugs and weapons. These crimes are a major component of actual court dockets, and in some jurisdictions, they

are the biggest component. The law that governs these crimes is different in concept from the law that governs other kinds of crimes. For these reasons, our casebook exposes students to a typical statutory framework by including excerpts from the Uniform Controlled Substances Act, and we use problems or cases to explore the meaning and proof of crimes that include manufacturing, delivery, distribution, precursors, imitations, and possession. The chapter also includes materials that facilitate debate of the question whether criminalizing drugs is the best policy, as well as the impact of drug crimes on race and gender issues.

4. *Other Coverages: White Collar Offenses, Domestic Violence, Stalking, and Terrorism.* Another optional chapter includes brief but focused coverage of white collar offenses and of the features that make them different. It also explores solutions to the problems of domestic violence and stalking in a way that is compact but that will help students confront the real issues. Finally, the law of terrorism has expanded so that it is an appropriate subject of the Criminal Law course today. Our coverage of terrorism is short (it appears at the end of the chapter on contraband), but it shows students the statutory framework of criminal anti-terrorism laws, covers a selected variety of terrorism-related crimes, and highlights the due process and separation of powers challenges that face anyone trying to deal with anti-terrorism offenses.
5. *Perspectives: Non-Criminal Means of Crime Reduction, Victims' and Survivors' Interests, Plea Bargaining, Competencies in the Criminal Law, and the Personal Dimension.* Our casebook contains an optional chapter entitled "Perspectives," which explores other influences on the Criminal Law. First, the criminal sanction is expensive and heavy-handed, and good lawmakers of tomorrow will rely increasingly on other means of reducing crime. Our coverage ranges from regulatory methods to broken-windows theories to architectural design. Second, crime victims and survivors are no longer so neglected as they once were. Our coverage explores the claims and demands of crime victims and survivors and considers the implications. Third, most cases are settled by guilty plea agreements today, and a casebook that neglected this issue would be seriously incomplete. Our casebook describes the phenomenon, explores the underlying reasons, and considers safeguards and procedures for conviction by guilty plea. Fourth, the competencies needed for the practice of criminal law go far beyond the ability to read cases and statutes, and our coverage includes materials that describe and explore those competencies. Finally, it is not always easy for criminal lawyers (or for lawyers in any specialty) to find satisfaction and to live full lives, and we address this issue in Appendix B.
6. *Modular Construction: Selection and Omission of Optional Materials.* Few professors will want to use every one of our features or expanded coverages. Even with a compact book, the number of hours devoted to the Criminal Law course will not permit it. Therefore, we have designed this casebook with

frequent use of “modular construction”: sections and chapters that are readily identifiable for either inclusion or omission. For example, extra materials about the logic of reading statutes are contained in an appendix to the chapter on crime elements. Our coverage of the mechanics of the Federal Sentencing Guidelines is concentrated at the end of the sentencing chapter. The Perspectives chapter and its five sections are set off separately, as is the chapter on contraband and terrorism. It should be easy for a professor to describe to students the parts of this casebook that are to be omitted or included.

A Classroom-Tested Book That Helps the Study of Criminal Law Become “Serious Fun.” The fundamental ingredients of this casebook have been classroom-tested multiple times. Experience shows that the casebook can make the study of criminal law fascinating to students and, at the same time, help them expand their understanding of both the theory and the reality of the subject. We hope that you and your students will enjoy and benefit from it as much as we have enjoyed writing it.

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