CRIMINAL LAW AND ITS PROCESSES

CASES AND MATERIALS

FOURTH EDITION

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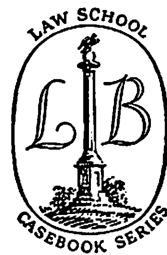

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the themes studied in Chapter 2, or it can be used to introduce those themes when time does not permit full consideration of Chapter 2.

Chapters 10 (*Theft*), *11* (*Business Crimes*) and *12* (*Disposition of the Convicted Offender*) pursue the general themes of the course in specific contexts. In a three- or four-hour course, one of these three chapters can be chosen for detailed treatment while the other two are omitted or deferred for study in advanced courses.

Collateral reading. Students wishing to pursue further the questions raised in the readings and Notes will find helpful six outstanding works: One is the text and Commentary of the American Law Institute's Model Penal Code. Much of the text is reproduced as an Appendix to this casebook, but space limitations preclude reprinting all but a few excerpts from the Commentary. In thirteen Tentative Drafts published over the period 1954-1961, the Code's reporters presented succinct analyses of existing law and the major issues it presented. Students will still find it useful to consult these earlier commentaries. For Part II of the Code (Definition of Specific Crimes), there is now available an expanded set of commentaries, including analysis of legislative developments through the 1970s. This more recent Commentary has been published in a three-volume set, Model Penal Code and Commentaries, Part II (1980). The revised commentaries for Part I of the Code are now in preparation and publication is expected in the near future.

The second resource consists of two works by Professor Glanville Williams. His treatise, Criminal Law: The General Part, appeared in its second edition in 1961. His Textbook of Criminal Law was published in 1978 and is primarily directed to the law student. While they are concerned with English law, the American student will find in these books a rich discussion of many of the issues raised in the casebook.

The third important recommended work is the late Professor Herbert Packer's The Limits of the Criminal Sanction, which appeared in 1968. This is a nontechnical but thoughtful analysis of the limitations of the use of the criminal law as a means of influencing conduct. In the course of his study, Professor Packer explores with freshness and clarity most of the fundamentally troubling issues and tensions of the criminal law, both substantive and administrative.

Fourth is Wayne LaFave & Austin Scott, Jr., Handbook on Criminal Law (1972), the best contemporary hornbook on American substantive criminal law, with the further advantage that its treatment of problems in many areas substantially parallels that in this casebook.

Fifth is the collection of essays by Professor H. L. A. Hart entitled Punishment and Responsibility (1968), now available in paperback. These short, powerful, and lucid essays have strongly influenced our own treatment of the subjects of punishment and responsibility, as well as contemporary thought generally on these issues.

The sixth collateral reading is Professor George Fletcher's Rethinking Criminal Law, published in 1978. This challenging book retraces many of the doctrines and problems of the course from a perspective that contrasts sharply with the pragmatism and utilitarianism of the Model Penal Code. Professor Fletcher's theoretical and comparative approach will prove provocative for many readers.

Style. Citations in the footnotes and text of extracted material have been omitted when they did not seem useful for pedagogical purposes, and we have

Stephen J. Schulhofer, 1998.

 : The Culture of Intimidation and the Failure of Law. Harvard University Press.

interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in the absence of more than the usual relative disproportion of age and strength between man and woman."[9] The court assumed, in other words, that no matter how strenuously a woman had protested, her assailant's success in achieving penetration showed that she must have been willing.

The story was endlessly repeated. Reversing a 1947 conviction, the Nebraska Supreme Court said that "submission" would count as consent "no matter how reluctantly yielded." Said the court, "carnal knowledge, with the voluntary consent of the woman, no matter how tardily given or how much force had hitherto been imposed, is not rape." For the Nebraska court, like so many others, "consent" meant something far short of willingness or sexual desire. Only if a woman resisted physically and "to the utmost" could a man be expected to realize that his actions were against her will. "She must persist in such resistance," said the court, "as long as she has the power to do so until the offense is consummated."[10]

The Flawed "Model" Code

In the 1950s the American Law Institute, a prestigious body of judges, lawyers, and legal scholars, began an ambitious project to examine the whole of American criminal law. The institute's goal was to draft a proposal for replacing the disorganized and archaic statutes of the time with a coherent, modern code. When they turned their attention to rape, the reformers were alarmed by the low rate of conviction in clear cases of serious abuse. The reformers—all of them men[11]—attributed this problem to three defects in the law: the resistance requirement, the undue preoccupation with victim consent, and the inclusion of too many diverse kinds of misbehavior within a single felony that carried extremely severe punishments.

In their proposal for a "Model Penal Code," the reformers suggested changes that reflected this accurate but limited diagnosis. Most of their recommendations made no break with traditional assumptions. The code preserved the rules requiring a prompt complaint, corroboration of the victim's testimony, and special cautionary instructions to the jury.[12] The reformers not only preserved the "marital exemption" but extended it: The code barred prosecution in cases of compelled intercourse when the assailant and victim were "living together as man and wife," regardless of whether the couple was formally married. Interestingly, the code placed substance over legal form by extending the marital exemption to unmarried couples who were living together, but it placed form over substance by preserving the exemption for most legally married couples who were living apart.[13] The consistent thread in both situations was that fear of false accusations and appreciation for a man's sexual needs prevailed over his partner's claim to determine for herself whether to permit sexual intimacy.

To make rape prosecutions more effective, the reformers proposed three major steps—abolishing the resistance requirement, eliminating all mention of victim consent from the definition of the offense, and dividing rape into several offenses with distinct penalty levels. Even in these promising proposals, however, modern concerns about underenforcement were mixed with starkly traditional assumptions about women's passive role in sexual encounters and inability to be forthright about their sexual desires. Those attitudes shaped the reform proposals, which, in turn, continue to shape rape law today.

The reformers' proposal to divide rape into two separate offenses reveals the limited reach of their ambitions. In order to get convicted of the more serious offense—the only crime called "rape" in the code—a sexual predator practically had to kill his victim. The offense of rape was reserved for defendants who had inflicted or threatened "serious bodily injury," "extreme pain" (ordinary pain wasn't enough), or "imminent death."[14] A man who threatened to kill a protesting woman the next morning would not be guilty of rape, because he had not threatened to carry out his threat immediately.

The crime called "rape" in the code, though limited to extremely violent misconduct, was still too broad to satisfy the Law Institute draftsmen. They proposed subdividing the offense they called rape into two degrees. Life-threatening sexual abuse was treated as a first-degree felony (with a potential for a life sentence) only if the parties were strangers or if the perpetrator actually inflicted serious bodily harm. Rape involving acquaintances—life-threatening rape—was downgraded to a second-degree felony (with a maximum sentence of only ten years' imprisonment) any time the defendant did not inflict serious