
PREFACE

Criminal law is fun. Whatever challenges await the authors of a civil procedure casebook, putting together a criminal law casebook by comparison is easy: the main job of a criminal law casebook is to stay out of the way of the inherent interest that its subject holds for beginning law students.

The goal of this book, then, is to present a stimulating collection of up-to-date materials that capture the complex reality of modern American criminal law.

The last significant change in the way American criminal law is taught occurred some forty years ago. In 1962, the American Law Institute (ALI) completed its Model Penal Code and Paulsen & Kadish published the first edition of their seminal casebook, *Criminal Law and Its Processes* (which still covered both substantive and procedural criminal law). Paulsen/Kadish (and later Kadish/Schulhofer) was the first casebook based on the Model Penal Code and has set the standard for American criminal law teaching ever since.

Since then, American criminal law has undergone so many dramatic changes that it is time to reconceptualize American criminal law teaching once again. Some of the more momentous developments since 1962 include:

- The collapse of the rehabilitative project and the renaissance of retribution as a justification for punishment;¹
- The eventual dominance of incapacitation in a decades-long “war on crime”;
- The rise of the “victims’ rights” movement, and the concomitant recognition of the victim’s significance in all aspects of criminal law, from definition (e.g., hate crimes) to imposition (e.g., victim impact statements) to infliction (e.g., restitution and compensation);
- At the same time, the explosion of so-called victimless crimes, most importantly of drug offenses in a “war on drugs”;²

¹ On the Code’s anti-retributivist and pro-treatmentist approach, see Markus Dirk Dubber, “Penal Panopticon: The Idea of a Modern Model Penal Code,” 4 *Buff. Crim. L. Rev.* 53 (2000).

² The Model Penal Code did not include drug offenses because the “project did not extend to [special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws]” because “a higher priority on limited time and resources was accorded to branches of the penal law which have not received close legislative scrutiny.” See Model Penal Code (Proposed Official Draft) 241 (1962).

- More recently, the enlistment of criminal law in a “war on terror”;
- The appearance of internet crime;
- The rise of white collar criminal law;
- The expansion of federal criminal law;
- The growth of administrative, or regulatory, criminal law and the resulting transfer of criminal lawmaking power from the legislature to executive agencies (after the shift from the judiciary to the legislature solidified by the Model Penal Code);
- The emergence of vaguely defined offenses like RICO, money laundering, and stalking that free law enforcement officials from the constraints of legality in the pursuit of elusive “criminal networks” or dangerous individuals;
- The proliferation of inchoate and dangerousness offenses, like possession, solicitation, unilateral conspiracy, facilitation, and reckless endangerment;
- The death and rebirth of loitering statutes;
- The continued expansion of so-called public welfare and malum prohibitum crimes;
- The entrenchment of strict liability offenses throughout the “periphery” (e.g., public welfare offenses) and the “core” of criminal law (e.g., felony murder);
- The reform of the law of sex offenses, including the abandonment of the marital rape exemption and the adoption of rape shield laws;
- The rise and demise (and renaissance?) of constitutional criminal law;
- The curtailment and, in some cases, abandonment of the insanity defense;
- The establishment of plea bargaining as the dominant mode of case disposition and the attendant disappearance of jury trials;
- The emergence of a law of punishment, including the appearance of punishment guidelines as a source of criminal law, the creation of a determinate punishment regime, and the transfer of the power to make the law of punishment to quasi-administrative bodies (sentencing commissions);
- The erosion of the distinction between the treatment of juveniles and the punishment of adults in all aspects of criminal law;
- The expansion of so-called non-punitive measures, including civil forfeiture, indefinite commitment of “sexual predators,” and involuntary registration and community notification for sex offenders;
- The rising popularity of so-called alternative punishments, including shaming penalties;
- The widespread adoption of harsh recidivist statutes, including three-strikes laws;

- The demise and rise of capital punishment;
- The privatization of prisons;
- The abolition of parole and the curtailment of probation; and
- Last, but certainly not least, a six-fold increase in the prison population to over two million, resulting in the highest incarceration rate in the world, with particularly disturbing effects on the minority population, with as many as one third of all black males in their twenties under some form of carceral or noncarceral penal control.

General Part. The Model Penal Code concerned itself mostly with the general part of criminal law, and today pretty much everyone teaches—and thinks about—the general principles of American criminal law along the lines of the Code. If one takes the MPC as the baseline of American criminal law, as we do in this casebook, teaching the general part should be fairly straightforward, while noting “common law” and “traditional” variations along the way.

To gain a fresh perspective on familiar material, we have frequently adopted a *comparative* approach to the issues covered in the book. Comparative materials include excerpts both from foreign (and, to a lesser extent, international) *criminal* law and from American *civil* law, to highlight parallels between the law of crimes and the law of torts (and, occasionally, contract law and victim compensation law). The ALI’s Restatements of Torts make for a particularly convenient point of comparison on common issues, both in the general part (e.g., negligence, recklessness, intention, causation, omission, “privileges”) and in the special part, where we consistently explore the availability of civil remedies as alternatives, or supplements, to criminal sanctions. For instance, our discussions of the difficulties in defining when women are “coerced” sexually (in Chapter 9, on rape) and in ascertaining when “consent” is “freely given” (see Chapter 7, on justification) are explicitly tied to discussions of “coercion” in contract law. This emphasis on parallels among different areas of law will be especially useful to novice law students, who are generally rushed through survey courses covering enormous amounts of material during both semesters of their first year, and find it difficult, without guidance, to notice the relationship among the courses they study.

In another attempt to locate criminal law within a broader conceptual context, we encourage students to explore the constitutional limitations on substantive criminal law. Although substantive criminal law remains far less constitutionalized than does procedural criminal law, constitutional principles can—and in some cases do in fact—place formal and substantive constraints on substantive criminal law as well, including certain aspects of the principle of legality, the source and scope of criminal jurisdiction, double jeopardy, *actus reus*, *mens rea*, defenses, burdens of proof, and—perhaps most important—the right of the state to criminalize conduct.³

³ See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (striking down homosexual “sodomy” statute on due process grounds). Note too that we raise issues about the appropriate reach of the criminal law not merely in relationship to the traditional victimless crimes (e.g., drug use, voluntary sexual contacts) but in relationship to the expansion of white collar crime (e.g., certain forms of securities fraud, money laundering).

Acknowledging the Model Penal Code as the key to—if not the source of—the general part of American criminal law also allows us to drive home the point that American criminal law is no longer judge-made common law, a point that was still contested in 1962 but no longer warrants extensive discussion. That does not mean, however, that American criminal law is *legislator*-made, as the MPC assumed, and properly so for its time. For even though all of American criminal law is now codified (or at least statutory), much of it has become increasingly insignificant because so much of criminal law today is, in fact, the law of punishment, as opposed to the law of crime: “sentencing” law has become, in a significant sense, the real heart of substantive criminal law. Since sentencing law, however, increasingly is generated by a quasi-administrative—*sui generis*—body of experts, a sentencing “commission,” it appears like an exercise in lawmaking by an executive agency rather than by the judiciary. The executive also makes criminal law through prosecutors, who control sentences through charging decisions, and through other, more traditional, administrative agencies, which promulgate rules and regulations backed by criminal sanctions (generating “regulatory” offenses in the true sense). There is now even a scholarly literature very much *in support* of the shift of criminal lawmaking power to the executive.

The present book deals in some detail with punishment law as criminal law, and sentencing guidelines as codes. The law of punishment—with a now well-developed jurisprudence on sentencing—serves as a convenient point of entry into federal criminal law and the federal guidelines, which turn out to be a *de facto* federal criminal code, with a general part and a special part, including offense categories and offense definitions.

Special Part. The teaching of the special part of criminal law also requires significant updating. The MPC succeeded, by and large, in shaping the big issues of the general part. The special part, though, is another story. If one read the MPC’s special part today, one would have no idea what American criminal law—in the special parts of criminal codes, other statutes, and regulations, as well as in courtrooms and in prisons—actually looks like.

Modern criminal law, contrary to the impression left by the MPC, is not about homicide, or theft. It is about the very crimes that appear nowhere in the MPC: drug possession crimes, traffic offenses, and “white collar crime” in its myriad manifestations. If a “traditional” crime deserves emphasis—not only because there is actually some doctrinal development in this area—it is rape, and other sex offenses, not the stagnant homicide, the MPC’s central crime.⁴

Homicide used to get more than its share of doctrinal attention, but the trend in modern criminal law has been to generalize once homicide-specific doctrines like self-defense (originally homicide *se defendendo*). Still, an extensive chapter on homicide is included, not only for the sake of continuity but also because the law of homicide remains the most heavily parsed

⁴ It’s no accident that the blueprint for the MPC first appeared in an article devoted to the law of homicide. Jerome Michael & Herbert Wechsler, “A Rationale of the Law of Homicide (Parts I & II),” 37 Colum. L. Rev. 701, 1261 (1937).

area of the special part and provides a convenient testing ground for student's understanding of the distinctions among various types of mens rea. Moreover, the law of provocation/extreme emotional disturbance raises significant theoretical issues that may help students better understand the defenses of excuse and justification, and may help them understand more generally the perils and promises of vaguely defined statutory language, on the one hand, and unduly constrained rules on the other.

The much more common possession offenses by themselves can be used to teach many issues in modern criminal law—actus reus, omission, mens rea, strict liability, conduct offense/result offense, inchoate offenses, complicity, defenses, presumptions (of possession based on something else—like presence—and of something else—like distribution—based on possession). Traffic offenses also generate thoughtful discussion because students are much more likely to be familiar with them through personal experience than they are with, say, homicide. In addition, they raise a host of interesting issues themselves—e.g., actus reus, strict liability, punishment vs. regulation and civil sanction (like suspension of driver's license), and criminal vs. civil negligence.

For similar reasons, white collar crimes receive more attention in the present book than they have in the past. Students—and courts—are less likely to demonize an insider trader, or even a third-party money launderer, than they are a murderer or a rapist, and therefore may be less impatient with the doctrinal niceties of the analysis of criminal liability. What's more, white collar crime is an area of American criminal law that is continuously developing (and expanding) and is much richer, *from the standpoint of criminal law*, than is generally supposed. New white collar crimes nicely illustrate many key issues in criminal law, including, e.g., symbolic legislation, vagueness, legislativity, strict liability, vicarious liability, group criminality, actus reus, complicity, material/non-material elements, federal/state jurisdiction, civil/criminal sanctions/remedies, and in their complicated—and often convoluted—structure, the operation of “the special part” in modern criminal law, be they defined in criminal codes, other codes, or administrative regulations, or—as is often the case—some combination of the three.

We place great emphasis on the effort to have students engage with the doctrinal issues early and often, rather than observe them from afar with the attitude that criminal law is something that happens to other (more precisely, bad) people. To this end, we have included not only cases, statutes, and excerpts from scholarly commentary, but also excerpts from newspaper accounts, jury instructions, and executive materials (like agency regulations, prosecutors' manuals and guidelines, and internal government memoranda) and have supplemented the primary and secondary materials with problems that allow students to deepen their understanding of an issue or set of issues. The obligatory homicide and rape cases are supplemented—and probably outnumbered—by cases on drug crimes (possession and distribution), gun possession, shoplifting, traffic offenses (DWI, reckless driving, negligent homicide), loitering and trespass, internet crimes, hate crimes, tax evasion, RICO, mail fraud, and money laundering (the crime that opens and closes the casebook).

Form and Function. In implementing the basic approach outlined above, our casebook remains largely within the general structure of a criminal law casebook familiar since Paulsen/Kadish. It begins by exploring justifications for criminal law (chapter 1) and basic formal constraints on the power to make criminal law (chapter 2). Having set out the basic structure of the analysis of criminal liability in American criminal law (chapter 3), it covers first the general part (chapters 4–8), and then selected offenses in the special part, rape (chapter 9), homicide (chapter 10), and white collar crimes (chapter 11).

The materials are presented with an eye toward the role of first-year (and often first-semester) criminal law classes as courses on legal thinking, rather than merely on criminal law, on method, rather than merely on substance. A casebook on criminal law—like all first-year casebooks—is really two casebooks wrapped into one: a criminal law casebook and a legal methods casebook.

Throughout this book we highlight the materials both for their more straightforward doctrinal significance and for their potential as instances of various repetitive themes that can be traced throughout the doctrine. These themes, we will emphasize, are not limited to particular topics in criminal law, nor are they limited to criminal law in general, but instead are features of legal thought and action that one can detect in all areas of law, and—more to the point—across the first year curriculum.

Among the repetitive themes running through the materials is one of form: the distinction, and tension, between doctrinal rules and standards.⁵ The distinction between rules and standards—and recurrent arguments regarding their respective merits—can provide the collection of cases, statutes, and comments in this casebook with a comprehensive formal framework. What’s more, it can help connect the course in criminal law to other courses in the first-year curriculum, where students encounter similar tensions between rule-like and standard-like tests (as, for instance, the contrast between rules regarding offer and acceptance and standards like the duty to bargain in good faith in the law of contracts).

Aside from these pervasive questions of form, we will also frequently examine the function of particular doctrines, and doctrinal approaches. The complex doctrinal apparatus of the law of possession, for instance, might profitably be understood as part of a general attempt to construct a system of criminal law that is well suited to eliminate criminality through the early detection of potentially dangerous individuals, while ostensibly remaining within the formal limits set by traditional criminal law doctrine. Likewise, it may help to regard the famously self-contradictory capital jurisprudence of the U.S. Supreme Court as part of a system wide effort to shift responsibility for (capital) punishment onto other participants in the criminal justice system.⁶

⁵ Cf. Mark G. Kelman, “Interpretive Construction in the Substantive Criminal Law,” 33 *Stan. L. Rev.* 591 (1981).

⁶ Cf. Markus Dirk Dubber, “Policing Possession: The War on Crime and the End of Criminal Law,” 91 *J. Crim. L. & Criminology* 829 (2002); Markus Dirk Dubber, “The Pain of Punishment,” 44 *Buff. L. Rev.* 545 (1996).

But enough about what we tried to do in this book. It's up to you to decide if we succeeded.

MARKUS D. DUBBER
MARK G. KELMAN

* * *

EDITORIAL NOTE

Footnote numbers in cases and other source materials are as in the original, with no renumbering to take account of omitted footnotes. Our footnotes are designated by letters. Most citations in cases have been omitted.