

# Why I Authored a Criminal Law Casebook

Arnold H. Loewy\*

My greatest goal in teaching criminal law is to get my students to think. Consequently, nearly my entire teaching plan is focused on questions about the cases. The questions are in my casebook and the students are expected to read them before class and think about them. (Candidly, some students think harder than others.) I then conduct the class by focusing on the questions and soliciting answers to and discussion about the questions. To familiarize themselves with black letter law, I have them read my basic text: *Criminal Law in a Nutshell*. Obviously other texts like Joshua Dressler's *Understanding Criminal Law* would work just as well.

Although I obviously expect my students to be familiar with the facts, issue(s), holding, and rationale of the cases, we do not spend much, if any, class time focusing on those things. Certainly, in the course of focusing on some of the questions (e.g. Had you been on the court, would you have agreed with the majority or the dissent? Why?), the students will have to understand relevant facts, issue(s), and competing holdings and rationales. But these are merely incidental points discussed in conjunction with the decisions.

I very much encourage students to participate. Towards that end, I have a rule that if they are present and prepared for at least thirty-eight of the forty-two classes, they will receive a half grade higher than they would have received had they not been so prepared. I will not call on a student who does not circle her name, and it is a violation of the honor code to circle your name if you are not prepared (I try to be relatively lenient on what constitutes being prepared). If a student has an excused absence (health, religion or interschool competition), he is free to submit the answers to the questions to me via email and be credited with being present and prepared.

Because I am developing the students' thinking prowess, not all cases are well-reasoned, nor do they always represent majority viewpoints. Indeed, a substantial minority of cases are chosen because they are poorly reasoned, and I want the students to figure out why. For example, in *People v. Archer*,<sup>1</sup> the judge would have found a valid necessity defense to trespass for abortion protesters sitting in an abortion clinic and attempting to prevent abortions by their presence, but for the fact that the abortions were first trimester abortions. Suffice it to say, there is more wrong with that analysis than I can begin to describe in a three-page article.

I also like to use cases where I think either the prosecutor or defense counsel

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\* Judge George R. Killam Jr. Chair of Criminal Law, Texas Tech University School of Law.

<sup>1</sup> *People v. Archer*, 537 N.Y.S.2d 726, 735 (1988), reprinted in ARNOLD H. LOEWY, CRIMINAL LAW: CASES AND MATERIALS 512 (3d ed. 2010).

made a grievous tactical error, and highlight that for the students. For example, in *Weiland v. State*,<sup>2</sup> the prosecutor succeeded in getting the trial court to exclude eyewitness evidence that the defendant (on trial for killing her husband) was a battered spouse. Instead of just living with this error (as the appellate court found) and hoping nobody noticed, he (I assume it was a “he”) argued that we have no way of knowing that the defendant was a battered spouse because she presented no evidence that she was. We spend some time talking about how incredibly unwise that prosecutor was and how his emphasis on the lack of evidence highlighted the trial court’s error and greatly increased the chance of ultimate reversal of the conviction.

To highlight bad defense lawyering, I use *State v. McFadden*<sup>3</sup> from Iowa, where in a drag race involuntary manslaughter case, defense counsel argued that the court should adopt a standard of proximate cause stricter than tort proximate cause (as a Pennsylvania court had done). When the court asked counsel if he could think of any policy reason that would justify a different standard, counsel said he couldn’t think of any. When I challenge my students to think of one, they almost always can (and indeed the question is not all that difficult). Yet McFadden’s lawyer’s inability to think of one effectively killed his case. Hopefully when my students enter practice, they will not make mistakes as egregious as the prosecutor in *Weiland* or the defense lawyer in *McFadden*.

This methodology helps prepare students for their final exam. I always tell them that if I knew the answer I wouldn’t ask the question. Typically I make them a prosecutor, defense attorney, judge, or legislator’s assistant and ask them to work through a problem. Sometimes I give them a problem, tell them that their client has been charged with first-degree murder, and that the DA has offered voluntary manslaughter and five years imprisonment. I then ask them to analyze whether they should take it. I like to think that the learning from the course and the casebook helps them in analyzing the problem.

There are two other differences between my book and others on the market. One is I am cognizant of the number of hours a typical criminal law course has. Consequently, the book is designed for the number of hours typically available to teach the course. The other difference is the ordering of the material.

Turning to the first difference, the first edition of the book was consciously designed to be covered in forty-four hours. Candidly, by adding material in subsequent editions, the book has expanded to fifty classes, and can’t quite be covered in a forty-two hour class. Nevertheless, each section is carefully designed to cover only the amount of material that can be covered in an hour. And I do believe that this approach allows for coverage of more topics than would otherwise be the case, without sacrificing too much thoroughness.

In terms of ordering, I reject what is supposed to be the modern view of teaching, namely that mens rea and actus reus come first. Although I firmly believe

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<sup>2</sup> *Weiland v. State*, 732 So.2d 1044, 1058 (1999), reprinted in LOEWY, *supra* note 1, at 254.

<sup>3</sup> *State v. McFadden*, 320 N.W.2d 608 (1982), reprinted in LOEWY, *supra* note 1, at 167.

that these concepts are the heart of the criminal law, I think that they are way too esoteric for the beginning of the course. Students have trouble with these concepts as abstractions. But once they have learned about degrees of homicide, we can treat mens rea as explaining concepts that they have already learned, such as the “wilful, deliberate, and premeditated” formula, which they already know from their study of homicide.

The casebook begins with a class on punishment because I believe that punishment is the distinguishing feature of the criminal law. We then have nine classes on homicide, one and a half on causation, one half on assault and kidnaping, three on rape, four on self-defense, three on various forms of theft, and four on mens rea (including one on federal statutory interpretation). It takes less time to teach mens rea if they are already familiar with the concept through their study of the particular crimes. We then have two on actus reus, and one each on infancy, intoxication, duress, necessity, and entrapment. We follow that with two classes on insanity, one on capital punishment, and one on burden of proof. We conclude with three on attempt, two on complicity, and one on victimless crimes (or what should and should not be made criminal).

This covers forty-two classes. The eight in my book that I do not get to are one on assisted suicide, one on presumptions, three on conspiracy, one on RICO, one on corporate criminal liability, and one on vagueness and fair notice. Obviously in an ideal world, I would cover the whole book as I intended when I wrote it, but I am satisfied that I cover as much as I reasonably can in a forty-two hour course. Candidly, I have to confess that my students do not disagree.

