Moskovitz

CASES AND PROBLEMS IN CRIMINAL LAW

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Library of Congress Cataloging in Publication Data

Moskovitz, Myron.
Cases and problems in criminal law: with teacher's manual/
Myron Moskovitz
p. cm.
ISBN 0-87084-592-6
1. Criminal law—United States—Cases. I. Title.
KF9218.M67 1989 89-30869
CIP

Anderson Publishing Co. / Law School Division / Cincinnati, Ohio

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To Ruth, Alex, and Damian—with much love.

PREFACE

A client comes to a lawyer with a difficult legal problem, involving a complex set of facts. The lawyer then researches the legal issues, finding a cluster of cases and statutes—almost all from the jurisdiction in which the problem arises. In order to advise the client (and—if necessary—to litigate the case), the lawyer must analyze, distinguish, reconcile, and interrelate the authorities in the cluster, seeing them as a group indicating the direction of that state's law as well as seeing them separately.

This book is an attempt to recreate that experience for the law student, and to help the student learn how to handle it. To learn to do something practical, one needs 3 things: a task, some tools, and a teacher. This book supplies the task and the tools. The task is the Problem at the outset of each chapter. The tools are the statutes and cases which follow. To make the experience more realistic, each statute and case in the chapter is from the jurisdiction in which the Problem arose. Following each case is a note giving the student a hint as to how the case might be used to help analyze the Problem.

I have tried to select cases which have interesting facts, raise issues that tend to be central to the topic of the chapter, and which contain readable—though not always "correct"—analyses by the courts. (My research assistant, Dan Drummond, did an excellent job of helping me find many of these cases). I have edited the cases severely to make them even more readable.

This book is primarily a tool for learning skills, rather than for learning all the intricacies of each doctrine of criminal law. While the materials should enable the professor to explore many basic principles of criminal law, greater breadth of coverage can be obtained from a good treatise or hornbook. I usually assign my students specific pages of such a book to read along with each chapter of this book. (I assign La Fave & Scott, *Criminal Law* (West, 2d ed), which I consider the best of its kind.) The La Fave and Scott, *Criminal Law* material appearing throughout this work has been reproduced with the permission of the authors and West Publishing Company.

While I believe that the approach taken by this book is pedagogically sound, I have another, more selfish reason for using this approach in my teaching: it is fun to play lawyer. My students usually agree, and I think this in itself enhances their learning. This approach does demand more work from them. Not only must they read the cases, but they must try to apply them to the Problem. I also ask them to prepare an outline of an analysis of the Problem, based on the authori-

ties in the chapter. All this takes more time and effort, but they do it and seem to enjoy doing it. They know that they are reading the cases as a lawyer would, for a specific purpose: to answer the Problem.

I hope you enjoy it too.

M.M.

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Part I:
MENTAL STATES—IN GENERAL

Many issues in criminal law involve the question of what mental state is required for a particular crime, or for a particular element of that crime.

Suppose A shoots his gun, aiming at B and intending to kill him. Instead, he misses and the bullet hits and kills C. Has A committed murder? This depends on the definition of murder. What mental state is required for murder? There are several possibilities, including:

1. *Intent* to kill the person killed. If this is the standard, then A is not guilty, as he did not intend to kill C.

2. *Negligence*[1] regarding the person killed. If this is the standard, then A *might* be guilty, but we need to know more facts (e.g., did A know that C was nearby, and how carefully did A aim at B?).

3. *Strict liability*. Under this standard, where one voluntarily does a certain thing, he is responsible for all injuries he causes—even those he did not intend and was not negligent in causing. If this is the standard, and attempting to kill *anyone* is sufficient to make A strictly liable, then A is guilty, as his intent to kill B led to the death of C.

Sometimes courts choose a standard by use of "judicial fictions," instead of squarely facing and discussing the question of which standard best serves the purposes of criminal law. In the above example, many courts would hold A guilty simply by invoking the doctrine of "transferred intent," holding that A's intent to kill B is mystically "transferred" over to C. It would be better to say that A's intent shows that he is a very bad person, needing the same amount of isolation and rehabilitation as if he had killed B, and since he also happened to kill someone (C), the community's desire for retribution is just as high as if he had killed B.

Note that if a crime has more than one element—as most do—it is quite possible that different mental states will be required for different elements. Murder requires the killing of a *human being*. Suppose, in the above example, A believes (erroneously) that B is a deer, shoots at the "deer" with intent to kill, and misses and kills C. It is quite conceivable that a legislature or court might define murder to impose strict liability regarding the "intent to kill" element of murder, but require *intent* regarding the "human being" element. If this were the rule, then A *would* be guilty of murder of C if A knew B was human and intended to kill him, but would *not* be guilty if he believed B were a deer.

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[1] There are several degrees of negligence used in various torts and crimes, including "simple" negligence, "gross" negligence (sometimes called "criminal" negligence), recklessness, and extreme recklessness (sometimes known as "depraved heart").

How do you determine which mental state is required for an element of a crime? Today, in most jurisdictions, crimes are set out in *statutes* enacted by state legislatures and by Congress. So your first stop should be the statute. Sometimes the statute will clearly indicate what mental state is required. Often, however, the statute will say nothing about this[2], or it will use some word (such as "wilfully" or "knowingly") which is subject to different interpretations. Then, the court will attempt to divine the intent of the legislative body—or it will simply assume that the legislature intended to conform to principles or policies which the court believes to be fair.

When you read each case in the following chapter, try to discern from the court's opinion (1) *which* mental state it chose, (2) *why* it chose that mental state, (3) *which element(s)* of the crime are governed by that mental state, and (4) whether the court's ruling and/or rationale could help—or hurt—your client in Problem 1.

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[2] The notion that a statute's silence regarding mental state means strict liability was suggested by lawyer W.S. Gilbert, in *The Mikado* (Act II). When the Mikado (the emperor) learns that Ko-Ko, Poobah, and Pitti-Sing had apparently killed Nanki-Poo (the son of the Mikado), without realizing who he was, the Mikado indulges in a bit of statutory construction:

MIKADO: I forget the punishment for encompassing the death of the Heir Apparent.

KO-KO, POOBAH, & PITTI-SING: Punishment?

MIKADO: Yes. Something lingering, with boiling oil in it, I fancy. Something of that sort. I think boiling oil occurs in it, but I'm not sure. I know it's something humorous, but lingering, with either boiling oil or melted lead. Come, come, don't fret—I'm not a bit angry.

KO-KO [in abject terror]: If your majesty will accept our assurance, we had no idea—

MIKADO: Of course.

PITTI-SING: I knew nothing about it.

POOBAH: I wasn't there.

MIKADO: That's the pathetic part of it. Unfortunately, the fool of an Act says "compassing the death of the Heir Apparent." There's not a word about a mistake—

KO-KO, PITTI-SING, & POOBAH: No!

MIKADO: Or not knowing—

KO-KO: No!

MIKADO: Or having no notion—

PITTI-SING: No!

MIKADO: Or not being there—

POOBAH: No!

MIKADO: There should be, of course—

KO-KO, PITTI-SING, & POOBAH: Yes!

MIKADO: But there isn't.

KO-KO, PITTI-SING, & POOBAH: Oh!

MIKADO: That's the slovenly way in which these Acts are always drawn. However, cheer up, it'll be all right. I'll have it altered next session. Now, let's see about your execution—will after luncheon suit you? Can you wait til then?

KO-KO, PITTI-SING, & POOBAH: Oh yes—we can wait til then.

MIKADO: Then we'll make it after lunch.

POOBAH: I don't want any lunch.

MIKADO: I'm really very sorry for you all, but it's an unjust world, and virtue is triumphant only in theatrical performances.

1 MISTAKE

Problem 1

To: My Law Clerk
From: Wally Walkem
Re: *People v. Rea*

My client, Manny Rea, got into a dispute with his neighbor in Berkeley. As a result, Manny has been charged with a violation of California Penal Code section 418, which provides:

> Every person using any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and in the manner allowed by law, is guilty of a misdemeanor.

Misdemeanors are punishable by up to 6 months in county jail or a fine of up to $1,000, or both—although the maximums are seldom given to first offenders.

Manny's version of what happened appears in the attached transcript of my interview with him. I'm not sure, however, whether I will be allowed to present his whole story to the jury. The deputy district attorney prosecuting the case—Roger Righteous—will probably object to the admissibility of some of Manny's statements, on the ground that they are *irrelevant* under the applicable rules of law. The trial judge, Judge Stickler, will sustain any objection supported by the law.

I found some authorities which seem to be pertinent here, though none mentions Penal Code section 418. Please read them and be prepared to advise me regarding the relevance of the various parts of Manny's testimony; including the best arguments Righteous can make, our best responses, and how Judge Stickler is likely to rule on this issue.

Transcript of Interview With Manny Rea

WW: So, what happened?

MR: My next-door neighbor, Al Airhead, is really a creep. He drinks too much, plays loud music, and has too many parties. He recently put in an outdoor hot tub, and I thought that about a foot of it was over the property line onto my property. I

thought I knew where the property line was, because when I bought my house last year, the real estate agent told me that the telephone wire to the house was right over the property line.

WW: Did you tell this to Airhead?

MR: Sure, and I told him to get the hot tub off my property. But he said that the property line was 2 feet farther over. My daughter, Minnie, is a law student, so I asked her what to do. She went to City Hall and asked to see the subdivision map on file. She told me that it showed the telephone wire easement right on the property line. She also told me that a city ordinance required that you have a valid permit before installing a hot tub. She looked up Airhead's permit, and saw that it was not signed by the head of the city's building department. The city clerk then told Minnie that because of this, the permit was not valid. I went and told Airhead what Minnie had said. He called me a liar and walked away.

WW: So then, of course, you consulted a lawyer about your legal remedies, right?

MR: Not exactly. Lawyers cost too much, and besides, I know how to take care of myself. That night, I went out with my flashlight, tape measure, and a saw, and I cut off a foot of the hot tub. It was on my property, and Airhead wouldn't remove it, so I removed it myself.

WW: I take it Airhead wasn't too pleased when he saw what you did.

MR: He was furious—especially when I told him he could still take half a bath. He complained to the District Attorney's Office. The DA checked with City Hall. They found another file, which showed that 3 years ago the phone company had been granted an easement to move the phone line over 2 feet. So Airhead was right about the property line, and the hot tub was actually on his property. When I saw the phone wire, it had been moved 2 feet from the property line, and I didn't know it.

WW: How come Minnie hadn't seen this file?

MR: I guess she didn't know enough to look for it. She had told the clerk that she wanted to know how to find the property line, and he just gave her the subdivision map. He didn't tell her about any other file. Oh, by the way, it turns out that the city ordinance on permits does not require the permit to be signed by the head of the building department. The city clerk was mistaken when he told Minnie otherwise.

WW: Were you surprised when the DA filed the complaint against you?

MR: Yes. I thought Airhead might sue me for shortening his hot tub a bit, but I had no idea that this might be a crime. I never heard of this Penal Code section 418.

WW: If Airhead were to sue you, he'd probably win. In civil law, if you go on someone else's property without permission, it's considered a trespass—even if you made a reasonable mistake—and he could collect for any damages you caused. You are considered "strictly liable" for a civil trespass. In criminal law, however, the rule *might* be different. Various criminal statutes require various states of mind.

MR: So, do I have any defense?

WW: Maybe. I just hired a bright new law clerk who might be able to give me some help on this. Let's talk about my retainer. . . .

LaFave & Scott, *Criminal Law* (West, 2d ed., 1986), pages 405–406

"No area of the substantive criminal law has traditionally been surrounded by more confusion than that of ignorance or mistake of fact or law. It is frequently said, on the one hand, that ignorance of the law is no excuse, and, on the other, that a mistake of fact is an excuse. Neither of these propositions is precisely correct, and both are subject to numerous exceptions and qualifications. . . . In actuality, the basic rule is extremely simple: ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged."

California Penal Code

Section 20: In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

Section 26: All persons are capable of committing crimes except those belonging to the following classes:

One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

Two—Idiots.

Three—Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

Four—Persons who committed the act charged without being conscious thereof.

Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

Six—Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

Note from Wally:

I pulled out these statutes because they deal with the mental states required for crimes in California. Read them carefully. Do they tell us whether Manny is guilty? Section 20 mentions "intent," but does it indicate *what* intent is required? What is "criminal negligence"? Was Manny acting under "an ignorance or mistake of fact," under section 26(3)? Didn't Manny commit the act "by accident," under section 26(5)? When you read the following cases, note what use *they* made of these statutes.

People v. O'Brien

Supreme Court of California, 1892
96 Cal. 171, 31 Pac. 45

Paterson, J.

In May, 1886, J. H. Derevan conveyed to the defendant a tract of land in Modoc County. The defendant erased his own name, "Denis," from the deed, and inserted therein "Mary," his wife's name, thus making the deed purport to convey the property to Mary O'Brien, instead of to himself. In this form the deed was, at the request of the defendant, recorded in the office of the county recorder. Thereafter the defendant called upon T. B. Reese, the county recorder, before whom the deed had been acknowledged by Derevan, informed him of the change which he, the defendant, had made, and requested him to change the deed and the record so that both would speak the truth with respect to the transaction. Reese refused to make the changes unless Derevan and Mrs. O'Brien consented thereto. Their consent having been obtained, Reese erased the name "Mary" in the deed and also in the record, and inserted in lieu thereof the name "Denis" in each place.

The defendant was convicted of the crime of altering a public record, and was sentenced to serve a term of two years in the state prison. From the judgment,and from an order denying his motion for a new trial, he has appealed.

It is conceded that the case is prosecuted under sections 113 and 114 of the Penal Code. Section 113 provides that "every officer having the custody of any record filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering the whole or any part of such record is punishable," etc. Section 114 provides that "every person not an officer such as is referred to in the preceding section, who is guilty of any of the acts specified in that section, is punishable," etc. The language of the indictment is: "The said Denis O'Brien, not being an officer such as referred to in section 113 of the Penal Code, did then and there willfully alter and procure to be altered a certain deed record of real estate."

It is urged with much earnestness that no offense could have been committed by the defendant, because there was no intention on his part to do an unlawful act, his object being simply to rectify a wrong already done. It is admitted that the defendant was not excusable for procuring the deed to be recorded in its altered form, but it is insisted that his subsequent attempt to rectify the error cannot be deemed a crime. The attorney-general admits that the evidence fails to show any fraudulent intent on the part of defendant, and the question presented is, whether it is necessary, in making out the offense, for the prosecution to show that the act was done for some sinister purpose.

It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit any one to gainsay. It is expected that the jury[1] and the court, where it is shown that in fact the defendant was ignorant of the law, and innocent of any intention to violate the same, will give the defendant the benefit of the fact, and impose only a light penalty. 1 Bishop's Crim. Law, sec. 2961.

The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement. If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal

[1]Editor: Today, in California and most other states, the jury plays no role in selecting the penalty—except where the prosecutor seeks the death penalty.