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THOMAS J. GARDNER

TERRY M. ANDERSON

CRIMINAL LAW

THIRTEENTH EDITION

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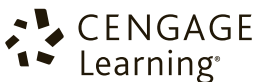
THIRTEENTH EDITION

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Criminal Law, Thirteenth Edition**Thomas J. Gardner and Terry M. Anderson**Senior Product Director: Marta
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Library of Congress Control Number: 2016941535

Student Edition:

ISBN: 978-1-305-96636-9

Loose-leaf Edition:

ISBN: 978-1-305-96640-6

Cengage Learning20 Channel Center Street
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Printed in the United States of America
Print Number: 01 Print Year: 2016

Dedicated to Eileen Gardner
January 25, 1925–September 26, 2005

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Preface

GOALS

The first edition of this text was published more than 30 years ago. Its goal was to introduce law enforcement personnel and others in the criminal justice field to the main principles of American criminal law. In the subsequent editions, including this, the thirteenth edition, we have tried to adhere to that goal and at the same time broaden the scope of the text while also keeping it current. As in past editions, we have included recent court opinions and legislative acts that illustrate the current status of those principles of American criminal law. We have also tried to include information we believe to be helpful to the study of criminal law, taken from governmental reports, empirical studies, and news accounts of current criminal cases and developments. We hope these additions and changes in the thirteenth edition serve to advance our goal for this text.

We make extensive use of court opinions, especially U.S. Supreme Court opinions and case citations in the text. We use these opinions and case citations primarily to illustrate how the majority of courts interpreted and applied criminal statutes within their jurisdiction. We also identify and cite decisions on key points of criminal law so that teachers and students will have a sound basis for doing more extensive research into such points. It has always been our plan to create a text that would prove useful as both a classroom learning tool and a reference book for post-classroom use. We are gratified that users of our text have found that it met that plan in previous editions, and we hope they will conclude the same about this edition.

Features

In this edition we continue to use more detailed case excerpts called Case Close-Ups to examine courts' analyses of difficult or emerging criminal law issues, sometimes including our observations about the possible effect of a court's decision on a particular issue. These case excerpts generally include a more detailed factual statement and a more complete discussion of the court's reasoning than the other case excerpts found in the text. Also, in some chapters we examine an important U.S. Supreme Court case or cases and then discuss lower court cases that apply the rules announced by the Supreme Court. As an example, in Chapter 8 we include an extensive analysis of three U.S. Supreme Court cases involving juvenile life sentences, *Graham v. Florida*, *Montgomery v. Louisiana*, and *Miller v. Alabama*, together with important lower court decisions decided subsequently.

Where possible, we chose U.S. Supreme Court cases for the Case Close-Up features. Given the increase in federal criminal statutes we describe in Chapter 2, it is not surprising this edition has several recent Supreme Court decisions interpreting federal statutes on scienter or other elements of the offense in the statute. In subject

areas where the Supreme Court does not ordinarily issue opinions, we chose opinions of the federal circuit courts or the highest state courts. Cases were usually selected because their topics were of current interest, but not necessarily because the opinion represented the majority view on the topic (though in most cases it does). We hope these closer looks at important cases will add substance to our coverage of the issues framed in those cases.

We continue to make references to specific state and federal criminal statutes, as well as illustrations from the Model Penal Code, which we have expanded in this edition. For example, in Chapter 6, we include excerpts from the Florida “Stand Your Ground” statute, including amendments to the statute since the last edition, which has been a model for similar legislation in twenty-nine other states.

In this edition we have retained the chapter-opening vignettes, with new vignettes for most chapters. We also retained the chapter-ending “Case Analysis and Writing Exercises” feature. Most of the cases highlighted in the exercises are new to this edition, though we did retain a small number from the previous edition. In this edition we also continue to use charts, boxes, and lists as supplements to text and case summaries. We intend the textual materials and case summaries to serve as the main exposition of criminal law principles, with the boxes and other tools helping to illustrate specific applications or examples of those principles.

New to This Edition

In addition to the features just discussed, we have made other changes and additions to this edition. While we have always striven to incorporate new cases and statutes into each new edition, in the twelfth edition we did this on a very broad scale. We not only added many cases decided since the eleventh edition was published, we also replaced a substantial number of older cases that illustrated legal principles with more recent cases that accomplish the same result but in a more current setting. There are hundreds of cases cited or discussed in our book; in this thirteenth edition over **300** court decisions will have come from cases decided in the years 2010–2016. With this effort we believe we have made the thirteenth edition as up to date and complete as possible, while at the same time maintaining the clarity and ease of understanding that we hope are the hallmarks of our Criminal Law textbook.

In this edition we have a new feature, called “**You Be the Judge.**” In this feature, which appears throughout the edition, students are asked to consider some of the issues presented to a trial judge (or in a few instances to an appellate judge) in a criminal case. These include motions to dismiss based on a claim the prosecution didn’t prove every element of an offense, and the proper jury instruction on the relevant law to be given by the judge to the jury to use when making its fact findings. We hope this feature will help students focus on the elements of a criminal charge and what the prosecution must do to prove those elements.

Finally, we have added the most recent reports available in the many places in the book where we include statistical information. There is commonly a lag between when statistics are gathered and reports are published, and we tried our best to minimize that lag time.

We have always been appreciative of the efforts of those who review our book before we begin work on a new edition. In this edition, as in the past, we

have made it a point to incorporate specific suggestions made by our reviewers and others who have taken the time to communicate with us. We thank them and invite all our readers to share their thoughts on the book with us at Terry Anderson's e-mail address, which is listed in the brief biography that appears in the front pages of this edition.

New Content

In addition to the changes discussed above, in the thirteenth edition we have made many substantive additions as well. They include the following:

- **Chapter 1, Criminal Law: Purposes, Scope, and Sources:** In this chapter, as in most others, we changed the approach of the chapter-opening “vignettes.” These short features now are used not only to introduce the criminal law issues discussed in the chapter, but also to ask students to think about, as they study the materials in the chapter, what the law should be for the fact situation in the vignette. We continue to examine the constitutional limits on criminal laws, including a new section focused on vagueness and the meaning of “violent felony,” as a result of the U. S. Supreme Court's 2015 decision in *Johnson v. United States*. The application of that decision to related issues by lower federal courts will be reviewed by the Supreme Court in 2016.
- **Chapter 2, Jurisdiction:** In response to the growth of federal crimes (and requests from readers), we expanded our discussion of the basis of federal jurisdiction to enact criminal laws. This includes a new section on the Commerce Clauses, interstate, foreign, and the Indian Tribes. We discuss a case before the U.S. Supreme Court in 2016 on the interstate commerce clause and what effect criminal acts must have to trigger federal jurisdiction under the clause. We also discuss the 2015 *Yates* and 2014 *Bond* Supreme Court decisions on the limits of federal jurisdiction. We include two 2015–2016 cases on jurisdiction of tribal courts and federal courts to try cases involving crimes by or against Indian tribe members. We also discuss the decision pending before the Supreme Court in 2016 on the permissible use of prior convictions of Indians in tribal courts for use in federal courts. There, the Court will consider if such tribal court convictions where the defendant did not have appointed counsel may be used under the federal habitual offender statute.
- **Chapter 3, Essential Elements of a Crime:** We continue to focus on the mens rea and scienter requirements in criminal statutes. To that end, we discuss in a “Case Close-Up” the 2015 U.S. Supreme Court decision in *Elonis v. United States* on when Facebook posts become criminal threats. We also have a “You Be the Judge” box on what “knowingly” requires the prosecution to prove under illustrative federal criminal statutes. We have new sections on when “willful blindness” satisfies a statute's scienter requirement, and when (if ever) a defendant may raise a mistake of age defense in a sex with a child crime. In the possession section we added a box on when one “possesses” the stolen gun subsequently used by another person to kill four Lakewood, Washington, police officers.
- **Chapter 4, Criminal Liability:** We added new cases on solicitation to illustrate attempts to persuade another to commit a crime, including a 2015 Illinois case

on the impact of a failure of a solicitation communication to reach the person solicited. In the conspiracy section we added recent cases that considered if a federal conspiracy statute has an overt act requirement, since some do and some don't. In the attempt section we again have a new case looking at the availability of an attempt charge where the underlying crime (here felony-murder) does not have a specific intent element. Finally, we expanded the discussion of accomplice liability, especially in light of the Supreme Court's decision in *Rosemond v. United States*. That decision has already influenced lower courts' accomplice liability decisions.

- **Chapter 5, Criminal Responsibility and the Capacity to Commit a Crime:** In the capacity materials, we expanded the section on juvenile courts to include recent cases and statutes that illustrate how criminal charges are transferred from juvenile to adult courts. In the insanity materials we included recent cases and examples discussing the “substantial capacity” test used in the Model Penal Code. We discuss the use of mental illness evidence to prove lack of specific intent in states that have abolished or limited the insanity defense. We added a new box that focuses on the mental illness evidence in the John Holmes, Aurora, Colorado, mass killings trial. Holmes' insanity defense was rejected by the jury, and he was convicted of murder in 2015. The box asks students to compare the expert medical evidence introduced in Holmes' trial to similar evidence introduced in a recent Wisconsin case. We reorganized the intoxication and diminished capacity defense materials, with an expanded discussion of what courts hold constitutes “diminished capacity” and what it means as a defense to a charge of homicide. Finally, we updated the “forced competency” box with a 2015 case on when a defendant can be forced to take medication to achieve competency.
- **Chapter 6, The Law Governing the Use of Force:** In this chapter we include many new cases, examples, and boxed materials to illustrate the use of force in self-defense. This includes updating cases under the “stand your ground” laws and the “castle” doctrine. We also updated the box on the meaning of “unlawful” activity under those laws, with a 2014 Florida case holding the defense available even if a defendant was acting unlawfully, and the subsequent amendment of the Florida statute in response to that case. We also include a “You Be the Judge” box raising a question about the proper application of a “stand your ground” defense to a homicide. The “battered women” defense section was rewritten to delete older cases and add a 2013 case showing the possible use of evidence of “battered woman syndrome.” In the use of force by police materials we added a new section, “Police and the Use of Deadly Force.” There we include several recent cases illustrating fact patterns where courts found the use of deadly force by police either excessive or reasonable.
- **Chapter 7, Other Criminal Defenses:** In the previous edition we included, for the first time, a 2011 case on legislative immunity under the Speech and Debate Clause of the Constitution. In this edition we added a 2015 case showing the limits of that privilege. In witness immunity, we added a recent Oregon case showing the consequences (for the prosecution) of a violation of an immunity agreement with a suspect in a murder case. We updated the mistake

of fact defense materials with four new examples of that defense. To illustrate the borders of the duress defense, we include a “You Be the Judge” box on the duress defense in a robbery/felony-murder case. In the Double Jeopardy section we added the Supreme Court’s 2014 affirmation in *Martinez v. Illinois* of the “bright line” rule for when jeopardy attaches. We also include a 2015 Michigan case on double jeopardy as applied to a “double punishment” for a single offense. We completely updated the “Stings, Scams, and Outrageous Government Conduct” box, adding three 2015 cases and one 2013 case on this subject. Finally, we include a 2015 Wisconsin case showing what kind of corroboration evidence is required before a defense that a third person committed the crime may be raised.

- **Chapter 8, Criminal Punishment:** In previous editions we noted the rarity of U.S. Supreme Court decisions, under the Cruel and Unusual Punishment Clause, on the proportionality of non-capital prison sentences. Because states are free to have their own, broader proportionality review of prison sentences, in this edition we added a section titled “Proportionality in State Sentencing Laws,” with appropriate recent cases showing how representative sentencing reviews work. The new section includes a discussion of factors a sentencing judge is to consider when deciding when punishments for multiple convictions can be consecutive rather than concurrent. In a related manner, we have a “You Be the Judge” box on sentence enhancement statutes, based on the Supreme Court’s 2016 decision in *Lockhart v. United States*. In the capital punishment section we updated all the death sentence/execution statistics, noting the decline of both from previous years. We added Supreme Court death penalty decisions reached since the last edition, and also updated the box on life sentences without parole for juveniles, adding cases showing how resentencing is proceeding since *Miller* and *Graham*, as well as the Supreme Court’s decision in *Montgomery v. Louisiana* making the decision in *Miller* retroactive to juveniles whose sentences were final before *Miller* was decided. In the forfeiture as punishment section, we added the 2016 Supreme Court decision in *Luis v. United States*, where the court held “untainted” assets of a defendant could not be seized pretrial. Finally, we added a Case Close-Up of the Supreme Court’s 2013 decision in *Descamps v. United States*, establishing a rule on when a prior conviction is a “violent crime” for sentence enhancement under the ACCA.
- **Chapter 9, Free Speech, Public Order Crimes, and the Bill of Rights:** We use the chapter-opening vignette to show the developments in prosecutions under the federal “false valor” statute, part of which was struck down by the Supreme Court in the *Alvarez* case. That case remains a Case Close-Up in this edition. In the “fighting words” section we rewrote the introductory paragraphs to make it clearer how “fighting words” interact with the “clear and present danger” test. We included several recent cases considering when speech constitutes “fighting words.” We converted the Case Close-Up discussion of the Supreme Court’s decision in *United States v. Stevens* on the overbreadth doctrine to a new box on overbreadth and “crush videos” to show Congress’s reaction to the *Stevens* decision, and one court’s decision upholding the amended statute aimed at “crush videos.” In the section on use of the mail, Internet, or e-mails to threaten another

person we added a box titled “Criminal Threats, Harassment, and Social Media,” containing several recent decisions on when posts on social media go beyond protected speech and become criminal threats. In the section on gun ownership and regulation, we added (as a subset of gun regulation limitations under the Second Amendment) a “You Be the Supreme Court Justice” box. The Supreme Court granted review in *United States v. Voisine* in 2015, a case presenting the issue of what Congress intended when it passed a statute making it illegal for a person convicted of a “misdemeanor crime of domestic violence” to own a gun. The box asks students to consider the arguments for and against an expansive interpretation of the statute. It is here to supplement a new section in this edition on the federal criminal statute establishing a (often) lifetime ban on gun ownership by persons previously convicted of violent crimes or drug offenses, illegal aliens, or persons subject to a domestic abuse protection order. We note that virtually every court hearing cases under this statute has upheld the statute in the face of Second Amendment claims. Finally, we updated the recent cases in the section on regulating guns after *Heller*.

- **Chapter 10, Homicide:** This chapter was substantially changed in the twelfth edition, in part in response to requests from our users. In this edition we have mainly updated those changes. For example, in the causation section we added a recent California case to illustrate how the presumption in that state’s “three years and a day” rule works. In the section on murder, we added a 2015 New York case showing the limits of transferred intent as a vehicle to achieve multiple convictions for the same homicide. We also have a “You Be the Judge” box that raises questions about when a “predicate” felony such as child abuse or neglect can be used to invoke the felony-murder rule. We also note that in a 2015 case the Massachusetts Supreme Judicial Court adopted the agency or “malice” theory for felony-murder convictions, as opposed to the minority “proximate cause” theory followed by some courts. Finally, in the manslaughter section we added a (somewhat unusual) 2014 Georgia case finding “words” to be adequate provocation to change murder to manslaughter.
- **Chapter 11, Assault, Battery, and Other Crimes Against the Person:** We have continued our effort from the twelfth edition to try clarify the elements under the federal assault statutes. To that end, we added a 2016 case that illustrates the broad scope of the federal assault statute, as well as a 2014 and a 2015 case that discuss the meaning of “dangerous weapon” under the federal assault statute. We believe these decisions, though not binding in state assault trials, will have some persuasive authority. We also included a charge under a state aggravated assault statute in a “You Be the Judge” box in the assault materials. We updated the hate crime statistics, and added two new hate crime-related cases. One, the subject of a “Case Close-Up” box, is a 2014 case that focuses on the required relationship under the federal hate crime law between the “hate” and the motive for the criminal acts. The second is a 2015 New Jersey case striking a hate crime statute that made the perception of the victim the basis for criminal assaults being treated as hate crimes. Finally, we added yet another example, here a 2015 California case, of a court struggling with the “movement” requirement in a kidnapping conviction; and (sadly) updated the school shootings box to show some that have occurred since the last edition.

- **Chapter 12, Sexual Assault, Rape, Prostitution, and Related Sex Crimes:** In the previous edition we substantially rewrote the rape materials, including the rape shield laws section, substituting newer cases for older ones. Here, we updated those changes. For example, we added a 2014 case that explains why there are limits in sexual assault prosecutions on the admissibility of evidence of past sexual relations between the victim and the defendant. The Internet and social networks unfortunately provide a fertile ground for child sex predators. Some states have passed laws limiting the access of convicted sex offenders to Internet sites like Facebook, where children can gain access. We added a 2015 North Carolina case upholding such a law, and noted a petition for certiorari was filed in the U.S. Supreme Court in March of 2016. In a related issue, we included the 2016 U.S. Supreme Court decision in *Nichols v. United States* on the registration requirements under SORNA for those who move to a foreign country. In the child pornography materials we noted the effect of the Internet and cell phone technology on prosecutions under child pornography laws. We included two 2014 cases under the federal child pornography statutes, one involving posts on Facebook, and the other involving downloads of photographs from a cell phone to a computer. Also reflecting the growth of the use of the Internet in child sexual abuse cases, we added a new section in this edition titled “The Federal Enticement Statute,” with one 2015 and two 2014 cases under that statute. Finally, we added a “You Be the Judge” box to focus on the use of cell phone video and photography technology in state law crimes such as “up-skirting.”
- **Chapter 13, Theft:** We have rewritten the theft chapter in previous editions to reflect the way that crime is treated today. In this edition we tried to add materials that “stretch” some of the theft concepts. For example, we added a 2014 case on abandoned property and specific intent in theft prosecutions. In the fraudulent use of credit cards section we included a 2013 Arizona case finding a violation of a credit card fraud statute, followed by an excerpt from the LaFave treatise criticizing such decisions. Finally, we added a box on “The Home Depot Scam,” mainly to show how retail fraud scams can be organized and executed.
- **Chapter 14, Robbery, Burglary, and Related Crimes:** In this chapter we updated the materials on robbery, carjacking, and home invasion by adding cases that explore the limits of those crimes. When is “force” part of a theft sufficient to make it robbery, or carjacking? States differ on the answer to those questions, and we therefore showed competing views. In home invasion robberies states also vary on whether perpetrators can be charged with both home invasion and crimes committed once a home has been invaded. We included recent cases on that question as well. In the 2013 case of *Sekhar v. United States* the U.S. Supreme Court decided that extortion convictions under the Hobbs Act required the prosecution to prove the extortionate acts or threats were made to obtain “property,” meaning something of value capable of being transferred to another. In the burglary chapter we added 2015 cases illustrating how courts interpret the “breaking and entering” part of a burglary crime. We also included a “You Be the Judge” box raising the question of whether under a state burglary statute the “dwelling house of another” can include the defendant’s own house. Finally, as one of the “Case Analysis and Writing Exercises,” we ask students to consider the decision of the New Jersey Supreme Court in the *Gibson* defiant trespass case that