

# SKILLS AND VALUES: CRIMINAL LAW

## **LexisNexis Law School Publishing Advisory Board**

---

**Paul Caron**

*Professor of Law*

Pepperdine University School of Law *Herzog Summer Visiting Professor in Taxation*

University of San Diego School of Law

**Bridgette Carr**

*Clinical Professor of Law*

University of Michigan Law School

**Olympia Duhart**

*Professor of Law and Director of Lawyering Skills & Values Program*

Nova Southeastern University, Shepard Broad Law School

**Samuel Estreicher**

*Dwight D. Opperman Professor of Law*

*Director, Center for Labor and Employment Law*

NYU School of Law

**Steven I. Friedland**

*Professor of Law and Senior Scholar*

Elon University School of Law

**Carole Goldberg**

*Jonathan D. Varat Distinguished Professor of Law*

UCLA School of Law

**Oliver Goodenough**

*Professor of Law*

Vermont Law School

**Paul Marcus**

*Haynes Professor of Law*

William and Mary Law School

**John Sprankling**

*Distinguished Professor of Law*

McGeorge School of Law

# SKILLS AND VALUES: CRIMINAL LAW

---

**Andrew E. Taslitz**

*Director, Criminal Justice Practice and Policy Institute  
Washington College of Law  
American University*

**Lenese C. Herbert**

*Professor of Law  
Howard University School of Law*

**Eda Katharine Tinto**

*Benjamin N. Cardozo School of Law*

ISBN: 9781422484753  
ebook ISBN: 9780327179689

Library of Congress Cataloging-in-Publication Data

Taslitz, Andrew E., 1956- author.

Skills and values. Criminal law / Andrew E. Taslitz, Director, Criminal Justice Practice and Policy Institute, Washington College of Law, American University; Lenese C. Herbert, Howard University School of Law; Katie Tinto, Assistant Clinical Professor of Law, Benjamin N. Cardozo School of Law.

pages cm

ISBN 978-1-4224-8475-3

I. Criminal law--United States--Problems, exercises, etc. I. Herbert, Lenese C., author. II. Tinto, Eda Katharine (Katie), author. III. Title. IV. Title: Criminal law.

KF9219.T37 2014

345.73--dc23

2014002288

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2014 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at [www.lexisnexis.com/lawschool](http://www.lexisnexis.com/lawschool).

Editorial Offices  
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800  
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# Dedication

---

As this volume went to press, our wonderful co-author, Andrew Eric "Taz" Taslitz, lost his valiant fight with cancer. Although this loss has created an enormous void for those who respected his work, enjoyed his collegiality, and flourished under his mentorship, we are comforted by the knowledge that he completely contributed to this volume and cheered it to its conclusion. Accordingly, we dedicate this volume to Taz: our co-author, colleague, mentor, teacher, and friend.



## PREFACE

---

All law students must take Criminal Law. Traditionally, Criminal Law is taught during the first year of law school via “case method” instruction. The case method requires students to study appellate decisions to uncover legal principles, classify and organize these principles, and then apply the doctrines to a more general set of facts in order to reach a solution to legal questions.

In recent years, reports such as the Carnegie Foundation’s Carnegie Report,<sup>1</sup> *Best Practices for Legal Education*,<sup>2</sup> and the MacCrate Report,<sup>3</sup> stand for the idea that legal education needs to change. Unanimously, these reports suggest that, in order to better prepare students for the practice of law, legal education must bridge the disconnect between law school and lawyering by introducing lawyering skills and values to the law school curriculum. For example, the MacCrate Report identified problem solving as one of the ten most important skills for attorneys. Yet traditionally, students in Criminal Law do not work through legal problems with professors or classmates in order to learn from their application of facts to law (rather than only applying law to a given set of facts). In other words, Criminal Law rarely focuses on how to develop facts to which the law can be applied or on how facts and substantive law interact. Yet gathering and interpreting evidence in light of case theories and the substantive law is at the heart of much criminal lawyering. *Skills and Values: Criminal Law* fuses fact-creation and interpretation with traditional substantive law-application in the same manner that practicing lawyers do.

*Skills and Values: Criminal Law* provides students an overview of key criminal substantive law and a series of exercises (comprised of tasks) that includes complex fact patterns, relevant state or federal law (case and codified), and skills guides. This material enables students to explore actual legal issues and develop problem-solving skills in ways that arise in a criminal law practice, from both a defense and prosecution point of view. This approach is not typically found in a first year Criminal Law class. The combined use of common law, Model Penal Code, jury instructions, and “real” state and federal statutes is also a virtue. Real-world statutes add realism and frequently come with legislative history and applicable caselaw, enabling students to practice statutory interpretation with challenging novel issues as well as more mundane ones.

Criminal Law professors will find that they may use *Skills and Values: Criminal Law* as a primary teaching text. This is so partly because of the discussion of substantive law and the extensive links to case law and other materials in the on-line component (OLC). The OLC also includes sample documents, videos related to the requisite skills, and other ways of modeling tasks for students. In addition, there is self-assessment for each skills task. The self-assessment portion of the OLC provides an outline of what a good response should contain or an excerpt from a model response so that students cannot “cheat” by just looking

---

<sup>1</sup> WILLIAM SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

<sup>2</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

<sup>3</sup> AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

---

## *PREFACE*

up the answer. At the same time, the exercise material is rich enough that even with on-line feedback, there remains much fodder for classroom discussion. The exercises also permit ample discussion of underlying policy issues and potential legal reforms. These policy discussions often appear in a practical setting so that lobbying or other means of achieving legal change can also be discussed.

Alternatively or additionally, the text can serve as a supplemental source of rich factual problems for classroom discussion of law application and the development of lawyering skills. Instructors can choose from a wide array of skills, from client interviewing and counseling, to conducting direct examinations, drafting motions, and crafting jury instructions. Already time-pressed instructors may wonder how they can “add” these skills and values to doctrinal instruction. The exercises are structured to permit many options. The tasks range in complexity and provide suggested times to allot for each task. Some exercises can be assigned instead of, or in addition to, reading the traditional case law text. The exercise itself can be used in class as the way to teach the substantive law. If cases are assigned, students can be drilled in case analogy. Sometimes it is helpful to break students up into “law firms,” having them spend 15 minutes of class time brainstorming before one student is chosen, for example, to do a sentencing argument or oral motion. As still a third option, many tasks can be completed at home (e.g., a written motion to dismiss), using class time only to review and debrief the exercise. A teacher interested in using these materials must be willing to depart at least occasionally from her comfort zone to experiment with new methods, though the degree of experimentation is in the instructor’s hands. The self-assessment materials are sufficiently detailed, as are the skills guides and the teacher’s manual, that instructors who have long been away from legal practice should feel no intimidation in using these materials. Bold instructors with a supportive faculty might even seek an extra credit for a “skills lab,” this text being used as the material for the lab, the remaining course hours taught in a mostly more traditional fashion. At the other extreme, the text might simply be recommended as a way for students to review basic criminal law doctrines.

Although each chapter may stand on its own, students may be best served by taking these chapters largely in order, as Criminal Law instruction necessarily builds upon requisite fundamental knowledge. Accordingly, we have largely structured this volume much in the same way that traditional Criminal Law course books are structured and crimes are defined in American jurisdictions: we begin with the basics of a crime and build upon that knowledge. We also cross-reference chapters and skill guides to facilitate the most beneficial use of the materials presented. This provides students and professors an optimal opportunity to address and assess where competency or challenges exist.

We thus offer *Skills and Values: Criminal Law* as a tool to enable law students to bridge the gap between law school and law practice as early as their first year of legal education. *Skills and Values: Criminal Law* exposes students to many of the essential tasks inherent in the practice of criminal law via an integrated approach, blending both traditional instruction with “Best Practices” reform, so that students may enjoy an interactive, skills-based, 21st century approach to the study of Criminal Law.

### *Organization of the Book*

Each chapter contains: 1) an overview of the chapter’s substantive criminal law topic; this information summarizes the key legal doctrines and concepts; 2) a minimum of two tasks,



---

## *PREFACE*

i.e., assignments, in which the student can practice lawyering skills in the context of the applicable legal doctrine; 3) the relevant law (e.g. caselaw, statutes, or jury instructions); 4) a guide for how to engage in each assigned skill, e.g., how to draft a jury instruction, negotiate a plea, or interpret a statute; and 5) a self-assessment section that the student may use independently of, before, or after s/he has completed the assignment. In addition, all chapters contain supplemental materials related to the required tasks. Supplemental materials may include: 1) sample documents or models from which to begin to prepare the tasks or links to those documents; 2) short video clips (“SVCs”); and 3) optional further reading, including practitioners’ texts and law review articles. These materials do not all appear in the hard copy text. Some of the materials appear in that text, but much of the material appears in the OLC for each chapter.

### *A Plea to Users*

We are well aware that there are ample alternative ways to teach these materials and to improve the product. We encourage users to offer any suggestions to us using the contact information in the Acknowledgements section, and we cheerfully thank you in advance for this feedback. We hope you enjoy using this text as much as we have enjoyed putting it together.

September 3, 2013



## *ACKNOWLEDGMENTS*

---

Endless appreciation to my wife, Patricia V. Sun, for putting up with my scholarly and teaching obsessions; to my sister, Ellen Duncan, for teaching me to read and write, thus releasing my words on an unsuspecting world; and to the Washington College of Law, American University, for its support of this project. A special thanks, however, to my co-authors, the ever-talented Lenese Herbert, now of Howard University School of Law, and rising young star Katie Tinto, now of Cardozo School of Law. Lenese and Katie bring brilliance and joy to every project they touch, and I am blessed to be able to work with them. Finally, my deepest appreciation to my friends and family and my dogs, B'lanna and Odo, for seeing me through some tough times, and to my students to whom these materials are directed and who give such meaning to my professional life.

Andrew E. Taslitz  
Director, Criminal Justice Practice and Policy Institute  
Washington College of Law  
American University  
4801 Massachusetts Avenue, NW  
Washington, DC 20016  
202-274-4058  
ataslitz@wcl.american.edu

I would like to express gratitude to and appreciation of my co-authors, Andrew Taslitz, Director, Criminal Justice Practice and Policy Institute, Washington College of Law, American University, and Katie Tinto, Assistant Clinical Professor of Law, Benjamin N. Cardozo School of Law. Additionally, I would like to thank Lexis/Nexis Publications, especially Elisabeth Ebben, with whom working was a pleasure.

Lenese C. Herbert  
Howard University School of Law  
2900 Van Ness St NW  
Washington, DC 20008  
(202) 806-8000  
lherbert@law.howard.edu

Thank you to my family, the Lawyering Program of NYU School of Law, Christine Yurechko for excellent research assistance, and my first-year NYU Law students for their advice, edits, and perspectives. In addition, I would like to thank Cardozo School of Law for its strong support and my wonderful co-authors, Andrew Taslitz and Lenese Herbert, for the opportunity to be a part of this fantastic project.

Katie Tinto  
Benjamin N. Cardozo School of Law  
55 Fifth Avenue, Room 1108  
New York, NY 10003  
(212) 790-0433  
tinto@yu.edu



# TABLE OF CONTENTS

<b>Chapter 1</b>	<b>CHARGING AND SENTENCING</b> .....	<b>1</b>
I.	WHY SENTENCING PLANNING COMES FIRST .....	1
II.	OVERVIEW OF THE CRIMINAL PROCESS AND SENTENCING PLANNING’S ROLE IN THAT PROCESS .....	1
III.	SENTENCING PURPOSES .....	3
IV.	THE PRACTICAL RELEVANCE OF SENTENCING PURPOSES .....	4
V.	SENTENCING PROCEDURES .....	5
	Exercise .....	6
<b>Chapter 2</b>	<b>STATUTORY INTERPRETATION</b> .....	<b>17</b>
I.	THE PURPOSE OF, AND APPROACHES TO, STATUTORY INTERPRETATION .....	17
II.	LEGISLATIVE HISTORY, BROADER SOCIAL HISTORY, AND ADMINISTRATIVE REGULATIONS .....	19
III.	CANONS OF INTERPRETATION .....	19
	Exercise .....	22
<b>Chapter 3</b>	<b>ACTUS REUS</b> .....	<b>35</b>
I.	VOLUNTARY ACTS .....	35
II.	OMISSIONS .....	36
III.	CAUSATION: THE LINK TO PROHIBITED SOCIAL HARM .....	37
IV.	FAILURE OF PROOF DEFENSE TO <i>ACTUS REUS</i> .....	38
	Exercise .....	40
<b>Chapter 4</b>	<b>MENS REA BASICS</b> .....	<b>45</b>
	Exercise .....	49
<b>Chapter 5</b>	<b>MENS REA COMPLICATIONS AND FAILURE OF PROOF DEFENSES</b> .....	<b>53</b>
I.	MISTAKE OF FACT .....	54
II.	MISTAKE OF LAW .....	55
III.	TRANSFERRED INTENT .....	55
IV.	WILLFUL BLINDNESS/DELIBERATE IGNORANCE/“OSTRICH DEFENSE” .....	56
V.	INFANCY .....	57
	Exercise .....	58

---

*Table of Contents*

<b>Chapter 6</b>	<b>THE PROOF PROCESS: BURDENS OF PRODUCTION AND PERSUASION AND PROOF PLANNING</b>	<b>65</b>
I.	BURDENS OF PRODUCTION AND PERSUASION	65
II.	THE LAWS OF EVIDENCE AND IMPEACHMENT	67
III.	PROOF PLANNING CHARTS	67
IV.	JURY, JUDGE, OR GUILTY PLEA	69
	Exercise	70
<b>Chapter 7</b>	<b>HOMICIDE I</b>	<b>77</b>
I.	COMMON LAW MURDER	77
II.	MODERN LAW	80
III.	THE MODEL PENAL CODE	82
	Exercise	84
<b>Chapter 8</b>	<b>HOMICIDE II — MANSLAUGHTER AND FELONY MURDER</b>	<b>95</b>
I.	FELONY MURDER	95
A.	First Degree and Second Degree Murder	95
B.	Limits to the Felony-Murder Rule	96
II.	MANSLAUGHTER	97
A.	Voluntary Manslaughter	98
B.	Involuntary Manslaughter	99
	Exercise	100
<b>Chapter 9</b>	<b>RAPE</b>	<b>109</b>
I.	SUBSTANTIVE LAW	109
II.	PROCEDURAL LAW	111
	Exercise	113
<b>Chapter 10</b>	<b>ATTEMPT AND SOLICITATION</b>	<b>123</b>
I.	ATTEMPT	124
II.	SOLICITATION	128
	Exercise	131
<b>Chapter 11</b>	<b>CONSPIRACY</b>	<b>137</b>
I.	ACTUS REUS	137
II.	MENS REA	138
III.	THE SCOPE OF LIABILITY	138

---

*Table of Contents*

IV.	THE STRUCTURE OF THE CONSPIRACY .....	139
V.	DEFENSES TO CONSPIRACY .....	139
VI.	THE CONSPIRACY CHARGE IN PRACTICE .....	140
	Exercise .....	141
<b>Chapter 12</b>	<b>ACCOMPLICE LIABILITY .....</b>	<b>147</b>
	Exercise .....	150
<b>Chapter 13</b>	<b>SELF-DEFENSE .....</b>	<b>159</b>
	Exercise .....	163
<b>Chapter 14</b>	<b>ENTRAPMENT AND OUTRAGEOUS GOVERNMENT CONDUCT .....</b>	<b>175</b>
I.	ENTRAPMENT .....	175
II.	OUTRAGEOUS GOVERNMENT CONDUCT .....	176
	Exercise .....	178
<b>Chapter 15</b>	<b>INTOXICATION, INSANITY, AND COMPETENCY .....</b>	<b>185</b>
I.	INTOXICATION .....	185
II.	INSANITY AND COMPETENCY .....	186
	Exercise .....	189
<b>Chapter 16</b>	<b>THE DEATH PENALTY .....</b>	<b>195</b>
	Exercise .....	198

