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Case Studies & Controversies

*Fifth
Edition*



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Stanford Law School

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Paul H. Robinson

*Colin S. Diver Professor of Law
University of Pennsylvania Law School*

Shima Baradaran Baughman

*Associate Dean of Faculty Research and Development
Professor of Law
University of Utah College of Law*

Michael T. Cahill

*President, Joseph Crea Dean & Professor of Law
Brooklyn Law School*

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To Sarah, Sam, Mandy, Mac, Harry, and Atticus — P.H.R.

To Kian, Darian, Milo, Joon, and to my OTL, Ryan — S.B.B.

*To the memory of Dan Markel — a guide and an inspiration, in his work
and in his life — M.T.C.*

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Section 29: Criminal Law in the Technological Age

Preface

Criminal law is different from your other first-year courses in several ways, and *Criminal Law: Case Studies & Controversies, Fifth Edition* is correspondingly different from typical law school coursebooks.

The most obvious special feature of criminal law is its form: Whereas most first-year courses focus on judicial “case law,” criminal law has its basis in legislative statutory enactments. Accordingly, this book provides a focus on criminal statutes. Since the 1960s, two-thirds of the states have adopted comprehensive modern criminal codes. To the extent that court opinions continue to play a role in criminal law, it is most often to interpret ambiguous provisions of codes, rather than to make or alter the liability rules, as earlier courts commonly did. For these reasons, criminal law typically is the course by which statutory reading and interpretation are taught in the first year of law school.

A second unique feature of criminal law arises from the fact that nearly everyone, with or without legal training, has deeply felt intuitions about wrongdoing and punishment, the central focus of criminal law. A criminal law that seeks to influence conduct must at least take account of these feelings when setting its rules and planning its influence. To ensure that the course addresses this aspect of criminal law, the coursebook includes a series of case studies, each of which gives not only the abstract details that judges and lawyers might find important but also tells the full story of the case leading up to the offense in a way that is likely to trigger people’s intuitions of justice.

A final feature of modern criminal law is its tendency toward conceptual cohesiveness and theoretical consistency. Modern American criminal codes are typically built on several interacting base principles. Understanding those underlying principles and how they are expressed through criminal law doctrine is necessary for effective lawyering in criminal law more than in many other areas of law. Accordingly, the coursebook examines not only the doctrinal rules and their major variations but also the underlying principles

that drive them.

Section Template. The Sections of the coursebook commonly follow a template of sorts:

Principal Case. The coursebook gives two or three pages of factual detail about the people involved in, and events leading up to, the offense. (A “liability scale” at the conclusion of each case asks you to provide your own intuitive judgment about what punishment, if any, the offender deserves. The scale is aimed at putting your own analytic wheels in motion.)

The Law. The relevant statutes as they existed in the jurisdiction at the time of the offense are then presented. Where the criminal code is incomplete, as is often the case in non-modern code jurisdictions, the statutes are supplemented with one-paragraph summaries of the controlling cases that provide the legal rule missing from the statutes. Under our constitutional framework, criminal law is chiefly within the power of the states, rather than the federal government. There are 52 American criminal codes: one for each state, the District of Columbia, and the federal system. The coursebook’s Principal Cases are drawn from a wide number of jurisdictions, including Alaska, Arizona, California, Georgia, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New York, Tennessee, Texas, Washington, Wisconsin, Wyoming, and the federal system, as well as Israel. By the end of the course you will have a familiarity with the standard American criminal law rule as well as its major variations.

Overview Notes. Following the Principal Case and its relevant law is a treatise-like presentation of the law in that subject area, and its underlying theory. These Notes are meant to present the basics as efficiently as possible.¹ They put the Principal Case’s legal rules into the larger legal picture. The Notes often will begin with a Hypothetical that will then be analyzed throughout the following text. It is worth mastering, not just reading, the Notes, for they will be central in your studying for the course.

Core Case Opinion. The treatise-like Notes commonly are a more efficient means of conveying information than reading a collection of cases, typical in other coursebooks, but cases remain important even in criminal law. And case reading remains an important lawyering skill. Some sections contain a Core Case Opinion that has special historical, theoretical, or doctrinal significance in the subject area.

Problem Cases. Following the Overview Notes and Core Case Opinion are a series of Problem Cases—which are actual, not hypothetical, cases—

by which you can check your comprehension of the Overview material and that your instructor may use as a vehicle to raise additional issues. If you develop confidence in your liability analysis of all the Principal, Hypothetical, and Problem Cases, you will have mastered the central elements of the course. These cases are numbered consecutively throughout the coursebook to make it easy for you to keep track of them.

Discussion Issue and Materials. Each Section ends with a Discussion Issue, usually the most important controversy in the topic area, with excerpts from the legal literature discussing each side of the issue.

Appendix: Model Penal Code. This Appendix reproduces [Parts I and II](#) of the Model Penal Code, which serves as the foundation for the majority of American criminal codes and therefore is a useful point of comparison to the statutes appearing after each Principal Case.

Have a great time with these materials! Criminal law is a wonderful and special subject that has the potential to tell us much about law, our society, and ourselves.

Paul H. Robinson, Shima Baradaran Baughman, and Michael T. Cahill

March 2020

1. The paragraph headings in the Notes Section signal the paragraph's importance in relation to other paragraphs. In descending order of superiority the heading formats are: **Heading**, **Heading**, *Heading*, *Heading*.

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* N.B.— The facts recounted in the Principal Case stories are true as best as we can determine from our research of court documents, newspaper articles, personal interviews, and other available sources. In places, we have added what we think are reasonable speculations about a person's motivation or state of mind as it appears from the person's conduct and circumstances.



BACKGROUND MATERIALS

[Overview of the Criminal Justice Process](#)
[Overview of Proving Crimes](#)

Overview of the Criminal Justice Process: The Steps in the Process

Wayne LaFave, Jerold Israel & Nancy King, *Criminal Procedure* § 1.3 (3d ed. 2000)

The overview presented in this section follows the sequence of the procedure in a typical felony case. . . .

(c) *Step 1: The Reported Crime.* Descriptions of the sequence of events in the criminal justice process commonly start with the commission of a crime. Our focus, however, is on the major steps taken in the administration of the process. From that perspective, the starting point ordinarily is the event that brings to the attention of the police the possible commission of a crime, for that event commonly triggers those series of administrative steps that may lead to the eventual enforcement of the criminal law against the offender. Quantitatively, there is a vast difference between the number of instances in which crimes are committed and the number in which the commission of a crime is brought to the attention of the police. The best available studies indicate that substantially less than half of all crimes are brought to the attention of the police.

Police may learn about crimes that have been committed from reports of

citizens (usually victims), discovery in the field (usually observation on patrol), or from investigative and intelligence work. Where the police conclude that a crime may well have been committed, it will be recorded as a “reported crime” or “known offense.” This record-keeping function has no legal significance with respect to further police action; police are not required to investigate further because a crime is recorded as a “known offense” and they are not prevented from seeking to obtain information where they do not have knowledge of an offense. The long standing tradition of police departments, however, is to devote the vast bulk of their investigative efforts to solving “known offenses” and to at least initially attempt to investigate the vast majority of such offenses. Accordingly, the distribution of “known offenses” provides a fairly accurate general picture of the types of crimes that are investigated (albeit sometimes minimally) by police. The dominant offenses among the reported crimes are those involving the taking or destruction of property (likely to approximate 50%), offenses relating to the use of alcohol or drugs, and assaults of various types. The most serious violent offenses (e.g., robbery, rape, aggravated assault, and homicide) are likely to constitute as a group no more than 7% of all reported crimes.

(d) *Step 2: Prearrest Investigation.* Various distinctions are used in grouping prearrest investigatory procedures, but the most common are the agency involved (distinguishing primarily between the investigative activities of the police and the prosecutor) and the focus of the procedure (distinguishing primarily between activities aimed at solving past crimes and activities aimed at anticipated crimes). Those distinctions create three basic groups of prearrest investigative procedures: (1) police procedures that are aimed at solving specific past crimes known to the police (commonly described as “reactive” procedures), (2) police procedures that are aimed at anticipated ongoing and future criminal activity (commonly described as “proactive” procedures), and (3) prosecutorial and other non-police investigations conducted primarily through the use of subpoena authority. . . .

(e) *Step 3: Arrest.* Once a police officer has obtained sufficient information to justify arresting a suspect (i.e., probable cause to believe the person has committed a crime), the arrest ordinarily becomes the next step in the criminal justice process. The term “arrest” is defined differently for different purposes. We refer here only to the act of taking a person into custody for the purpose of charging him with a crime (the standard

commonly used in collecting statistics on the reporting of arrest statistics). This involves the detention of the suspect (by force if necessary) for the purpose of first transporting him to a police facility and then requesting that charges be filed against him. As an alternative to such a “full custody” arrest, many jurisdictions authorize the officer in some situations to briefly detain the suspect and then release him upon issuance of an official document (commonly titled a “citation,” “notice to appear” or “appearance ticket”) which directs the suspect to appear in court on a set date to respond to the charge specified in the document. This release-on-citation alternative commonly is authorized only for minor offenses, with the choice between the release procedure and the custodial arrest then lying in the discretion of the individual officer. In many localities, the standard practice is to use the citation alternative, rather than the arrest, for a wide range of minor offenses (including such offenses as disorderly conduct, vandalism, and petty shoplifting). In others, police generally prefer arrests and largely confine their regular use of the citation alternative to a few minor offenses, primarily regulatory in character. Where citations regularly are used for even a handful of the more common minor offenses, the number of citations issued can readily equal a quarter or a third of the total number of misdemeanor arrests.

Where there is no immediate need to arrest a suspect, an officer may seek to obtain an arrest warrant (a court order authorizing the arrest) prior to taking the person into custody. Arrest warrants in most jurisdictions are issued by magistrates. To obtain a warrant, the police must establish, to the satisfaction of the magistrate, that there exists probable cause to believe that the prospective arrestee committed the crime for which he will be arrested. The showing of probable cause may be made by affidavits or live testimony of either the investigating officer or a witness (usually the victim). Where a warrant is issued, it ordinarily will authorize the arrest to be made by any police officer in the state, not simply the officer seeking the warrant.

Arrests also can be made without a warrant, and that is the predominant practice in all localities. Of course, in a large percentage of all arrests (including, for example, “on scene” arrests), the police officer will make the arrest immediately after he has obtained probable cause for believing the person committed a crime. Yet, even where the investigating officer, after establishing probable cause, expects a lapse of a day or more before making an arrest, the common practice in most jurisdictions is not to use that opportunity to obtain an arrest warrant. Officers here will seek to obtain a

warrant, rather than rely on a warrantless arrest, only where the special setting makes a warrant legally necessary or otherwise advantageous. The most common of those settings are: (1) cases in which the offender is located in another jurisdiction (as a warrant is needed to utilize procedures for having the person arrested by officers of another state and later extradited); (2) cases in which the person cannot be found and his name therefore will be entered into the computerized state or local law enforcement information network as someone who is subject to an arrest on the basis of an outstanding warrant; (3) cases in which there will probably be a need to enter into a dwelling without consent in order to make the arrest (a situation that requires a warrant); (4) cases in which the offense was a misdemeanor not committed in the officer's presence (a situation requiring a warrant in some states); and (5) cases in which the police have sought the advice of the prosecutor before deciding to proceed (where the prosecutor responds affirmatively, a complaint typically will be filed immediately, with a warrant then obtained prior to the arrest).

As noted in subsection (d), many offenses that come to the attention of the police cannot be solved. Hence, the number of arrests made will be substantially less than the number of offenses recorded as a known offense. The proportion of known offenses that are "cleared" by an arrest varies substantially with the nature of the crime. For those eight "Index" offenses on which national data is collected by the F.B.I., the overall clearance rate is roughly 21%, ranging from a high of 65% for homicide to a low of 13% for burglary.

The vast majority of arrests (60–80%) will be for misdemeanors, with more arrests made for driving-under-the-influence than for any other offense. Among felony arrests, property offenses will account for roughly a third, and drug offenses for 25–30%, and crimes of violence for another 25%. A substantial percentage of all of the persons arrested (e.g., 10–20%) will be juveniles, with that percentage varying considerably with the offense. Ordinarily, juvenile arrestees will be separated from adult arrestees shortly after they are taken into custody, and will be processed through the juvenile justice system, although some will later be returned to the regular criminal justice process and be prosecuted as adults. From this point on, we will assume the arrestee is an adult or a juvenile treated as an adult.

(f) *Step 4: Booking.* Immediately after making an arrest, the arresting officer usually will search the arrestee's person and remove any weapons,

contraband, or evidence relating to a crime. If the arrested person was driving a vehicle, the officer may also search the passenger compartment of the vehicle for the same items. The arrestee will then be taken, either by the arresting officer or other officers called to the scene, to the police station, a centrally located jail, or some similar “holding” facility. It is at this facility that the arrestee will be taken through a process known as “booking.” Initially, the arrestee’s name, the time of his arrival, and the offense for which he was arrested are noted in the police “blotter” or “log.” This is strictly a clerical procedure, and it does not control whether the arrestee will be charged or what charge might be brought. As part of the booking process, the arrestee also will be photographed and fingerprinted.

Once the booking process is completed, the arrestee ordinarily will be allowed to make at least one telephone call. In many jurisdictions, an arrestee booked on a minor misdemeanor will be given the opportunity to obtain his immediate release by posting what is described as “stationhouse bail.” This involves posting a specified amount of cash, as prescribed for the particular offense in a judicially approved bail schedule, and agreeing to appear in court on a specified date. Persons arrested for more serious offenses and those eligible to post stationhouse bail but lacking the resources will remain at the holding facility until presented before a magistrate (see step 9). Ordinarily they will be placed in a “lockup,” which usually is some kind of cell. Before entering the lockup, they will be subjected to another search, more thorough than that conducted at the point of arrest. This search is designed primarily to inventory the arrestee’s personal belongings and to prevent the introduction of contraband into the lockup.

(g) Step 5: Post-Arrest Investigation. The initial post-arrest investigation by the police consists of the search of the person (and possibly the interior of the automobile) as discussed above. The extent of any further post-arrest investigation will vary with the fact situation. In some cases, such as where the arrestee was caught “red-handed,” there will be little left to be done. In others, police will utilize many of the same kinds of investigative procedures as are used before arrest (e.g., interviewing witnesses, searching the suspect’s home, and viewing the scene of the crime). Post-arrest investigation does offer one important investigative source, however, that ordinarily is not available prior to the arrest—the person of the arrestee. Thus, the police may seek to obtain an eyewitness identification of the arrestee by placing him in a