

# Criminal Law



# Criminal Law

*Problems, Statutes, and Cases*

SECOND EDITION

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# Diagramming Crimes

By Kevin C. McMunigal

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 a 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.<sup>1</sup> 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.

