

How Criminal Law Works

A Conceptual and Practical Guide

Samuel H. Pillsbury

HOW CRIMINAL LAW WORKS

A CONCEPTUAL AND PRACTICAL GUIDE

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*For my students,
past, present and future*

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PREFACE

Criminal law looks easy. But it isn't.

Criminal law is certainly familiar. Basic concepts of crime inform a huge amount of popular culture: consider all the movies, television shows, books, magazine and newspaper articles about crime. Criminal law also uses ordinary ideas about blame, such as the difference between an accidental and an intentional harm. Blaming people—and excusing them—is basic to human society. Nothing new there.

If there is a hard part to criminal law, it would seem to be proof. Figuring out who did what, that's the usual challenge for television crime fighters. But that's not the central challenge of criminal law.

This book is about the hard part of criminal law, which is analyzing facts according to particular rules of criminal liability. To do this badly is easy. To do it well requires great care and considerable learning.

This book comes out of many years of teaching criminal law in law school, but also from my work as a prosecutor and before that, a newspaper reporter covering courts. It also comes from a personal commitment to improve our understanding of this most basic form of responsibility. Here we know less than we think we do and our ignorance can have serious consequences.

To introduce the methods and aim of this book, I begin with what I see as the four basic challenges of learning American criminal law: the challenges of analysis, of the familiar, of many rules, and of consistency. After detailing each and how the book addresses it, I note the limits of the book, consider its audience, and give a quick overview of the chapters to follow.

The Challenges of Criminal Law

The Challenge of Analysis

Students of law, whether in law school or other settings, often believe that learning the law means absorbing all available information about rules and

rule distinctions. The more knowledge about rules the better. This neglects the critical skill emphasized in law school and important for anyone concerned with the law: the ability to *use* rules to analyze facts. Rules provide the means to a legal answer; they are not themselves the answer.

In learning to be a carpenter, you have to learn about the tools and materials of the trade. You need an introduction to 2 x 4's (a standard measurement of lumber), saws, hammers and nails, just for starters. But the most important learning comes with practice, with actual sawing, fitting and hammering. Similarly, substantive criminal law can be seen as a set of tools to be used by police officers, prosecutors, defense attorneys, judges, juries and others to reach reliable and just decisions about individual criminal responsibility. While the law's ideal is to resolve disputes by legal rules alone, the rules do nothing without human interpreters. Knowledge of rules is necessary, but not sufficient.

This book seeks to explain how criminal law *works*, not just what it says.

The Challenge of the Familiar

"Everyone Can Recognize When Someone Has Committed a Crime." This quote from Pope John Paul II appeared on a sign borne by a protester outside a meeting of Catholic bishops discussing child molestation charges against the clergy.¹ It states an important truth about criminal law. We can all recognize basic forms of criminality and make basic responsibility judgments. Virtually all adults—and most children—grasp the wrongness of stealing, defrauding, raping, robbing, murdering, as well as the need to punish such deeds. In the United States, the connection between popular understandings of criminal responsibility and criminal law is especially close, because all criminal offenses are defined by legislation approved by elected representatives and cases that go to trial are generally resolved by lay persons acting as jurors.

Most adults also learn a lot about crime and criminal justice by cultural osmosis. Crime suffuses popular culture: crime stories feature prominently in the news media and are a staple of movies, television dramas, and novels. Sometimes it just seems everywhere.

But the very familiarity of the subject, the very ease with which most of us reach preliminary judgments about criminal blame or excuse, represents the single greatest obstacle to legal understanding. This is because learning how to do criminal law analysis often requires altering established thought and speech habits; it requires unlearning old ways as much as it does learning new ones.

1. Michael Lobdell, *Conservatives and Liberals Are Unified by Church Sex Scandal*, Los Angeles Times, June 14, 2002, at A39.

Sound criminal law analysis demands a precision in expression beyond that required for ordinary conversation. Key words may be familiar, such as intentional or accidental, or archaic such as malicious, wanton or willful. But in any case, standard dictionary definitions will not suffice. Key legal terms have special *legal* meanings which must be learned and respected.

Criminal law analysis requires equal rigor at the conceptual level. Students must attend to distinctions in responsibility that make substantive criminal law analysis closer in both method and content to moral philosophy than to fields such as psychology or sociology which might seem to speak more directly about criminal behavior. (In fact, the latter fields do have more to say about criminal *behavior*, understanding why individuals offend; they have less to say, however, about criminal *responsibility*, determining who should be punished for crime.)

Unfortunately, the language and analysis skills needed here often conflict in some ways with existing knowledge and abilities. Learning here often requires changing ingrained habits of speech and thought. As a result, the experience of learning criminal law can be like someone telling you how to walk, a most annoying experience if you have not had any trouble walking since you were toddler. But just as an athlete or musician may have to unlearn old ways to take their game or musicianship to a higher level, so students of criminal law must sometimes—temporarily—regress to simpler, more deliberate modes of thought and speech to build the skills needed for sound legal analysis.

This book seeks to meet the challenge of the familiar primarily by the careful use of language. All critical legal terms are specifically defined and then illustrated by example. Linguistic traps—places where ordinary language meaning may confuse legal analysis—are pointed out.

The book also seeks to, where possible, reconcile common intuitions about responsibility with criminal law doctrine. As we will see, a great deal of criminal law involves finding a legal home for intuitive notions about responsibility. Learning about the law includes learning how to shape intuitions about blame and excuse into arguments about particular doctrines of criminal law.

The Challenge of Different Rules

Another challenge facing the student of American criminal law is its variety. In a nation with 52 independent criminal jurisdictions—the 50 states, the federal courts and military justice, it's hard to say what is the criminal law of the nation.

In order to give students the tools to learn the criminal law of different jurisdictions, teachers must concentrate on the basic principles of law which inform the codes and decisions of nearly all American jurisdictions. These are usually

grouped under two general headings: the Model Penal Code and the common law. These provide a broad, but as we will quickly see, quite inadequate description of the sources of American law.

The Model Penal Code (MPC) is not the law of any particular jurisdiction, but a proposed criminal code that has proven influential both in practice and in the academy. During the 1950s a group of prominent lawyers, judges and academics in the American Law Institute created the MPC in hopes of reforming criminal law generally. A number of states, especially in the eastern half of the United States adopted many aspects of the MPC. Other states have adopted selected provisions, while a number of states have ignored it entirely. For law students, the importance of the MPC goes beyond its pattern of adoption, however. It provides a relatively clear and uniform method for tackling a variety of criminal law problems, especially *mens rea*, that makes it an important learning tool even for those who will practice in nonMPC jurisdictions.

The MPC is normally contrasted with the “common law.” Unfortunately, what is meant by the common law is often unclear—except that it involves rules and concepts that predate the MPC. Classically speaking, the common law of crimes is the set of felonies, misdemeanors and their defenses established by English judges in decisions rendered prior to the nineteenth century. The standard source for this common law was William Blackstone’s *Commentaries on the Criminal Law of England*, published in the second half of the 18th century. When used in the modern academy, however, the common law usually carries a more expansive meaning, referring to traditional Anglo-American principles and doctrines of criminal liability. Thus when an American court refers to the “common law view of provocation,” the court may actually be referring to a modern manslaughter statute whose basic structure hails back to 18th century doctrine.

The reality is that many rules of American criminal law originate neither in traditional common law nor the MPC. For example, the rule of first-degree premeditated murder comes from Pennsylvania legislation enacted in the last decade of the 18th century and then adopted by many other states during the first half of the 19th century. It was never adopted in England and was not included in the MPC. Therefore, strictly speaking, premeditation is neither a common law nor an MPC rule. The point is that while the MPC and common law labels help distinguish some rule types, the terms do not cover many important features of the American criminal law landscape. In this, as in many other respects, American criminal law resists neat categorization.

This book seeks to meet the challenge of different rules by developing uniform terminology and methods. Instead of covering all the important rules of

criminal law, the focus here is on setting out a few essential doctrines and explaining how analysis under those doctrines should be conducted. Emphasis is placed on identifying the right questions to ask, in the right sequence.

The Challenge of Consistency

In order to make sense of the many terms and rules that comprise the American criminal law, we need organizing principles. We need to see the *system* behind the mass of different criminal law doctrines. Ideally, each doctrine should fit into a larger legal system in the same way pieces of colored glass fit together to form the image in a stained-glass window.

A systematic approach to criminal law is also critical to justice. We measure justice in criminal law not just by a particular case outcome, but by the outcomes of all cases subject to the law. A just legal system treats like cases alike; conversely, it recognizes distinctions between truly different cases. The key is determining what differences between cases should carry legal weight and which should not. Differences in the severity of harm done or the culpability of the actor are among the most important differences which the criminal law should measure. An assault that causes grave injury generally merits greater punishment than one that produces minor injury; a deliberate wounding of another is considered more serious than recklessly causing injury. Meanwhile other differences, such as race, economic or social status, should almost never have legal significance.

Despite the importance of a systematic approach, the two main institutional actors in criminal law—legislators and courts—frequently take an essentially ad hoc approach to solving criminal problems. For reasons detailed in Chapter 1, legislators and courts tend to concentrate their efforts on the best resolution of the day's most pressing responsibility problems, paying less attention to whether the terminology or reasoning employed coheres with other areas of criminal law.

Variations in terminology often cause confusion. A legislature or a court may use words such as "intent" or "intentional," in quite different ways according to context, yet never note the disparity.

Similar inconsistencies can be found in analytic method. For example, we generally expect that a mens rea term such as "knowingly" will modify the word or words that follow it, especially if those words describe something critical to the wrongdoing involved. This principle suggests that the words "knowingly and unlawfully," in a criminal statute mean that the defendant must know that his conduct violated the criminal law. And in the context of *some* criminal offenses, this interpretation will be correct. Yet the same phrase appearing

in another criminal statute may be interpreted differently because, as a court may say, ignorance of the law is no excuse. Under this principle, even though “knowingly” immediately precedes “unlawfully” in the statute, the defendant may be convicted even if he did not realize that his conduct was unlawful.

This book addresses the challenge of consistency primarily by the careful, consistent use of terminology. As mentioned before, critical terms are always defined and then employed in the same fashion in later discussions. But we also need a uniform *structure* for analyzing criminal law issues, a consistent way of approaching problems. In this book I provide such a structure in what I call the liability formula, introduced in Chapter 3. The formula helps organize criminal law analysis by placing criminal law doctrines into a few general categories. The formula sets out a sequence for analyzing issues according to category and so provides a series of basic questions to address all the major criminal law issues in a case. The formula also provides a way of understanding the relationship between different doctrines.

Finally, the book seeks to elucidate deeper continuities in the criminal law by frequent discussion of the values that inform doctrinal rules. A common failing of both courts and commentators is to assume that formal rule definitions provide all the guidance needed to resolve criminal cases. But policy considerations often shape the interpretation and application of rules. Where a rule produces inconsistent results in apparently similar cases, it is often because the rule involves competing policies, whose conflict must be worked out on a case-by-case basis.

Paying attention to policy helps us understand doctrine better. Making value conflicts explicit also eases the emotional resistance to learning that many students experience when they encounter a rule with which they disagree, something almost inevitable in this deeply normative field.

What the Book Is Not

I need to be clear about what this book is not. It is not, in any sense, a definitive work on U.S. criminal law. Many important categories of offenses go unexplored here, among them assault, theft, fraud and drug crimes. The coverage of defenses is similarly limited, excluding such important doctrines as necessity, duress and law enforcement. And even for those doctrinal areas that are covered, many rule variations are not detailed. These coverage limitations are made to preserve space for careful explanation of key terms and analytic concepts. Nor is the work heavily footnoted. Source notes are kept to a minimum and skew towards the MPC which is a national resource and California, which

is my home state. For those interested in more complete coverage of criminal law rules and authorities, there are other books that do an excellent job of this.²

I must also confess a personal agenda. This book presents how *I* think criminal law issues should be stated and how I think they should be analyzed. In this regard, part of my aim is to improve the craft of criminal law analysis in the United States. In the discussion of doctrine, I favor certain terms and methods over others, including some widely used in the law. For example, here in California, courts rely heavily on the distinction between general and specific intent offenses. General and specific intent are analytic concepts that I and many other commentators find confusing and unhelpful. As a result, I use these terms as little as possible.

Some will object that this does not present the criminal law as it is today. And there is some truth to this. But I believe that students should learn good law before bad, meaning that a grounding in coherent analysis should take precedence over coverage of all terminologies and analytic techniques. Still, readers must beware. Other sources, including judicial opinions, will sometimes present criminal law controversies in different terms and in a different manner than I will here and the difference between their framing and mine will sometimes prove confusing. It cannot be helped.

These caveats should make clear that this book should not be used as a substitute for basic legal research in resolving particular criminal law issues. Just as reading a review is not the same as seeing the movie or reading the book, so reading a work of legal commentary—including this one—cannot substitute for basic case and statutory research.

Intended Audience

Finally, a word about who this book is for. I began writing this book for my own students: first semester, first-year law students studying criminal law. While I believed, and still believe, that studying appellate cases is critical to legal learning, I realized—after many years of teaching (some of us professors are slow learners) that students have a totally legitimate need for a secondary text on the law that explains basic principles accurately. I decided that if I was going to warn my students away from other works that I believed unhelpful or misleading, then I needed to supply an alternative. And so I have done.

2. See Joshua Dressler, *Understanding Criminal Law* (5th ed. 2009); Wayne LaFare, *Criminal Law* (4th ed. 2003).

My hope is that this book will be useful to many others besides law students, however. These may include students of criminal justice at the undergraduate or graduate level, practicing lawyers, journalists, and anyone else with a serious interest in the subject. While books intended for the legal market do not often reach lay audiences, and while there has traditionally been a nearly impermeable divide between the teaching of criminal law in law school and in criminal justice programs, these facts of current life are neither necessary nor healthy.

In truth, most first-year law students enter the classroom with the same prior knowledge of criminal law as most undergraduates. As a result, a book that does not presume prior familiarity with legal terms should work for students both in and out of the legal academy. The reader will be the final judge, of course.

Just one preliminary caution for criminal justice students: as detailed in Chapter 1, this is a book about substantive criminal law, not criminal procedure. Thus it covers rules about guilt, not rules for criminal investigation or adjudication.

A Brief Overview

Part One provides the basic context, structure and principles for an examination of American criminal law. In Chapter 1, after introducing basic criminal law institutions and related fields of law, we look at basic features of criminal adjudication. Principles of punishment and responsibility are introduced in Chapter 2. Chapter 3 sets out an essential structure for analyzing criminal doctrines in what is called the liability formula. The challenges of proof and persuasion, particularly rules about the burden of proof, are covered in Chapter 4.

Part Two introduces the single most important part of criminal law, the concept of *mens rea*, also sometimes called criminal intent. In its chapters we examine the most common forms of *mens rea*, their application to facts, their functioning in criminal statutes, and special problems in *mens rea* involving factual and legal mistakes.

In Part Three we turn to some basic crimes of violence: murder, manslaughter and rape.

Part Four covers inchoate liability, meaning criminal liability that does not depend on proof of a particular concrete harm. This includes liability for attempts at crime, for acting as an accomplice to another's offense and liability for conspiracy.

In Part Five, affirmative defenses are discussed, notably self-defense and insanity. Defense arguments related to intoxication are also covered.

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