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# The Changing Market for Criminal Law Casebooks

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## ESSAY

# THE CHANGING MARKET FOR CRIMINAL LAW CASEBOOKS

*Jens David Ohlin\**

### INTRODUCTION

Criminal law is a nasty business. The field takes as its point of departure the indignities that human beings visit upon each other—each one worse than the one before. A book or article about criminal law often reads like a parade of horrors, an indictment of humanity's descent into moral weakness. For those who teach criminal law, everything else pales in comparison. Neither the business disputes of contract law nor the physical injuries described in a torts casebook can compare with the depravity of what we teach in criminal law. Criminal law professors are often addicted to their subject. Nothing else matches its intensity and despair; by comparison, teaching a private law course can seem unreal to the criminal law junkie. Although we often hate the material because of what it represents, I do not know a single teacher of criminal law who is ambivalent about the subject. Teaching criminal law inspires a level of intellectual commitment bordering on obsession.

Criminal law professors are equally passionate about their teaching material. They use a variety of different styles in the classroom, and what works for one professor and his or her students may not necessarily work for another. This is not an indictment of any casebook, but simply a logical implication of pedagogical pluralism. There are multiple avenues for developing a rich and profound understanding of the criminal law, and it is unclear whether the current offerings in the field respond adequately to the needs of every professor. The question then arises whether there is room in the market for a new casebook that structures the learning materials in a new way.

In the following Review, I analyze the leading criminal law casebooks on the market and describe the ways in which they do—and do not—respond to the needs of criminal law teachers. At least part of the issue is the changing nature of law teaching—what actually happens in the classroom has changed in the last three decades. Moreover, there may be less uniformity in classroom practice than in the past; in other words, what works in one law school might not work in another, due in part to the changing profile of law students, as well as the great diversity of intellectual perspectives that law

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teachers bring to the lectern.<sup>1</sup> I then lay out a vision for a new casebook in criminal law that responds to some of these desiderata with a fresh yet flexible approach.<sup>2</sup>

### I. THE STATE OF THE FIELD

At the moment, a few offerings dominate the field. In 1962, Sanford Kadish published *Criminal Law and Its Processes: Cases and Materials*—a market leader now in its ninth edition.<sup>3</sup> It is no exaggeration to say that Kadish had a huge impact on the teaching and scholarship of criminal law. Multiple generations of scholars and polished pedagogues learned from Kadish's casebook as students and carried over its influence when they entered the academy. Along with other early works in criminal law theory, such as George Fletcher's *Rethinking Criminal Law*,<sup>4</sup> it is clear that the Kadish casebook played an important role in the evolution of criminal law to its present form. Among other things, it marshaled to the forefront the various concepts that continue to dominate the teaching and research of criminal law, including: the philosophical justifications for punishment and their use as barometers for evaluating the morality of competing doctrines in substantive criminal law, the significance of justification and excuse as categories for understanding defenses, and the criminal law's continuing struggles to appropriately define causal criteria for certain offenses. While these discussions were already under way in the academy at the time, and thoroughly debated by the American Law Institute during the adoption of Herbert Wechsler's Model Penal Code,<sup>5</sup> Kadish brought these theoretical debates into the classroom to educate a generation of future judges and scholars.

The brilliance of the Kadish approach stems from its introduction, early in the semester, of the key philosophical ideas necessary for understanding the criminal law. Chapter 1 begins with a foundational discussion of the institutions and "processes" of the criminal law—the material from which the book draws its famous title.<sup>6</sup> This includes, among other things, a discussion of presentation of evidence, burdens of proof (both production and persuasion), standards of decision, and the role of the jury. The book then moves in Chapter 2 to justifications for punishment, which require the students to grapple with primary texts, including those from Bentham and

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1. While some criminal law professors have a background in criminal law practice, others have graduate-level training in philosophy, psychology, or political science—each of which leads professors to approach the subject differently.

2. See JENS DAVID OHLIN, *CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE* (2016).

3. See SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (9th ed. 2012).

4. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

5. See MODEL PENAL CODE (AM. LAW INST. 1962). For a good description of the Code's genesis, see Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

6. See KADISH ET AL., *supra* note 3, at 1–73.

Kant.<sup>7</sup> The goal of the materials is to force students to come to terms with the competing moral paradigms of deontology and consequentialism and map these competing moral frameworks onto modern theories of punishment, including retributivism, general and specific deterrence, rehabilitation, and incapacitation.<sup>8</sup> Students discuss reasons for—and the methods of—punishment; in so doing they build the necessary tools for understanding the building blocks of society’s penal prohibitions.

Nonetheless, despite its undeniable role in shaping the practice and study of the criminal law, Kadish et al. had its detractors. Some professors less interested in criminal law theory and philosophy were dissatisfied with the abstract nature of these materials in the long run-up to Chapter 4—on rape—when the doctrine begins in earnest. Moreover, even among those professors with an interest in theory or a background in philosophy, the overtly philosophical nature of the introductory materials often generated substantial complaints from students, many of whom asked, not entirely facetiously, whether they had taken a wrong turn at the campus quad and ended up in the philosophy department instead of the law school. Of course, student dissatisfaction need not be catered to when it is misguided, but nonetheless some professors who assigned Kadish et al. to their students were forced to listen to the whistling of the pages as the students frantically searched for the doctrine they so clearly craved.

The landscape for criminal law casebooks changed in 1999 with the publication of Joshua Dressler’s *Cases and Materials on Criminal Law*, now in its sixth edition.<sup>9</sup> Dressler’s brilliant text, with the recent introduction of coauthor Stephen Garvey, is sometimes unfairly described as “Kadish-lite.” To some, I suppose, that moniker is meant as a compliment. Dressler’s book placed a premium on criminal law theory and a structural approach to understanding substantive criminal law. After a semester using Dressler & Garvey, students can intuit, at both a macro- and micro-level, the so-called tripartite structure of the criminal law: the material elements of the offenses that prohibit unlawful conduct, the justifications that negate the wrongfulness of the act, and the excuses that negate the culpability of the individual actors.<sup>10</sup> After a semester, students understand why self-defense and necessity are justifications, why duress is an excuse, and what implications these

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7. See, e.g., Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in KADISH ET AL., *supra* note 3, at 91; Jeremy Bentham, *Principles of Penal Law*, reprinted in KADISH ET AL., *supra* note 3, at 91–92; Immanuel Kant, *The Philosophy of Law*, reprinted in KADISH ET AL., *supra* note 3, at 93–95.

8. See KADISH ET AL., *supra* note 3, at 93–124.

9. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* (6th ed. 2012).

10. For a discussion of the tripartite structure of the law, see 1 GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 328 (2007); Russell L. Christopher, *Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions*, 28 CARDOZO L. REV. 2675 (2007).

categories might have for the fate of accomplices.<sup>11</sup> All of it hangs together in a beautiful picture of structure, doctrine, and theory, woven together in one text. Like Kadish et al., Dressler and Garvey begin with introductory chapters on the criminal process and the principles of punishment (including materials from the dreaded Kant and Bentham),<sup>12</sup> but the rest of the chapters offer a clarity of presentation that some find wanting in Kadish et al. In many of the subsequent chapters, the unapologetically philosophical approach of Kadish et al. is replaced by Dressler and Garvey's light touch with a discussion of the criminal law's theoretical dimension. What remains is a beautiful exegesis of law and theory that helps convince students of the criminal law that theory matters, without hitting them over the head with it.

For many professors, this approach hits the spot, although some find its theoretical orientation still too heavy for their classrooms and crave a more doctrinal approach. On the other hand, some professors find that Dressler and Garvey are sometimes too willing to characterize the law into a binary opposition: the Model Penal Code (MPC) approach and the "common-law" approach.<sup>13</sup> While the Model Penal Code undoubtedly has an "approach" for each topic of the substantive criminal law, it is doubtful whether anything can be properly described as the "common-law" approach to any particular issue of substantive criminal law. Indeed, even the term is confusing. If the term is used in its historic sense, then yes, the "common-law" approach might refer to how courts "at common law"—in England in, say, the 1800s—might have punished the behavior. But that is not what is meant by a "common-law" approach in this context. Rather, the phrase is an attempt to juxtapose the Model Penal Code with some non-MPC approach to which the label "common law" is affixed.

This distillation of the criminal law into two categories—MPC versus common law—is misleading because it falsely suggests that there are only two avenues for each doctrinal fork in the road. Rather, for each issue, there may be two options or there may be five, depending on the multiplicity of standards or tests that courts and legislatures have deployed to solve that particular problem. For example, the law of insanity is replete with a series of tests: the *M'Naghten* cognitive test,<sup>14</sup> the irresistible impulse addition to the *M'Naghten* test, the *Durham* Product Test,<sup>15</sup> the pure medical test used in

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11. Dressler and Garvey include a nice case, *United States v. Lopez*, 662 F. Supp. 1083 (N.D. Cal. 1987), which gets students to understand that the necessity justification for a prison break would also apply, by logical implication, to the accomplice of the prison break. See DRESSLER & GARVEY, *supra* note 9, at 864–66.

12. DRESSLER & GARVEY, *supra* note 9, at 29–91.

13. See also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 27–31 (6th ed. 2012) (distinguishing the common-law approach to criminal law with the Model Penal Code).

14. *M'Naghten's Case*, (1843) 8 Eng. Rep. 718 (HL).

15. The Product Test was first articulated in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

Norway,<sup>16</sup> and the Model Penal Code's combination of cognitive and volitional tests with the additional overlay of a "substantial capacity" standard.<sup>17</sup> This complex laundry list of tests and ideas is not helpfully arranged in an MPC versus common law matrix. To even use this matrix is to suggest a degree of coherence and singularity to the substantive criminal law of jurisdictions that eschew the Model Penal Code. To add an even simpler level of confusion: when the MPC sides with an older, supposedly common-law position, what shall we call it: common law or MPC? Indeed, the "common law versus MPC" language is so pervasive among some hornbooks and commercial outlines that it is nearly impossible to deprogram students from using that language even when the professor actively discourages students from carving up the landscape in this fashion.

Taken together, Kadish et al. and Dressler & Garvey share the largest market share and their influence on the field shows. However, there are other important offerings. Paul Robinson's pathbreaking casebook, *Criminal Law: Case Studies and Controversies*, offers the most distinct pedagogic approach to the study of the criminal law.<sup>18</sup> Each chapter starts with a "case study," often drawn from newspaper articles and other media sources, about a real crime. After reading a factual description of the crime written by Robinson himself, students are then prompted to consult their own intuitions of justice to answer a series of questions regarding the proper resolution of the case and what punishment, if any, is warranted for the perpetrator. Students are given a numerical scale to rank the amount of punishment the wrongdoer deserves. After the presentation of the case-study materials, the chapter typically includes a long set of statutes, culled from both the local jurisdiction of the case study as well as the Model Penal Code. Students are then given a short doctrinal, treatise-like presentation of the key criminal law concepts, often followed by a very brief, highly edited, presentation of an appellate case that discusses the issue. What is striking about the organization of the materials is the degree to which the appellate opinion is the least important aspect of the chapter and comes near the end. The key aspects of each chapter are the case study, statutes, and doctrinal presentation—all of which form an entryway into provocative classroom discussion. Professors expecting to find a casebook of appellate opinions had better look elsewhere.

In developing this innovative pedagogical approach, Robinson effectively brings some of his scholarly insights into the classroom—an elegant and profound marriage of scholarship and pedagogy that is all too rare in today's legal academy. Robinson and John Darley, along with a new generation of young psychologists trained by them, have pioneered the study of lay

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16. For a defense of this test, see Michael S. Moore, *The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Brevik*, CRIM. L. & PHIL. (2014).

17. MODEL PENAL CODE § 4.01(1) (AM. LAW INST. 1962).

18. PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES (3d ed. 2012).

intuitions of justice. In various books and articles, Robinson and Darley argue that lay intuitions of justice are widely shared across cultural and political contexts.<sup>19</sup> What “regular people” believe about culpability, blameworthiness, and punishment turns out to be relatively stable regardless of their cultural or political locales.<sup>20</sup> Or at least it is with regard to the “core” of the criminal law—the essential doctrines that define the basic categories of the substantive criminal law. Moreover, Robinson and Darley argue that legal systems are most effective when they embody and reflect these lay intuitions.<sup>21</sup> When legal systems substantially depart from them, a host of negative consequences flow that prevent the criminal law from realizing its goals of norm compliance: people see the law as less legitimate and start ignoring it.<sup>22</sup> Regular people believe in moral desert—that people deserve to be punished for their wrongdoing—but this desert has positive consequences, an inner utility if you will. This is the utility of desert.<sup>23</sup>

So it is clear why Robinson should be so passionate about surveying his students, early in each class session, about their intuitions of justice regarding the particular legal issue, whether it is the dividing line between lawful preparations and criminal attempts, or the type of intervening action that will break the chain of causation in a case of reckless behavior. And it is equally clear why Robinson’s approach would downgrade the significance of appellate decisions and increase the use of case studies. Robinson’s profound approach, however, also limits its flexibility: its methodology is baked into the DNA of every chapter in a way that cannot be excised by professors who prefer an alternative. Those professors who use Robinson’s casebook are often fanatical supporters of his approach because it works for them. But for those professors who do not wish to spend a significant amount of time surveying and debating common intuitions of justice, the Robinson casebook is not for them. Some professors—and indeed many students—labor under the (perhaps false) assumption that they are not teaching or learning the law if they are not reading cases. This may be an unexamined assumption, but it is a pervasive one nonetheless.

Many professors hungry for a case-based approach have drifted toward Wayne LaFave’s *Modern Criminal Law: Cases, Comments and Questions*.<sup>24</sup> If Robinson is hostile to the role of appellate decisions in criminal law pedagogy, LaFave is the exact opposite: he goes all in with the case approach to law teaching. Indeed, LaFave’s large casebook is almost *all* cases: each

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19. See, e.g., Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

20. See *id.* at 3–4 (“Social science research demonstrates that people’s intuitions of justice are quite nuanced and that, for the punishment of serious wrongdoing, our intuitions are widely shared across societies and demographics.”).

21. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

22. *Id.* at 471–77.

23. *Id.* at 488–97.

24. WAYNE R. LAFAVE, *MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS* (5th ed. 2011).

chapter includes only a brief introduction followed by several lengthy cases, each of which is followed by notes that often summarize or quote squib cases. The subsections within each chapter—for example in the chapter on mens rea, subsections on recklessness, negligence, and knowledge—have no introductory text and move directly into the cases.<sup>25</sup> The pedagogy seems clear: learn the criminal law through its iconic cases. Where did all of the original text go? The answer is LaFave's treatise on substantive criminal law,<sup>26</sup> first started with Austin W. Scott, Jr. decades ago,<sup>27</sup> and which now is in its fifth edition under the sole authorship of LaFave. The treatise, which is arguably the single most comprehensive treatise on the substantive criminal law, is available in a three-volume practitioner edition in print and on Westlaw, and a one-volume student "hornbook" edition—a label that hardly gives the book enough credit for its rigor and sophistication (and length, clocking in at a rather un-hornbook-like 1,293 pages in its most recent edition). LaFave's treatise, a mainstay for judges and clerks writing appellate decisions on criminal law, is arguably the most cited criminal law text ever.<sup>28</sup> One effect of the treatise is that it liberated LaFave from including treatise-like descriptions of the law in his casebook; they have been pushed into another volume so that the casebook can be a pure *casebook*.

## II. FOUR PROBLEMS IN CRIMINAL LAW TEACHING

Viewed globally, the current field of criminal law casebooks represents an impressive collection of learning methods, though as a whole there are still unmet needs for teachers who cannot find the right casebook with the right ratios of cases to doctrine and theory to practice—in a flexible and modular format that allows professors to teach the way they want to. Taken as a whole, the following issues remain unresolved: cases selected for the wrong reasons, problems of tact in rape and sexual assault materials, overreliance on law review excerpts to engage with theoretical controversies, and excessive length.

### A. Selection of Cases

Arguably the biggest question facing a casebook author, especially for a new casebook as opposed to a legacy volume, is which cases to include, and why. This raises a difficult and perhaps underexplored question of law school pedagogy: What exactly do we hope to achieve in making our students read cases? For many casebooks, the case opinion is included as a vehicle for students to find the law—the doctrine and that jurisdiction's particular approach to it. In many cases, the opinions will also engage in

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25. See *id.* at 140 (knowledge); *id.* at 156 (recklessness and negligence).

26. See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* (2d ed. 2003).

27. *Id.* at xi.

28. See Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397, 404–05 (2000) (listing a previous version of LaFave's treatise as the thirteenth most-cited legal text or treatise).

statutory interpretation, philosophical or theoretical analysis, and policy debates over which doctrine, standard, or test to adopt for any particular legal issue. Occasionally, a case is included because it includes a rich fact pattern—a new and innovative set of facts that might be difficult to handle using the existing doctrine. These latter cases are truly interesting because they require the student to take the doctrine and apply it to a new set of facts. They also get the student thinking about advocacy, that is, how prosecutors and defense attorneys can convince a judge or jury of whether the defendant's conduct violated the statute. These cases are also the ones that are most likely to stimulate an engaging and fruitful class discussion. Unfortunately, the cases that involve such complex applications of the doctrine are often the minority in a casebook.

Far too often, cases are selected because they *announce* the law rather than apply the law to new and interesting facts. In some cases, the appellate decisions strip away most of the interesting facts, and sometimes casebook editors omit the facts entirely so all that remains is a legal analysis of the doctrine. Indeed, in some cases the legal analysis within the case is heavily doctrinal and practically treatise-like, except it is encased within the four corners of an appellate decision instead of written by the casebook author. Why use these cases? One frequent argument is that reading cases to find the law teaches important legal research skills that students will need as practicing attorneys. Whether working at a law firm or as a district attorney, young attorneys will perform searches on Westlaw and Lexis and start reading cases. In the process, they will need to learn how to pull out the law from a large stack of appellate decisions.

This is an important legal research skill that all law students must master, but it is unclear whether teaching criminal law should be mixed with learning this skill. Almost every law school has a separate introductory class on legal research and writing that teaches this skill. Furthermore, it is certainly not the case that practicing lawyers will be thrown into reading cases without first consulting secondary literature. Indeed, even a practicing lawyer would be well-advised to—and certainly does—consult LaFave's treatise on a given topic before starting to read cases and deepening his or her knowledge regarding the approach taken by a specific jurisdiction. So it is just false that legal research requires the reading of cases without any prior doctrinal introduction to the subject.

This is not to say that casebooks always select cases simply because they announce the law, and that casebooks never include "application" cases. What is wrong is the ratio. Far too many cases are included as doctrinal foils—a pure vehicle for throwing doctrine at students—instead of cases that involve complex application to new and interesting fact patterns. Strangely enough, this is what most professors test their students on at the end of the semester: we give them a complex hypothetical or real fact pattern and ask them to apply the law to it. If my experiences are any indication, 90 percent of the students get the law exactly right. What distinguishes the A and B exams is the quality of the analysis as the student applies the law to the given fact pattern and argues why the prohibition should, or should not, apply to

the given conduct. And this is what good lawyers need to do. So why don't we do more of this in our casebooks? Why don't we select cases on this basis instead of how well the case explains the doctrine? Here is a "radical" (not really) idea: first give the students a lesson in the doctrine and then get them to apply the doctrine to the facts of some really interesting cases. What flows naturally from that exercise can then be tailored to the demands of the particular student cohort: either a normative and philosophical discussion about which doctrinal solution works best under the circumstances, or a more practice-oriented discussion of how the doctrine works on the ground for prosecutors, defense attorneys, and trial judges.

In a sense, Robinson's casebook is the best at encouraging this process because it gets students to apply the law to new and interesting facts through its innovative use of case studies. Robinson's book is not more widely adopted because students themselves perform the initial application of the law to the case study, as opposed to an appellate decision. The value of the appellate decision is that it gives students a baseline against which they can react—an example of how one judicial body has applied the law, which students can then critique and argue about how they might have applied the law differently. It also provides students with a window into judicial decisionmaking. In Robinson's book, in contrast, the lack of an appellate opinion for the students to react against forces the students to invent the application process out of whole cloth. The Robinson approach is arguably *more* appropriate, at least in the context of a psychological study, because it does not contaminate the students' initial reporting of their intuitions of justice with an anchor (the appellate decision) that might sway their responses in one direction or another.<sup>29</sup> But the point of a criminal law casebook is not to generate a high-quality dataset but rather to produce optimal pedagogical outcomes. Thus, many professors prefer to give students an appellate decision to react to. As a final point, Robinson insists on giving the students the case study first—and testing their reactions to it—before giving them the actual doctrine. Again, for a psychological study that approach gets it exactly right, but for a classroom experience, why not teach them the law first and then have them apply it afterward?

#### B. *Rape and Sexual Assault Materials*

It is no secret that the study of rape and sexual assault law has grown more difficult—and simultaneously more urgent—in the last decade. The campus climate on these issues is increasingly charged, both politically and legally, and some professors have responded by dropping the subject entirely from their syllabi, or not testing it on their final exams.<sup>30</sup> Putting aside the

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29. See Adrian Furnham & Hua Chu Boo, *A Literature Review of the Anchoring Effect*, 40 J. SOCIO-ECONOMICS 35, 35 (2011).

30. For example, at least one notable casebook moves rape to the back of the book in a section labeled "additional offenses" which includes, in addition to rape, chapters on theft and perjury. See JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 865 (7th ed. 2012). This placement is optimal for professors who exclude the subject from their course.

difficult question of crafting appropriate exam questions on the subject, it is clear that the topic of sexual assault should be part of the classroom discussion in a first-year criminal law class.<sup>31</sup> First, rape provides an important case study on the rapid evolution of the law—as various elements of the doctrine, such as the resistance or force requirements, have either been dropped or substantially redefined.<sup>32</sup> This in itself is an important reason to teach rape law. Second, rape provides an important case study in the complexities of mens rea and how it relates to mistakes. Over time, jurisdictions have changed how they view the crime’s mental element and which objective elements it applies to. So, for example, it was once common to think that the perpetrator must intend to have sex with the victim with knowledge that the victim is not consenting.<sup>33</sup> Now it is more common to think that the perpetrator must intend to have sex but that this mental element need not range over the attendant circumstance of the victim’s lack of consent.<sup>34</sup> This change in conception in the law of rape helps students understand that they need to carve up the material elements of the offense and figure out how broadly, or narrowly, the mental element applies to them. Finally, and perhaps most importantly, if the law remains unsatisfactory, either in its written form or in its application in courtrooms across the country, the only way to improve it is by educating a generation of practicing attorneys who will apply their skills to triggering meaningful reform at the level of state statutes or local prosecutions. None of this will happen if students are taught that rape law is something to be avoided.<sup>35</sup>

While rape law should not be avoided in a criminal law classroom, it is true that there is room for improvement. Some students continue to complain about how the subject is handled in classroom discussions and in their casebooks. I leave to the side the issue of classroom discussions, since that depends on the dynamic of each class and the tenor of its discussions. But as to casebooks, it is clear that at least some of these complaints in the past

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31. For an argument for its continued importance in the criminal law curriculum, see Jeannie Suk, *The Trouble with Teaching Rape Law*, *NEW YORKER* (Dec. 15, 2014), <http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law> <http://perma.cc/6V2T-AT7C> (“Now more than ever, it is critical that law students develop the ability to engage productively and analytically in conversations about sexual assault.”).

32. See, e.g., *State v. Jones*, No. 36841, 2011 WL 4011738, at \*5 (Idaho Ct. App. Sept. 12, 2011) (concluding that verbal resistance is sufficient to meet the statute’s resistance requirement although “legal decision-makers have historically ignored evidence of a woman’s verbal resistance; under the law, verbal resistance was simply inadequate to prove anything”).

33. See, e.g., *McQuirk v. State*, 4 So. 775, 776 (Ala. 1888) (“The consent given by the prosecutrix may have been implied as well as express, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act.”).

34. See, e.g., *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001) (“Although the Commonwealth must prove lack of consent, the ‘elements necessary for rape do not require that the defendant intend the intercourse be without consent.’” (quoting *Commonwealth v. Grant*, 464 N.E.2d 33, 36 (Mass. 1984))).

35. See *id.*

have been legitimate. Students have complained to me about appellate decisions that linger far too long on the details of a sexual encounter, even when the details are not relevant to resolving the crucial issues of the case and addressing the factual and legal dispute over whether the material elements are satisfied: the act of sex, the mental element of the perpetrator (whatever it is under the applicable statute), and the consent of the victim. Occasionally, the description of the facts of the case includes reference to the details and mechanics of the victim's or perpetrator's sexual behavior that leads some students to question whether the judges have a prurient interest in their lengthy factual descriptions of the sexual encounter or assault.<sup>36</sup> Are all of these facts necessary? While this may sound like it cuts against what I said above—that casebooks should get students to apply the law to new and unfamiliar fact patterns—these facts must be carefully selected. And it is not unreasonable for students to insist that the descriptions of sexual assault cases, whether hypothetical or real, be edited in such a way as to focus the students on the facts that are relevant to the material elements of the offense. It is true that students need to learn how to avoid irrelevant facts because part of applying the law to new facts is arguing persuasively about which facts are relevant and which are not. That being said, this pedagogic value needs to be balanced against the legitimate needs of students who would prefer not to read more details than necessary about a sexual assault.

### C. Law Review Excerpts

The third aspect of criminal law casebooks that deserves consideration is the widespread use of excerpts from law review articles to introduce students to the theoretical or policy controversies embedded in the law. There is, of course, wide disparity in their use among the casebooks. Both Kadish et al. and Dressler and Garvey make heavy use of law review excerpts, as does Robinson (in an appendix), but LaFave does not (concentrating on cases), and a fifth option, Bonnie, Coughlin, Jeffries, and Low, does not favor law review excerpts either.<sup>37</sup> Kaplan et al. includes many law review excerpts, though most are edited down to a few pages and are often clustered together in conversation with each other.<sup>38</sup> For casebooks that include the excerpts, it is worth asking why they are an important vessel for classroom pedagogy. In their favor, they give students a front-row seat to scholarly disputes regarding the criminal law and help bridge the gap between scholarship and pedagogy; they make scholarship simultaneously more relevant and more accessible for students. Finally, they teach students how to read law review articles—a source of law surely relevant to their legal research when they are academics or practicing attorneys.

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36. See, e.g., *State ex rel. M.T.S.*, 609 A.2d 1266, 1267–69 (N.J. 1992); *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1339–41 (Pa. Super. Ct. 1992), *aff'd in part and vacated in part*, 641 A.2d 1161 (Pa. 1994).

37. RICHARD J. BONNIE ET AL., *CRIMINAL LAW* (3d ed. 2010).

38. See, e.g., KAPLAN ET AL., *supra* note 30, at 46–51, 52–57, 59–64, 68–70, 72–73, 74–77.

On the other hand, law review excerpts can be clunky and inefficient vessels for introducing students to a particular theoretical or policy problem. Inevitably, the argument in the law review article is situated within a particular academic debate that may or may not match up with the particular doctrinal or theoretical issue in that chapter. What is to be gained by using the law review article? In its place, the casebook author can simply flesh out the theoretical or policy debate without resorting to excerpting someone else's words. In that process, the casebook author can integrate the theoretical debate by referring back to materials already studied in that chapter—other cases, other statutes—with the result being a holistic treatment of the legal controversy in one set of materials.

As for what is lost by excluding law review excerpts, I argue that little has been lost that cannot be made up elsewhere. While it is true that law school students need to know how to read complex law review articles, it is doubtful that exposure to heavily edited excerpts will accomplish the task. Also, it is unclear whether a first- or second-semester doctrinal class is the best place to do it. Better perhaps to defer the process of engaging with legal scholarship in all of its complexity and glory into the second year of legal education.

#### D. *Excessive Lengths*

Like many casebooks, criminal law casebooks are long. For example, Robinson is 1,263 pages, Kadish et al. 1,308, Dressler & Garvey a comparatively compact 1,009, Bonnie & Coughlin 1,375, Kaplan et al. 1,121; LaFave is 1,022 but with small margins. Should we be concerned? This is not just a matter of preventing back problems among 1Ls or making sure that law schools don't have to invest in larger lockers to accommodate the rising girth of student casebooks. There is a deeper, pedagogical reason to be worried. Criminal law is almost always a three- or four-credit class in the first year of law school. This makes criminal law different from contracts or civil procedure, which some schools confine to a single semester but other schools have kept the older model of two semesters for each subject. Substantive criminal law (not procedure) is invariably a single-semester class. Even in a four-credit class, most professors cannot hope to assign and complete a full 1,200-page casebook during the semester. Indeed, professors invariably only assign a mere *fraction* of these casebooks—a process which requires professors to carve up the readings and materials into digestible chunks that fit onto their syllabi. By itself this is not objectionable, but it leads to problematic results because it forces the professor into the difficult dilemma of carving up the readings in an ad hoc and unsatisfying manner. Who better to engage in this process: the individual instructor or the casebook author? The latter could cut down the material into usable chunks so the casebook can be taught in one semester with a coherent presentation of the material.

Of course, there are good reasons for individual teachers to include or exclude certain readings, and these decisions have nothing to do with length. One professor may wish to teach the death penalty while another may find

the subject inessential. Another professor may find theft law theoretically satisfying or necessary for preparing students for the bar exam, while another teacher may consider it superfluous. These are all reasonable differences in syllabi, and a criminal casebook should accommodate them by being slightly overinclusive, with the solution that those who do not wish to teach some materials can leave them out. But some casebooks have taken this process to an extreme by including so much material—and making it so long—that professors are sometimes forced either to make cuts within a chapter in awkward ways, or to leave out core topics due to time constraints, neither of which are attractive options. The goal should be to produce a casebook whose length is such that the majority of adopters—though not all—can teach most of the book.

Several notable casebook authors in other areas have recognized this problem and have recently published excellent condensed editions specifically designed for professors who find their unabridged versions unwieldy and crave a single text that can be taught, for the most part, from cover to cover in one semester. Two important examples of leading casebooks come to mind. The first is *Property: Concise Edition*,<sup>39</sup> and the second is *Civil Procedure: Materials for a Basic Course*.<sup>40</sup> Having examined both, I found neither watered down, unduly truncated, or in any way lacking in academic rigor. (Indeed, in some sense they reinforce Mies van der Rohe's minimalist edict that less is more.) Instead, both casebooks simply recognize that a 1,200-page casebook may not suit the needs of every professor at every law school. When examined against this trend, the current criminal law casebooks are behind the curve in their failure to recognize that length and classroom experience are related in important ways.

By writing a shorter criminal law casebook, whether an abridged or original edition, are we kowtowing to unreasonable student demands for less reading? Although there are legitimate concerns about turning law school teaching into a consumer culture in which the student is "always right," I think the criticism is misplaced in this instance. When students carry around a 1,200-page casebook and only cover a fraction of it during a semester-long course that is designed to provide a systematic and comprehensive introduction to the subject, they may leave the course anxious that their introduction to the subject was incomplete. This anxiety, while perhaps exaggerated, is not made up out of whole cloth. A shorter casebook allows the professor to offer a comprehensive view of the subject rather than a piecemeal introduction of only select topics. In a course like criminal law in which structure is everything, with a dynamic and dialectical relationship between the elements of the offenses, the modes of liability,<sup>41</sup> and the justifications and excuses, a comprehensive approach to the subject is more than

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39. JESSE DUKEMINIER ET AL., *PROPERTY: CONCISE EDITION* (2014).

40. RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* (concise 11th ed. 2014).

41. The modes of liability are an essential part of the structure of the criminal law because they allow the court to link the defendant to the prohibited act. In other words, they

salutary—it is downright necessary. This is not to say that students should not be challenged by difficult or lengthy readings, but simply that we should write casebooks whose length is tailored to the classes that we teach.

### III. A NEW APPROACH

Given the existing offerings, it seems relatively clear that there is room for a new entry into the field of criminal law casebooks. This statement is not meant to criticize the existing offerings, but simply to recognize the bare empirical fact that different professors have different teaching styles and the current selection is not accommodating all of them. For that reason, in January 2016, Aspen published my casebook, *Criminal Law: Doctrine, Application, and Practice*.<sup>42</sup> I do not pretend that the casebook is superior in its design or approach to the casebooks described above, although I do hope that it responds to the needs of some professors who seek something they cannot find in the current casebooks, or who receive complaints from their students about the materials but cannot find a suitable alternative. In this Part, I explain and justify the structure of my casebook and describe how its design can accommodate a wide diversity of teaching styles.

The structure of *Criminal Law: Doctrine, Application, and Practice* is designed to be modular and flexible.<sup>43</sup> To that end, each chapter is much shorter and covers a discrete topic—to enhance the ability of professors to include or exclude topics as needed. So, for example, instead of having a chapter on justifications and another on excuses, *Criminal Law: Doctrine, Application, and Practice* has individual chapters on self-defense, defensive force by police officers, necessity, duress, intoxication, and insanity. The result is twenty-seven chapters instead of the more typical twelve or thirteen. This is more than just labeling. Although what counts as a chapter in my casebook might simply be labeled as a subsection in Kadish et al. or Dressler & Garvey, the shorter chapters make it easier for students and professors to approach the material. Instead of a single chapter on homicide, there are

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establish a culpable *connection* between the defendant's wrongdoing (his participation, his aiding and abetting, etc.) and the satisfaction of the material elements of the offense by someone else. One can think of this process as a distinct aspect of the criminal law's structure—which would make it quadratic—or one can integrate it into the first node of the tripartite scheme. The difference between these two options is largely formal.

42. OHLIN, *supra* note 2.

43. Luis Chiesa's casebook also uses a modular design, with separate sections in each chapter labeled "Scholarly Debates" and "Comparative Perspectives." The first section briefly canvasses how foreign jurisdictions treat an issue (with excerpts from foreign penal codes and academic articles), while the second section includes excerpts from American law review articles. See LUIS E. CHIESA, *SUBSTANTIVE CRIMINAL LAW: CASES, COMMENTS AND COMPARATIVE MATERIALS* (2014). Chiesa's strategy of segregating these materials is a good idea because many professors feel uncomfortable with the comparative approach or may wish to ignore the law review excerpts in the Scholarly Debates section. That being said, Chiesa's approach is most attractive to professors who prefer to teach American criminal law by contrasting it with foreign systems.

discrete chapters on intentional killings, reckless killings, and negligent killings.

Consider another example in which a large number of short chapters might be useful. Casebook authors often have a difficult decision to make about where to locate the materials on the conspiracy doctrine because conspiracy does double duty as an inchoate offense and as a mode of liability. So one possibility is to include conspiracy along with other inchoate offenses such as attempt and solicitation. This placement is less than ideal, however, since conspiracy liability—including *Pinkerton* liability—is such a major aspect of the conspiracy doctrine.<sup>44</sup> Because of that element of the conspiracy doctrine, the other solution is to place conspiracy with the other modes of liability dealing with accomplices. This would help students see the structural similarity between, say, the natural and probable consequences doctrine of accomplice liability and the reasonably foreseeable standard used for *Pinkerton* liability. But this placement also sows confusion because it fails to recognize the inchoate nature of conspiracy as a separate offense—an important policy discussion for the criminal law because it is the most aggressive tool that prosecutors have for early intervention in burgeoning criminal endeavors. The best solution is to carve up conspiracy into two short chapters, one called Inchoate Conspiracy and the other called Conspiracy as Mode of Liability, and place the former with the inchoate offenses and the second adjacent to accomplice liability. This also helps segregate the theoretical and policy discussions, which are really quite distinct from each other.

Casebooks are generally split on how to sequence the entire course. Some, like Dressler & Garvey and Kaplan et al., place the affirmative defenses right after the offenses of homicide and rape—and only afterward move on to inchoate offenses and then end with modes of liability.<sup>45</sup> Unfortunately, Kadish et al., Dressler & Garvey, and Kaplan et al. all place theft at the back of the book—segregated from the rest of the offenses. This move signals theft's status as an afterthought, something that no doubt irks serious scholars of theft law, and seems designed to facilitate the removal of theft from a professor's syllabus.<sup>46</sup> One other problem with Kadish et al. is that it includes a very large chapter on group criminality that mixes complicity, conspiracy, and corporate liability together in a way that might promote confusion between inchoate conspiracy and conspiracy as a mode of liability.<sup>47</sup>

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44. See *Pinkerton v. United States*, 328 U.S. 640, 645–48 (1946) (upholding conspiracy liability when crimes committed by coconspirators are in furtherance of the conspiracy and are reasonably foreseeable).

45. See DRESSLER & GARVEY, *supra* note 9, at xxiii–xxiv; KAPLAN ET AL., *supra* note 30, at ix–x (placing the chapters on justifications and excuses before the chapters on “attribution of criminality”).

46. See *supra* note 45. In both Kaplan et al. and Dressler & Garvey, this has the unfortunate effect of splitting up homicide, inchoate offenses, and theft (which comes near the end of the book).

47. See KADISH ET AL., *supra* note 3, at xxi–xxiii.

The better flow, which appears in Kadish et al. and others, is to start with all of the offenses, proceed to inchoate offenses and modes of liability, and finish the book with justifications and excuses.<sup>48</sup> The reason for including modes of liability after the offenses is that they remain an essential part of the prosecutorial burden: to demonstrate that a crime was committed and then link the defendant to that crime through some mode of liability. Then, the materials can finish with justifications and excuses. The result mirrors the tripartite structure of the criminal law: offenses, justifications, and excuses.<sup>49</sup> Consequently, Part I of *Criminal Law: Doctrine, Application, and Practice* lays out the basic elements of criminality and includes chapters on the criminal process, punishment, the death penalty, foundational principles of criminal law, the act requirement, mental states, mistakes, and causation. Then, Part II lays out the offenses, with separate chapters for intentional killings, voluntary manslaughter, reckless killings, felony murder, negligent killings, rape, and theft. Part III examines the inchoate offenses, with separate chapters for attempts, inchoate conspiracy, and solicitation. Part IV details the modes of liability, with chapters for accomplices, conspiracy liability, and corporate crime. Finally, Part V divides up the justifications and excuses into the following chapters: self-defense, defensive force by police officers, necessity, duress, intoxication, and insanity.

As for their internal structure, each chapter begins with a succinct explanation of the doctrine for that particular legal concept. The goal of this introductory section is to give students the basic doctrinal tools that establish the outer scope of the legal doctrine in question. There is nothing wrong with providing doctrinal exegesis before students start attacking cases. Although this might run counter to a pure vision of the Socratic Method—give students nothing but cases and pose all statements to the class in the form of a question—it seems to me that even the most Socratic teachers I know are actually using a hybrid formula: some lecture, some Socratic questioning, some policy debates. It is fine for a casebook to reflect that. And there is no reason for casebooks to fall victim to excessive hide-the-balism—as if making an actual doctrinal statement were vulgar.

Armed with this doctrinal introduction, the chapter then takes students to the second section—the “Application” portion. In this section, the students are asked to read one case for each major element of the doctrine that requires them to apply the law to a given fact pattern and grapple with the difficulties that such application necessarily involves. It is one thing to, for example, declare in the abstract that a given jurisdiction follows the substantial-step test for attempts, and quite another to gain fluency in the types of legal arguments that would need to be deployed to convince a fact finder that a defendant’s course of conduct satisfied—or failed to satisfy—the test.

Since the goal of reading the case is different—applying the law as opposed to finding it—cases have been selected with different criteria in mind.

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48. See, e.g., *id.* at ix–xxx.

49. See *supra* note 10 and accompanying text.

Sometimes the case that first announces the doctrine is not terribly satisfying as an application of that doctrine. For example, *Pinkerton v. United States*<sup>50</sup> is the namesake case for conspiracy as a mode of liability, though the facts are uninspiring (tax evasion) and do not clearly implicate the “reasonably foreseeable consequences” aspect of the doctrine. Better to select a contemporary case involving an application of *Pinkerton* to a real-life scenario that will engage the students in the difficulties posed by applying the doctrine to new facts. In some areas, the old case that announces the rule will also be an excellent case for application. *Dudley & Stephens* is one example.<sup>51</sup> Not only does *Dudley & Stephens* originate the rule that necessity is no defense to murder,<sup>52</sup> but it also provides a compelling factual scenario (cannibalism at sea) to test our application of the rule. But in many situations, the case that announces or distills the rule for the first time may not provide such a compelling or educational application of it.

Another word about case selection is in order. The “canon” of classic criminal law cases that forms the steady diet of our pedagogy has remained unchanged over several generations. In some cases, their continued inclusion is justified because the cases are excellent teaching tools. But many cases could be replaced by newer ones that might engage the students with crimes that happened during their young lives. Indeed, the criminal law has no shortage of new cases—every year includes new front-page depravities that involve complex and difficult applications of the very legal doctrines that we teach in class. Why not make use of them in our teaching?

For that reason, every chapter also includes, toward the end of the application section, brief “problem cases” ripped from the headlines. These problem cases, often just a few paragraphs, are unaccompanied by an appellate decision. They offer students the opportunity to apply the doctrine without the safety net of an appellate decision. But because of their short length—and because they are set as sidebars—they are logically separate and could be discussed in class, or not, depending on the needs and desires of the individual professor. In that sense, the problem cases are designed to be completely modular—a value-added component that could be the focus of classroom discussion, or dispensed with entirely without any loss of coherence to the overall material.

Each chapter then ends with a “Practice & Policy” section. These brief materials are designed to take the student’s engagement with the material to the next level. These materials ask students to consider the implications for

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50. 328 U.S. 640 (1946).

51. *Regina v. Dudley & Stephens*, [1884] 14 QBD 273 (Eng.) (necessity argument unavailable to shipwrecked sailors who resorted to murder and cannibalism).

52. See Michele Cotton, *The Necessity Defense and the Moral Limits of Law*, 18 *NEW CRIM. L. REV.* 35, 39 (2015) (“[T]he *Dudley and Stephens* court did not even allow for a lawful struggle between sailor and sailor, but defined the moral duty more sweepingly, suggesting some general concept of self-sacrifice, perhaps Christian in nature, which greatly limited if not eliminated any necessity defense available to defendants.”).

practice, such as the strategic decisions that prosecutors and defense attorneys might face depending on how their jurisdictions approach that particular legal issue. The Practice & Policy section also allows for deeper consideration of underlying policy questions that might animate how a lawmaker should approach the question. The placement of these materials at the end of the chapter is designed to promote their modularity. Some professors will find this speculative material the most engaging in the chapter; while some students may find the material so challenging or advanced that their professors may wish to downplay its significance and not focus classroom discussion around it. The bottom line is that law school students are not all the same—what works at one law school may not work at another, and professors favor different methodologies. The goal of *Criminal Law: Doctrine, Application, and Practice* is to get students to understand the doctrine and skillfully apply it, all in a flexible and modular format that does not demand that every professor adopt the same methodology.