

Criminal Law

Criminal Law

Problems, Statutes, and Cases

Kevin McMunigal

PROFESSOR OF LAW

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2018
Kevin McMunigal
All Rights Reserved

ISBN 978-1-5310-0401-9
Ebook ISBN 978-1-53100-402-6
LCCN 2017960453

Carolina Academic Press, LLC
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.caplaw.com

Printed in the United States of America

Contents

Table of Cases	xv
Table of Statutes	xvii
Acknowledgments	xxiii
Diagramming Crimes	xxv
Chapter 1 · Overview of the Criminal Justice System	3
A. The Start of a Criminal Case	3
B. Charging: The Prosecutor’s Office	5
1. The Charging Decision	6
2. The Applicable Law	9
3. Grand Jury versus Prosecutorial Charging and Preliminary Hearing	10
a. Grand Jury	10
b. Preliminary Hearing	10
C. In the Courthouse	11
1. Arraignment, Counsel, and Settings	11
2. Plea Negotiations	11
3. Discovery	13
4. Trial	13
5. Post-Trial: Sentencing and Probation	15
D. Participants	16
E. Problems with the Criminal Justice System	19
Chapter 2 · Punishment	23
A. What Is Punishment?	23
<i>Kansas v. Hendricks</i>	24
B. Why Punish?	28
1. The Purposes of Punishment: An Overview	28
<i>Graham v. Florida</i>	36
<i>United States v. Bergman</i>	39
2. The Purposes of Punishment: A Closer Look	46
a. Deterrence	46
<i>Help Wanted: Economists, Crime and Public Policy</i>	48
b. Incapacitation	50

c. Rehabilitation	51
d. Retribution	54
C. How Much Punishment?	56
<i>Ewing v. California</i>	58
D. Synthesis and Review	70
Chapter 3 · Making Criminal Law	73
A. Legislators and Judges	73
<i>Khaliq v. Her Majesty's Advocate</i>	75
<i>Khaliq v. Her Majesty's Advocate</i>	77
<i>Keeler v. Superior Court</i>	78
1. The Rule of Lenity	87
<i>United States v. Wiltberger</i>	87
<i>State v. Maggio</i>	88
<i>Muscarello v. United States</i>	89
2. Analogy	89
3. Common Law versus Statutes	91
a. Legitimacy	91
b. Accessibility and Comprehensibility	93
c. Prospective versus Retrospective Operation	94
d. Balancing the Particular and the General	95
e. Keeping Criminal Law Current	96
f. Institutional Competence	97
B. The Executive Branch	97
<i>Connecticut v. White</i>	98
<i>Three Conceptions of Federal Criminal-Lawmaking</i>	103
C. The Jury	104
<i>Duncan v. Louisiana</i>	105
<i>The Law-Finding Function of the American Jury</i>	106
<i>United States v. Dougherty</i>	109
D. Statutory Interpretation	114
1. Intentionalism	117
<i>Church of the Holy Trinity v. United States</i>	117
2. Textualism	121
<i>A Matter of Interpretation</i> 16-37 (1997)	121
<i>On the Uses of Legislative History in Interpreting Statutes</i>	127
3. Dynamic Statutory Interpretation	131
<i>Dynamic Statutory Interpretation</i>	131
E. Specificity	136
<i>A System of Penal Law for the United States of America</i> 2 (1828)	136
<i>City of Chicago v. Morales</i>	137
<i>State v. Pomianek</i>	144
F. Synthesis and Review	153
<i>Three Conceptions of Federal Criminal-Lawmaking</i>	153

Chapter 4 · Conduct	155
A. The Elements of an Offense	155
B. Why Require Conduct?	159
C. What Is an Act?	160
D. Status	162
E. Voluntariness	163
<i>Martin v. State</i>	164
F. Timeframing	166
<i>People v. Decina</i>	167
G. Omission	170
<i>Jones v. United States</i>	171
H. Possession	175
<i>State v. Barger</i>	179
I. Vicarious Liability	186
<i>State v. Guminga</i>	186
J. Synthesis and Challenges	190
1. Rethinking the Conduct Requirement	191
<i>Crime and Consciousness: Science and Involuntary Acts</i>	192
 Chapter 5 · Mental States	 195
A. Introduction	195
1. Functions of Mental States	198
a. Distinguishing Criminal from Non-criminal Conduct	199
b. Grading Offenses	199
2. Sources of Difficulty	200
a. Mental State Is a Question of Degree	200
b. Multiple Mental States	200
c. Mental State Is Relational	201
3. The Vocabulary of Mental States	201
a. Model Penal Code Terminology	202
The “Other Minds” Question	208
b. Traditional Terminology: Intent	212
<i>State v. Roufa</i>	212
<i>Regina v. Faulknor</i>	213
<i>Woodward v. State</i>	213
<i>State v. Clardy</i>	213
B. Strict Liability	215
<i>United States v. Balint</i>	215
1. The Strict Liability Debate	218
2. A Compromise Position	220
C. Resolving Statutory Ambiguity	221
<i>Morissette v. United States</i>	223
1. Statutes Silent on Mental State	227
<i>Elonis v. United States</i>	229

2. Statutes that Include a Mental State	236
<i>Flores-Figueroa v. United States</i>	239
D. Mistake of Fact	246
1. Mistake as Evidence of Mental State	249
<i>People v. Rypinski</i>	252
2. Reasonableness	254
E. Mistake of Law	257
1. The Law Defining the Charged Offense	257
a. The Conventional Position	258
<i>United States v. Baker</i>	258
b. Special Cases	260
i. Statutes Requiring Culpability Regarding Illegality	260
<i>Ratzlaf v. United States</i>	261
ii. Reliance on Official Interpretation	265
<i>Cox v. Louisiana</i>	267
2. Mistake Regarding Circumstances that Include a Legal Element	268
<i>Regina v. Smith (David)</i>	269
F. Willful Blindness	272
<i>United States v. Jewell</i>	274
G. Conditional Purpose/Intent	278
<i>Holloway v. United States</i>	279
H. Intoxication	287
<i>People v. Hood</i>	288
<i>Montana v. Egelhoff</i>	289
I. Synthesis and Challenges	298
Chapter 6 · Homicide	301
A. Introduction	301
B. Purposeful Killings	302
1. Degrees of Murder	303
2. Premeditation and Deliberation	307
<i>State v. Bingham</i>	307
<i>People v. Morrin</i>	309
<i>Byford v. Nevada</i>	310
<i>Commonwealth v. Carroll</i>	314
<i>Young v. State</i>	317
<i>Carmichael v. State</i>	318
3. The Provocation Doctrine	318
a. Actual Provocation	319
b. Limitations on Provocation	321
i. Categorical Limitations	323
<i>Dennis v. State</i>	323
<i>Maher v. People</i>	328
ii. Words	330

<i>Scott v. State</i>	330
iii. Time Limitations	332
<i>State v. Pierce</i>	332
<i>People v. Wharton</i>	335
iv. Victim Identity	338
v. “Tailoring” the reasonableness standard	339
<i>Director of Public Prosecutions v. Camplin</i>	339
vi. The Model Penal Code’s Approach: Extreme Mental or Emotional Disturbance	342
c. Battered Spouses	343
d. Provocation Outside the Homicide Context	344
C. Extreme Reckless Murder	346
<i>United States v. Fleming</i>	348
<i>Berry v. Superior Court</i>	352
Final Thoughts on Extreme Reckless Murder	359
D. Manslaughter	360
<i>Commonwealth v. Welansky</i>	362
<i>People v. Hall</i>	367
E. Negligent Killing	377
<i>State v. Williams</i>	380
<i>Removing Children: The Destruction of American Indian Families</i>	383
F. Felony Murder	384
1. The Basic Rule	386
<i>State v. Sims</i>	386
<i>People v. Stamp</i>	389
<i>People v. Aaron</i>	390
<i>In Defense of the Felony Murder Doctrine</i>	398
<i>The Felony-Murder Rule: A Doctrine at Constitutional Crossroads</i>	400
2. Limitations on the Felony Murder Rule	401
a. Enumeration	402
b. Inherently Dangerous Felony	402
<i>People v. Sanchez</i>	403
c. The Merger Doctrine	407
<i>Barnett v. State</i>	407
d. Agency or “In Furtherance”	409
<i>Weick v. State</i>	410
<i>State v. Oimen</i>	411
e. Res Gestae	414
<i>State v. Adams</i>	414
G. Synthesis and Review	416
Chapter 7 · Causation	419
A. Introduction	419
B. Cause in Fact	422

<i>Burrage v. United States</i>	425
C. Proximate Cause	432
1. Intervening Actors Other Than the Victim	433
<i>People v. Flenon</i>	434
<i>People v. Kibbe</i>	437
2. The Victim as Intervenor	440
<i>State v. Echols</i>	440
<i>Commonwealth v. Root</i>	442
<i>Commonwealth v. Carlson</i>	447
3. The “Eggshell Victim” Rule	452
<i>State v. Jenkins</i>	452
D. The Model Penal Code and Causation	453
E. Synthesis and Review	454
Chapter 8 · Justifications and Excuses	455
A. Introduction	455
B. Self-Defense and Defense of Others	456
1. Introduction	456
2. The <i>Goetz</i> Case	461
<i>People v. Goetz</i>	461
3. Self-Defense and Domestic Violence	468
<i>State v. Norman</i>	469
4. Retreat	481
5. Initial Aggressor Rules	483
6. Model Penal Code Treatment of Self-Defense	485
C. Necessity	486
1. Introduction	486
2. Necessity and the Common Law	490
<i>The Queen v. Dudley and Stephens</i>	490
3. Civil Disobedience	495
<i>United States v. Schoon</i>	495
4. Model Penal Code Treatment of Necessity	500
D. Duress	502
<i>United States v. Contento-Pachon</i>	505
E. Insanity and Mental Illness	509
1. Introduction	509
2. Case Study: One State’s Struggle to Choose an Insanity Test	511
<i>People v. Drew</i>	511
<i>People v. Fields</i>	515
<i>People v. Skinner</i>	518
3. Moral Wrong versus Legal Wrong	521
<i>State v. Crenshaw</i>	521
4. Insanity Definitions	525
5. Rationales for and against an Insanity Defense	527

<i>Working Papers of The National Commission on Reform of Federal Criminal Law</i>	528
Chapter 9 · Rape	531
A. Introduction	531
B. Context: Statistics, Studies, and Demographics	532
C. Conduct	535
1. Force, Resistance, and/or Lack of Consent	537
<i>People v. Warren</i>	537
<i>State in Interest of M.T.S.</i>	542
2. Other Types of Coercion	549
3. Fraud	549
4. Lack of Consent	551
a. The Traditional View	551
<i>Brown v. State</i>	551
b. Consent in Transition	553
<i>People v. Barnes</i>	553
5. The Model Penal Code	557
D. Mental States	558
1. Regarding Force or Fear	558
2. Regarding Lack of Consent	559
<i>Commonwealth v. Lopez</i>	559
E. Incapacity to Consent	563
F. Rape Shield Statutes	564
G. Rape Trauma Syndrome	565
<i>People v. Taylor</i>	566
H. Marital Exemption	571
<i>People v. Liberta</i>	571
I. Statutory Rape	576
1. Historical and Contemporary Justifications	576
<i>Meaningful Consent: Toward a New Generation of Statutory Rape Laws</i>	578
2. Non-Mental Elements	581
3. Mental States	584
<i>State v. Elton</i>	586
<i>State v. Elton</i>	587
4. Constitutional Issues	593
<i>In re D.B.</i>	594
Chapter 10 · Attempt	599
A. Introduction	599
B. Punishment	600
C. Conduct	602
<i>Kansas v. Gobin</i>	606

<i>People v. Rizzo</i>	607
<i>United States v. Jackson</i>	610
<i>McQuirter v. State</i>	619
D. Mental States	622
1. Mental States Regarding Conduct and Result Elements	622
<i>South Dakota v. Lyerla</i>	624
<i>Montana v. Hembd</i>	630
2. Mental State Regarding a Circumstance Element	632
E. Abandonment	634
<i>People v. Staples</i>	634
F. Impossibility	638
<i>People v. Dlugash</i>	638
G. Synthesis and Review	643
<i>Canceling Crime</i>	644
Chapter 11 · Complicity	647
A. Introduction	647
B. Conduct	649
1. Presence	649
<i>State v. V.T.</i>	650
<i>Wilcox v. Jeffrey</i>	653
2. Causation	655
3. Omissions	656
<i>State v. Walden</i>	656
4. The MPC Approach to Conduct for Complicity	662
C. Mental States	662
1. Mental State Regarding Conduct	663
<i>People v. Beeman</i>	663
2. Mental State Regarding a Result Element	671
<i>Washington v. Hopkins</i>	672
3. Mental State Regarding a Circumstance Element	677
<i>Commonwealth v. Harris</i>	678
4. Attempt to Aid and Abet	684
D. Abandonment and Other Limiting Principles	685
E. Special Issues	686
1. Conviction of the Principal	686
2. Other Crimes Committed by the Principal	687
3. Innocent Instrumentality	689
4. The Feigning Accomplice	690
F. Synthesis and Review	690
Chapter 12 · Conspiracy	693
A. Introduction	693
<i>United States v. Valle</i>	695

B. Conduct	705
1. Agreement	705
<i>Martinez v. Wyoming</i>	707
2. Bilateral versus Unilateral	709
<i>Washington v. Pacheco</i>	710
3. Overt Act	717
<i>State v. Dent</i>	718
C. Mental States	722
<i>People v. Lauria</i>	724
1. Mental State Regarding a Circumstance	730
<i>United States v. Feola</i>	731
D. Scope of the Conspiracy	734
1. The <i>Pinkerton</i> Doctrine	734
<i>Pinkerton v. United States</i>	735
2. Parties to a Conspiracy	738
<i>United States v. McDermott</i>	738
3. Duration	741
<i>United States v. Jimenez Recio</i>	741
4. The Wharton Rule	743
E. Abandonment	744
F. Synthesis and Review	746
Chapter 13 · Theft	747
A. Introduction	747
<i>United States v. Aleynikov</i>	748
<i>People v. Aleynikov</i>	752
B. Larceny	757
<i>People v. Davis</i>	758
1. Conduct	759
<i>State v. Carswell</i>	759
<i>United States v. Mafnas</i>	761
2. Mental State	763
<i>People v. Davis</i>	763
3. Claim of Right	770
C. Larceny by Trick	771
D. Embezzlement	772
<i>State v. Archie</i>	772
E. Theft by False Pretenses	775
<i>People v. Marsh</i>	777
<i>People v. Cage</i>	779
<i>People v. Lorenzo</i>	781
F. Property	784
<i>Lund v. Commonwealth</i>	784
<i>United States v. Farraj</i>	788

G. Consolidation of Theft Offenses	791
Appendix	795
Index	825

Table of Cases

- Aaron, *People v.*, 390
Adams, *State v.*, 414
Aleynikov, *People v.*, 753
Aleynikov, *United States v.*, 749
Archie, *State v.*, 773
- Baker, *United States v.*, 258, 614
Balint, *United States v.*, 215
Barger, *State v.*, 179
Barnett v. *State*, 407
Beeman, *People v.*, 664
Bergman, *United States v.*, 35, 39
Berry v. *Superior Court*, 352, 422
Bingham, *State v.*, 307
Byford, *Nevada v.*, 310
- Cage, *People v.*, 780–782
Camplin, *Director of Public Prosecutions v.*, 339
Carlson, *Commonwealth v.*, 447
Carmichael v. *State*, 318
Carroll, *Commonwealth v.*, 314, 421
Carswell, *State v.*, 760
Church of the Holy Trinity v. *United States*, 114, 117, 122
City of Chicago v. *Morales*, 137
Clardy, *State v.*, 213
Contento-Pachon, *United States v.*, 505
Cox v. *Louisiana*, 267
Crenshaw, *State v.*, 521
- Davis, *People v.*, 759, 764
Decina, *People v.*, 166, 167
- Dennis v. *State*, 88, 89, 323
Dent, *State v.*, 719
Dlugash, *People v.*, 638
Dougherty, *United States v.*, 106, 109
Drew, *People v.*, 511, 515, 518
Dudley and Stephens, *The Queen v.*, 490
Duncan v. *Louisiana*, 105
- Echols, *State v.*, 440
Egelhoff, *Montana v.*, 287, 289
Elonis v. *United States*, 229
Elton, *State v.*, 586, 587
Ewing v. *California*, 58
- Farraj, *United States v.*, 789
Feola, *United States v.*, 732
Fields, *People v.*, 515
Fleming, *United States v.*, 348, 422
Flenon, *People v.*, 434
Flores-Figueroa v. *United States*, 239
- Gobin, *Kansas v.*, 606
Goetz, *People v.*, 456, 461
Graham v. *Florida*, 35, 36
Guminga, *State v.*, 186
- Hall, *People v.*, 367, 422
Harris, *Commonwealth v.*, 679
Hembd, *Montana v.*, 630
Hendricks, *Kansas v.*, 24, 31
Holloway v. *United States*, 279
Hood, *People v.*, 288
Hopkins, *Washington v.*, 673

- Jackson, United States v., 223, 610
Jenkins, State v., 452
Jewell, United States v., 274
Jimenez Recio, United States v., 742
Jones v. United States, 171, 421
- Keeler v. Superior Court, 78, 421
Khaliq v. Her Majesty's Advocate, 75,
77, 78
Kibbe, People v., 437
- Lauria, People v., 725
Liberta, People v., 571
Lopez, Commonwealth v., 559
Lorenzo, People v., 782
Lund v. Commonwealth, 785
Lyerla, South Dakota v., 624
- Mafnas, United States v., 762
Maggio, State v., 88, 89
Maher v. People, 328
Marsh, People v., 778
Martin v. State, 164
Martinez v. Wyoming, 708
McDermott, United States v., 739
McQuirter v. State, 619
Morissette v. United States, 199, 218,
223, 234, 276, 588
Morrin, People v., 309
Muscarello v. United States, 89
- Nesler, People v., 336
Norman, State v., 456, 469
- Oimen, State v., 411
- Pacheco, Washington v., 711
Pierce, State v., 332
Pinkerton v. United States, 736
- Pomianek, State v., 144, 210
Powell v. Texas, 162
- Ratzlaf v. United States, 261
Regina v. Faulknor, 213
Regina v. Smith (David), 269
Rizzo, People v., 607
Robinson v. California, 162
Root, Commonwealth v., 442
Roufa, State v., 212
Rypinski, People v., 252
- Sanchez, People v., 403
Schoon, United States v., 495
Sims, State v., 386
Skinner, People v., 518
Stamp, People v., 389
Staples, People v., 634
State in Interest of M.T.S., 542
- Taylor, People v., 566
- V.T., State v., 651, 652
Valle, United States v., 696
- Walden, State v., 657
Warren, People v., 537
Weick v. State, 410
Welansky, Commonwealth v., 362, 367,
422
Wharton, People v., 335
White, Connecticut v., 98
Wilcox v. Jeffrey, 654
Williams, State v., 379, 380, 416, 422
Wiltberger, United States v., 87, 790
Woodward v. State, 213
- Young v. State, 317

Table of Statutes

Alabama

Alabama Code

Section

13A-2-2	212
13A-2-5	430
13A-6-2	408, 409
13A-6-2(a)(3)	407
13A-6-3	409
13A-6-20(a)(1)	408
13A-6-62	582

Alaska

Code of Criminal Procedure

Section

12.55.65.005	31
--------------------	----

Arizona

Arizona Revised Statutes

Section

13-103	74
13-104	88
13-412	503
13-417	488
13-1001	616
13-1405	583, 585

Arkansas

Arkansas Code Annotated

Section

5-2-205	430
5-2-607	457, 482
16-90-801	57

California

California Penal Code Annotated

Section

4	81, 84
5	80
6	81
25(b)	518, 519, 520
28	510
187	79, 81, 82, 83, 84, 86, 90, 403, 405
189	305, 404
246.3	407
274	83
459	155
667.5	59
1170(a)(1)	31
1192.7	59

Colorado

Colorado Revised Statutes

Section

1	149
18-3-402	550
18-1-502	215
18-1-704	458, 484

Connecticut

Connecticut General Statutes

Section

53a-8	671
-------------	-----

Delaware	5/11-1.20	536
Delaware Code Annotated	7-1	458
Section	11-1.70	556
512(1).....		410
635		409
635(2)		410, 411
636		409, 410, 411
District of Columbia		
District of Columbia Code		
Section		
22-1805		649
Florida		
Florida Statutes		
Section		
775.01		74
775.02		74
775.021		87
794.011		556
794.021		585
Georgia		
Georgia Code Annotated		
Section		
16-4-9		745
16-5-2		330
16-5-2		331
16-6-3		582
Hawaii		
Hawaii Revised Statutes		
Section		
707-701		306
Idaho		
Idaho Code Annotated		
Section		
18-6101		535, 542, 582
18-7902 (2014)		149
Illinois		
Illinois Compiled Statutes		
Section		
5/8-2 C		704, 723
5/11-0.1		536
Indiana		
Indianan Code		
Section		
35-41-2-4		686
Iowa		
Iowa Code		
Section		
4.6		135
701.5		297
701.6		250, 260
709.1		536
Kansas		
Kansas Statutes Annotated		
Section		
21-3201		214
21-3205		663, 686, 688
21-3301		623
21-3401		305
21-3402		306
21-3436		305
21-5503		563
59-29a01		23, 25, 26
59-29a02		24
59-29a05		24
59-29a06		24
59-29a07		24
Kentucky		
Kentucky Revised Statutes		
Section		
446.080		88
506.010		617
Louisiana		
Louisiana Statutes Annotated		
Section		
14:3		88
14:31		332
80		582, 585

Maine	3.04	465, 466, 485
Maine Criminal Code	3.04(2)(b)	465, 477, 481
Section	4.01	526
151	5.01	604, 605, 617, 624
352	5.01	615, 633, 685
Maine Revised Statutes Annotated	5.01(2)	605
Title:Section	5.01(4)	636
17-A:33	5.03	704, 723, 734
17-A:57	5.05	602
	5.06	745
Maryland	7.01(1)(c)	41, 46
Maryland Criminal Law Code	210.2	306
Annotated	210.3	342, 360
Section	210.4	377
2-207(b)	213.1	557
	213.6	585
Massachusetts	213.6	585
Massachusetts General Laws	223.0	792
Chapter/Section	223.1	792
265:22	223.2	766, 793
	223.3	793
Minnesota		
Minnesota Statutes		
Section		
340.73		187, 189
340.941		187, 188, 189, 191
609.03		187
609.075		297
609.17		601
645.16		134
645.17		134
Model Penal Code		
Section		
2.01		165, 173, 176
2.02		202, 203, 204, 205, 207, 214,
		217, 228, 238, 260, 269
2.02(7)		276, 277
2.03		453
2.04		250, 253, 254, 260, 265
2.06		662, 670, 676, 684,
		685, 686, 688
2.08		298
2.09		504
3.02		500, 502
	Montana	
	Montana Code Annotated	
	Section	
	45-2-203	289, 290, 293, 297
	45-3-102	482
	45-4-103	601, 604
	45-5-102	289
	45-5-511	531
	Nebraska	
	Nebraska Revised Statutes Annotated	
	Section	
	28-1409	482
	195.020	649
	New Hampshire	
	New Hampshire Revised Statutes	
	Section	
	625:6	75
	New Jersey	
	New Jersey Statutes Annotated	
	Title:Section	

2C:14-1.....	546	Oregon	
2C:14-2c(1)	543, 546	Oregon Revised Statutes	
2C:16-1.....	148, 149, 150, 152	Section	
2C:16-1(a)(3).....	145, 146, 147, 151, 152	161.015(9)	181, 182
2C:33-4(d)	149	161.025.....	57
2C:35-7(a)	146, 151	163.686.....	178, 181, 182, 186
2C:44-3(e).....	148	163.686(1)(a)	179, 180, 181
New Mexico		163.686(1)(a)(A)(i)	181, 182, 183, 184, 185
New Mexico Statutes Annotated		163.686(1)(a)(A)(ii)	182, 182, 185
Section		174.020.....	181
30-1-3.....	74	Pennsylvania	
30-28-2.....	718	Pennsylvania Consolidated Statutes	
New York		Section	
New York Penal Laws		503 489	
Section		2503.....	338
15.05(3).....	253	2504.....	360
15.20(1)(a).....	253	3121	541, 542
35.05.....	488	3124.1	542
120.05	251, 252	South Dakota	
120.10.....	252	South Dakota Codified Laws	
125.15.....	360	Section	
130.30.....	536	22-3-3.....	649
North Dakota		Tennessee	
North Dakota Century Code		Tennessee Code Annotated	
Section		Section	
12.1-02-05.....	430	39-11-402.....	670
12.1-06-04.....	705	39-11-402(2).....	671
Ohio		39-11-403.....	671
Ohio Revised Code		39-12-101.....	617
Section		39-12-103	723, 745
2901.21.....	297	39-13-503	550, 559
2903.01.....	333	Texas	
2907.04.....	584	Texas Government Code	
2907.323.....	178	Section	
2923.01.....	704	311.023.....	135
Oklahoma		Texas Penal Code Annotated	
Oklahoma Revised Statutes		Section	
Title:Section		6.04.....	430
21:850.....	149	8.01.....	526
		8.02.....	255

8.03..... 265
 9.31..... 483
 49.03..... 156

United States

United States Code
 Title:Section
 18:2..... 610
 18:17..... 526
 18:111..... 730, 731, 732, 733
 18:228..... 171
 18:371..... 715, 730, 731, 733, 738
 18:641..... 222, 223, 226, 227
 18:661..... 222, 227
 18:875(b)..... 234
 18:875(c)..... 229, 232, 233,
 234, 235, 236
 18:875(d)..... 234
 18:1028..... 242
 18:1028A..... 242
 18:1028A(a)(1)..... 239, 240, 243, 245
 18:1111..... 348
 18:1111(a)..... 349, 350
 18:1112(a).4..... 350
 8:1325(a)..... 240
 18:1546(a)..... 240
 18:2113(a)..... 610, 613
 18:2119..... 280, 283, 285
 18:2252A..... 178
 18:2314..... 748, 751, 749, 750,
 788, 789, 790, 791
 18:2320..... 258
 18:2339B..... 156
 18:2423(a)..... 245
 21:174..... 276
 21:841(a)..... 276
 21:841(a)(1)..... 275, 507
 21:841(b)(1)(C)..... 431
 21:960(a)(1)..... 275
 25:1902..... 384
 31:5322..... 262, 263
 31:5322(a)..... 262
 31:5324..... 262, 263, 264, 265
 31:5322(a)..... 262

31:5324(a)(3)..... 264

Utah

Utah Code Annotated
 Section
 76-2-202..... 663
 76-2-402..... 480, 481
 76-3-304.5..... 593
 76-4-201..... 718

Vermont

Vermont Statutes Annotated
 Title:Section
 13:1404..... 710

Virginia

Virginia Code
 Section
 18.2-374.1..... 177

Washington

Revised Code of Washington
 Section
 9.48.030..... 381
 9.48.060..... 381
 9.48.0602..... 381
 9.48.150..... 381
 9.48.1503..... 381
 9A.12.010..... 523
 9A.52.120..... 156
 9A.16.060..... 503

West Virginia

West Virginia Code
 Section
 61-2-1..... 388
 61-2-1.5..... 387

Wisconsin

Wisconsin Statutes
 Section
 939.32..... 604, 624
 939.47..... 489, 494
 940.03..... 402, 411, 412, 413
 940.225..... 556

Wyoming
Wyoming Statutes
Section
6-1-303..... 723

Acknowledgments

I give special thanks to Dan Medwed, B.J. Priester, Michael Whiteman, and my colleague Mike Benza for their generosity in providing me with insightful comments and suggestions on various iterations of the manuscript. Librarian extraordinaire Judith Kaul has given unstinting and invaluable research support. My assistant, Ray Utrup, helped greatly in preparing the manuscript. Many students contributed to the making of this book, among them Jamielle Lamson-Buscho, Jamie Crist, Emily Knight, Christopher Lauer, Leah Slyder, and John Wrench. I'd also like to thank my nephew, Charlie Straut, and my wife, Tara Broderick, for their editorial assistance. Carol McGeehan gave unfailing support and encouragement in bringing this work to publication. I continue to be grateful to Professors John Kaplan and Sanford Kadish for sparking my interest in criminal law and criminal law texts. Last, but certainly not least, I would like to acknowledge the many students in my criminal law classes who have helped shape my thinking about teaching criminal law. Their insights, comments, and questions in large measure shaped this book.

I would also like to thank the authors, publishers, and copyright holders listed below for giving permission to reprint excerpts from their materials.

The American Law Institute, *THE MODEL PENAL CODE*, Copyright 1985 by the American Law Institute. Reprinted with permission. All rights reserved.

Breyer, Stephen, *On the Uses of Legislative History in Interpreting Statutes*, 65 Southern California Law Review, 845–890 (1992). Reprinted with the permission of the Southern California Law Review.

Buel, Sarah, *Violence Against Women: How to Improve the Legal Services' Response*, Nov. 18, 1991 (cited in *Defending Our Lives*, Study and Resource Guide 13, 19). Reprinted with permission of the author.

Crump, David & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J. L. & Pub. Pol'y 359, 362–68, 370–71, 374–75 (Spr. 1985). Reprinted with permission of the authors.

Denno, Deborah W., *Crime and Consciousness: Science and Involuntary Acts*, 87 Minn. L. Rev. 269, 269–72, 274–75, 361, 369 (2002). Reprinted with permission of the author.

DiIulio, Jr., John J., *Help Wanted: Economists, Crime and Public Policy*, 10 *Journal of Economic Perspectives* 3–24 (Winter 1996). Reprinted with permission of the author.

Eskridge, Jr., William N., *Dynamic Statutory Interpretation*, 135 *Univ. Pa. L. Rev.* 1479, 1479–1480, 1482–1484, 1496–1497, 1498, 1506–1507 (1987). (C1987 by the University of Pennsylvania Law Review.). Reprinted with permission of the author.

Harrington, Matthew P., *The Law-Finding Function of the American Jury*, 1999 *WISCONSIN LAW REVIEW* 377, 377–380. Reprinted with permission of the author.

Kahan, Dan M., *Three Conceptions of Federal Criminal-Lawmaking*, 1 *BUFF. CRIM. L. R.* 5, 5–18 (1997). Reprinted with permission of the author.

Kitrosser, Heidi, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 *Va. J. of Soc. Pol'y and L.* 287, 322–326 (1997). Reprinted with permission of the author.

Lee, Evan Tsen, *Cancelling Crime*, 30 *Conn. L. Rev.* 117 (1997). Reprinted with permission of the author.

Roth, Nelson E., & Sundby, Scott E., *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 *Cornell L. Rev.* 446 (1985). Reprinted with permission of the authors.

Scalia, Antonin, *A Matter of Interpretation* 16-37. Copyright 1997 by Princeton University Press. Reprinted with permission of Princeton University Press.

Some materials and ideas in this book, *Criminal Law: Problems, Statutes, and Cases*, are drawn from an original 2005 book entitled, *Criminal Law: A Contemporary Approach*, co-authored by Kate E. Bloch and Kevin C. McMunigal. The author of *Criminal Law: Problems, Statutes, and Cases*, Kevin C. McMunigal, is indebted to Kate E. Bloch for her innovative and thoughtful scholarship as reflected in the original work. Although the current text may draw upon that scholarship, because Kate E. Bloch did not prepare the materials for *Criminal Law: Problems, Statutes, and Cases*, Kate E. Bloch bears no responsibility for *Criminal Law: Problems, Statutes, and Cases*, including no responsibility for the selection or use in *Criminal Law: Problems, Statutes, and Cases* of any ideas or materials from the original work.

Diagramming Crimes

In my criminal law class, I routinely “diagram” crimes to help students grasp their elements and master the skill of legal analysis. The technique is reminiscent of diagramming sentences, once a staple of elementary school English classes. Criminal offense diagrams don’t look like sentence diagrams. But each is useful in breaking something down, whether a sentence or a criminal statute, to identify and understand its component parts.

A word of caution at the outset. Diagramming is a tool to help extract from a statute or an opinion and clearly state the elements of an offense. It is not alchemy. It cannot, for example, transform an ambiguous statute into a clear one. But it can help students spot ambiguity in the definition of an offense and respond by developing and deploying statutory interpretation skills.

Diagramming Basics

Each offense element gets a box. The boxes are stacked in two adjacent columns with the non-mental elements on the right and the mental elements on the left. For reasons revealed below, it makes sense to start with the non-mental elements. I typically place the conduct element at the top and put other non-mental elements, such as a result or circumstance, directly below the conduct box. The non-mental column for a hypothetical statute penalizing the transportation of stolen archaeological artifacts would look like this:

Non-Mental Elements

Transport
Stolen
Artifacts

The mental state boxes come next. I draw an empty box to the immediate left of each non-mental element box:

Mental Elements	Non-Mental Elements
	Transport
	Stolen
	Artifacts

Each empty box provides space for filling in any required mental state regarding the non-mental element to its immediate right.

Understanding Mental States

Simply drawing a column of empty mental state boxes helps one grasp several important points about mental state. First, it helps in distinguishing mental from non-mental elements. Second, it demonstrates that criminal statutes may and often do require more than one mental state for conviction. The stolen artifacts statute, for example, might require *purpose* to transport, *knowledge* that the objects are stolen, but only *recklessness* that the objects are archaeological artifacts. These mental states would be reflected in an offense diagram as follows:

Mental Elements	Non-Mental Elements
Purpose	→ Transport
Knowledge	→ Stolen
Recklessness	→ Artifacts

Failure to distinguish clearly among mental states is a common problem in the criminal law's treatment of mental state.

Diagramming also reveals that mental state is relational. A person at any one time has many mental states regarding many different things. In order to speak and think clearly about mental state, it helps to clarify the reference point for the mental state in question. If we were to ask, for example, "What was the mental state of the defendant?" in a case arising under our stolen artifacts statute, it would be impossible to answer the question clearly without specifying the reference point for the mental state—the act of transporting the artifacts, their status as stolen, or their status as artifacts. That a crime may require and a criminal may possess more than one mental state make it critical to specify a reference point for mental state to avoid confusion.

Because mental state is relational, it helps to begin an offense diagram by constructing the non-mental element boxes *before* constructing the mental state boxes to clarify the reference points for the mental states.

Once one is familiar with Model Penal Code mental state terminology, one can use a “P” for purpose, “K” for knowledge, “R” for recklessness, and “N” for negligence. If a statute is written or interpreted as doing away with mental state regarding a particular non-mental element, I indicate that by putting “SL” for strict liability in the mental box next to that element. Adding an arrow to the mental state boxes as shown here helps emphasize the relational nature of mental states:

Mental Elements	Non-Mental Elements
P	→ Transport
K	→ Stolen
R	→ Artifacts

Some mental state boxes are easy to fill in. With negligent homicide, for example, negligence is the required mental state regarding the resulting death. Some statutes provide for alternative mental states. Pennsylvania, for example, includes both reckless and grossly negligent killings under manslaughter.¹ Many jurisdictions provide that murder can be based on purpose, knowledge, or extreme recklessness regarding the death. Diagrams of such manslaughter and murder statutes look like this:

Mental Elements	Non-Mental Elements
P	→ Conduct
R or N	→ Death

Mental Elements	Non-Mental Elements
P	→ Conduct
P or K or ER	→ Death

Figuring out what mental states a statute requires for conviction, though, can be difficult. One routine ambiguity pertaining to mental state that diagramming helps illustrate is what I refer to as a mental state “carryover” problem. Sometimes a statute sets out a mental state without clearly indicating the non-mental element or elements

1. See 18 Pennsylvania Consolidated Statutes Section 2504.

to which the mental state applies. Assume, for example, that the stolen artifacts statute made it a crime to “knowingly transport stolen archeological artifacts.” What sort of knowledge is required for conviction? Knowledge that one is engaged in the act of transporting? Knowledge that the item transported is stolen? Knowledge that the item transported is an archaeological artifact? All of these?

Diagramming is a great way to illustrate this interpretive issue by putting a “K” next to the non-mental element to which “knowingly” is closest in the statute and question marks in the mental state boxes next to the other non-mental elements.

The Model Penal Code has a rule to resolve this interpretation dilemma. Section 2.02 (4) states that a prescribed mental state applies to *all* material elements “unless a contrary purpose plainly appears.” Diagramming demonstrates the usefulness of this Model Penal Code provision. In a Model Penal Code jurisdiction, I would replace each question mark with a “K” and use arrows to show that the mental state carries over from one non-mental element to the others.

Sometimes a statute requires proof of a mental state beyond those pertaining to its non-mental elements. Burglary statutes, for example, often require intent to commit a felony inside a building. One can easily incorporate such an additional mental state by adding a mental state box at the bottom of the mental state column. There would be no non-mental element box to the right of such a mental state box, as in the following diagram.

Mental Elements		Non-Mental Elements
P	→	Enter
K	→	Dwelling
K	→	At Night
P to Commit a Felony		

Statutory Interpretation

If a statute or a case found its way into a criminal law case book, there is a good chance that ambiguity will be found in the statutory language defining the crime at issue. Just as a map often facilitates following written directions when finding one’s way to an unfamiliar location, using a diagram to chart the extraction of elements from a statute aids in performing that extraction process. Diagramming represents and clarifies the process of analyzing a statute, something that can become quite murky using language alone.

Diagramming helps isolate and spotlight the ambiguity that gives rise to the need for interpretation. Statutes that are silent on mental state, for example, are regular

sources of ambiguity. Should the silence be interpreted as legislative approval of strict liability? Or did the legislature intend to require some mental state without stating it in the text of the statute? If so, what mental state? Just putting a question mark in the mental state box next to a particular element can be a great way to illustrate and focus on the statutory interpretation question such a statute poses.

