



ASPEN LAW & BUSINESS

CRIMINAL LAW

EXAMPLES AND EXPLANATIONS

Richard G. Singer

John Q. LaFond



CRIMINAL LAW

Examples and Explanations

Richard G. Singer

*Distinguished Professor of Law
Rutgers, The State University of
New Jersey School of Law*

John Q. La Fond

*Professor of Law
Seattle University School of Law*



ASPEN LAW & BUSINESS

A Division of Aspen Publishers, Inc.

This publication is designed to provide accurate and 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 professional assistance is required, the services of a competent professional person should be sought.

—From a *Declaration of Principles* jointly adopted by a Committee of the American Bar Association and Committee of Publishers and Associations.

Copyright © 1997 by John Q. La Fond and Richard G. Singer

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Permissions
Aspen Law & Business
1185 Avenue of the Americas
New York, NY 10036

Printed in the United States of America
Fourth Printing

Library of Congress Cataloging-in-Publication Data

Singer, Richard G.

Criminal law : examples and explanations / Richard G.
Singer, John Q. La Fond.

p. cm.

Includes index.

ISBN 1-56706-579-1

1. Criminal law—United States—Outlines, syllabi, etc.

I. La Fond, John Q., 1943- . II. Title.

KF9219.3.S54 1997

345.73—dc21

97-20432
CIP

**CRIMINAL
LAW**

Examples and Explanations

Editorial Advisory Board
Aspen Law & Business
A Division of Aspen Publishers, Inc.

Richard A. Epstein
James Parker Hall Distinguished Service Professor of Law
University of Chicago

E. Allan Farnsworth
Alfred McCormack Professor of Law
Columbia University

Ronald J. Gilson
Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia University

Geoffrey C. Hazard, Jr.
Trustee Professor of Law
University of Pennsylvania

James E. Krier
Earl Warren DeLano Professor of Law
University of Michigan

Elizabeth Warren
Leo Gottlieb Professor of Law
Harvard University

Bernard Wolfman
Fessenden Professor of Law
Harvard University

To Karen: For the laughter, and the love
—R.G.S.

To my parents, Dorothy Quinn La Fond and Richard D. La Fond
—J.Q.L.

Preface

Criminal law forces us to confront the most important moral dilemmas of our times. More than most law school courses, criminal law engages our emotions as well as our intellects. This book will encourage that engagement. Many of our examples are taken from current topics of intense public debate such as euthanasia, abortion, rape, and black rage. But the underlying normative challenge of the criminal law — justifying the coercive use of state power against individuals — transcends particular controversies. Indeed, this debate has challenged great thinkers of the past like Plato, Socrates, Aquinas, and Kant. And it will certainly challenge us and future generations. This text keeps that tension in sharp and continuous focus.

This book seeks to help students master a broad range of criminal law doctrines. But it does not merely present a collection of “rules.” It also explains and analyzes those doctrines and the problems they generate in a cohesive and comprehensive way. Where there are ambiguities — either theoretical or practical — we discuss them. Not to do so would mislead students and trivialize the criminal law. By recognizing how complex the tapestry is and how interwoven are its various threads students can appreciate the rich nuances of its doctrine and policy. This book examines that complexity, while remaining easy to read and to understand. Its sole purpose is to help students learn.

We were attracted to the format of the *Examples and Explanations* series long before we began work on this book. The format fits the typical law school classroom experience by posing challenging problems first (without answers of course!), followed by proposed solutions. We also enjoyed the humor evident in some other volumes in this series. Learning is serious business — but no business is so serious that it cannot be approached with an occasional smile. We have tried to sprinkle humor generously throughout the book.

Finally, a plea for your help. This book can only be successful in helping students if the authors know what works—and what doesn’t. We are anxious for your comments—negative and positive—on the piece, either on specific topics or hypotheticals, or generally. Please write us at our email addresses

and give us your criticisms and comments. We can't promise we'll respond directly, but we can promise that we'll consider every point as we move toward a second edition.

rsinger@crab.rutgers.edu

jlafond@seattleu.edu.

To all who read this book, we hope you learn from it and enjoy it.

Richard G. Singer

John Q. La Fond

April 1997

Acknowledgments

This book bears the name of its “authors.” But it required the hard work, assistance, and sacrifice of many people. Our students contributed helpful comments on many of the examples in this book, thereby saving future students the foibles found in earlier versions. Research assistants, particularly Laura Anglin, Jenifer Hanlon, Tara Manley, and Anne-Marie Sargent at Seattle University School of Law, made significant contributions to the manuscript. Moral support was provided by our respective Deans — Roger Dennis and Jim Bond. (And Jim Bond also provided generous financial support to one of us!) The tedious and frustrating job of reading our scribbles and making sense of them fell to wonderful and indefatigable secretaries: Noreen Slease at Seattle University and Mary Ann Purvenas at Rutgers University. We wish especially to thank our respective spouses, Karen Garfing and Evelyn La Fond, for their tolerance and patient support.

We wish to thank the following copyright holder who kindly granted permission to reprint excerpts from the following material:

Model Penal Code and Commentaries, Copyright © 1985 by the American Law Institute, as Adopted at the 1962 Annual Meeting of The American Law Institute. Reprinted with permission.

**CRIMINAL
LAW**

Examples and Explanations

Summary of Contents

<i>Contents</i>	ix
<i>Preface</i>	xxiii
<i>Acknowledgments</i>	xxv
Chapter 1. The Sources and Limitations of the Criminal Law	1
Chapter 2. The Purposes of Punishment	17
Chapter 3. Actus Reus	33
Chapter 4. The Doctrines of Mens Rea	43
Chapter 5. Mistake	75
Chapter 6. Strict Liability	93
Chapter 7. Causation	115
Chapter 8. Homicide	139
Chapter 9. Rape	173
Chapter 10. Theft	203
Chapter 11. Solicitation	227
Chapter 12. Attempt	239
Chapter 13. Conspiracy	263
Chapter 14. Complicity	309
Chapter 15. Defenses: An Initial Survey	339
Chapter 16. Acts in Emergency: Justification vs. Excuse	361
Chapter 17. Defenses Based on Individual Characteristics	407
<i>Table of Selected Cases</i>	467
<i>Index</i>	469

Contents

<i>Preface</i>	xxiii
<i>Acknowledgments</i>	xxv
Chapter 1. The Sources and Limitations of the Criminal Law	1
Overview	1
Sources of Criminal Law	2
The Common Law as a Source of Criminal Law	2
Legislative Sources	3
The Model Penal Code as a Source of Criminal Law	3
Constitutional Sources and Limits	4
Limitations on the Criminal Law	5
The Principle of Legality	5
The Common Law in England	5
The Common Law in the United States	6
The Strengths and Weaknesses of Common Law Crimes	7
Contemporary Law	7
Ex Post Facto	8
The Rule of Lenity	9
Void for Vagueness	10
The Burden of Proof	11
Examples and Explanations	12
Chapter 2. The Purposes of Punishment	17
Overview	17
Defining Punishment	17
The Purposes of Punishment	18
Utilitarianism	18
Deterrence	19
Incapacitation	22
Rehabilitation	23
Empirical Critiques	24
Normative Critiques	25
Retribution	25
The Relationship of the Theories	27

The Importance of Sentencing	28
Examples and Explanations	30
Chapter 3. Actus Reus	33
Overview	33
The Common Law	34
Voluntary Act	34
Omission and Legal Duty	35
Moral Duty	36
Possession	37
The Model Penal Code	37
Voluntary Act	37
Omission and Legal Duty	38
A More Precise Definition for Actus Reus	38
Possession	39
Examples and Explanations	39
Chapter 4. The Doctrines of Mens Rea	43
Overview	43
The Concepts of Mens Rea	44
“Traditional” and “Statutory” Mens Rea	45
Specific Kinds of Mens Rea	45
Intent	45
Recklessness	49
Negligence as a Predicate for Criminal Liability	50
Proving Mens Rea	53
The Relevance of Motive	54
Motive as Specific Intent	55
Motive and Mens Rea	55
Motive and Defenses	56
Contemporaneity, Prior Fault, and Time Frames	56
Statutory Interpretation and Mens Rea	58
Principles of Statutory Construction	58
Element Analysis	60
The “Default Position”	62
The Model Penal Code	63
Element Analysis	63
Elements and Material Elements	63
Distinguishing Material Elements	64
Levels of Culpability	64
Mens Rea and Material Elements	66
The Default Position Under the Code	66
Subjectivity vs. Objectivity	68
Examples and Explanations	68
Chapter 5. Mistake	75
Overview	75
Mistake and Ignorance of Law	75

Ignorance of the Law	77
Mistake of Law	79
Exceptions to the Rule	81
“Specific Intent” Crimes	81
Non-Criminal Law Mistake	81
The Model Penal Code	82
Retention of the “Ignorantia Lex” Doctrine	82
The “Reasonable Reliance” Approach to Mistake	82
Mistake of Fact	84
Reasonableness and Specific Intent	84
Knowledge and Willful Blindness	85
Mistake of Legal Fact	86
Model Penal Code	87
A Note on the Future of Mistake	87
Examples and Explanations	89
Chapter 6. Strict Liability	93
Overview	93
The Reach of Strict Criminal Liability	94
Legislative Intent, Positivism, and Democracy	96
Definitions and Indicia of Strict Liability	97
Public Welfare Offenses	97
Mala in Se (“Real”) vs. Mala Prohibita (“Unreal”?) Crimes	98
“Regulatory” or “Police” Offense	100
The Litmus Test of Available Punishments	100
Innocent Actors	101
Strict vs. Vicarious Liability	102
Policy Analysis: Arguments For and Against Strict Liability	103
Alternatives to Strict Liability	105
“Greater Crime” Theory	105
Constitutionality	107
The Model Penal Code	108
A Recap and a Methodology	109
Examples and Explanations	110
Chapter 7. Causation	115
Overview	115
The Rationale of Causation	116
The Elements of Causation	117
The Common Law	117
Responsibility for Causing Harm	117
Cause in Fact	117
Omission as a Cause	118
Concurrent Causation	118
Direct Cause	119

Proximate Cause	119
Contributory Negligence and Proximate Causation	125
The Model Penal Code	125
Responsibility for Causing Harm	125
“But For” Causation	125
Other Causation, Concurrent Causation, and Transferred Intent	126
Culpability as to Result	126
Examples and Explanations	127
Chapter 8. Homicide	139
Overview	139
Human Being	139
When Does Life Begin?	139
When Does Life End?	140
Cause and Death	140
Murder	141
“Original” Murder: Killing with “Malice Aforethought”	141
Presumed Malice	142
Gradations of Murder	143
“First-Degree” Murder	143
“Second-Degree” Murder	144
The Model Penal Code Approach	144
Some Further Thoughts	145
Examples and Explanations	146
Felony Murder	149
Introduction	149
Restrictions on the Doctrine: “Cause” Questions	150
The “Proximate Cause” Theory	150
The “In Furtherance” or “Agency” Theory	151
Justified vs. Excused Killings	151
The Shield Cases: Exception to an Exception to an Exception	151
The Mens Rea Approach	152
Other Restrictions	152
Duration of the Felony: Time Matters	152
Further Limitations on the Predicate Felony	153
Statutory Felony Murder: The Interplay of Courts and Legislatures	155
The Model Penal Code Approach	156
Examples and Explanations	157
Manslaughter	161
Voluntary Manslaughter	161
The Rules of Voluntary Manslaughter	161
Twentieth-Century Changes in the Doctrines	164
Involuntary Manslaughter	165

Reckless and Negligent Manslaughter	165
Misdemeanor-Manslaughter	166
The Model Penal Code Approach	167
Examples and Explanations	168
Chapter 9. Rape	173
Overview	173
The Common Law Approach	174
Definition	174
Spousal Immunity	175
Force	175
Threat of Force	176
Consent	176
Attacking the Credibility of the Complainant	177
Legally Ineffective Consent	177
Fraud	178
American Common Law	178
The Actus Reus of Rape	179
The Mens Rea of Rape	179
The Model Penal Code	180
Second-Degree Rape	181
First-Degree Rape	182
Gross Sexual Imposition	182
Modern Rape Statutes	183
Rape by Force or Threat of Serious Bodily Injury	184
Force	184
Additional Force	184
Inherent Force	185
Nonphysical Force	186
Dispensing with the Force Requirement	186
Threat of Force	187
Resistance by the Victim	187
Consent	188
Deception	189
Rape in the First Degree	189
Spousal Immunity	189
Rape Because No Legally Effective Consent	190
Summary	190
Evidence Reforms	191
The Corroboration Requirement	191
Rape Shield Laws	192
Examples and Explanations	192
Chapter 10. Theft	203
Overview	203
The Impact of History	204
The Death Penalty	204
Protecting Trade vs. Protecting Individualism	204

Larceny	205
Trespass	206
Asportation and Taking	207
Personal Property	208
Of Another	209
With Intent	209
To Deprive	210
Permanently	210
Contemporaneity	211
Finders	211
Embezzlement	212
Conversion	213
In Lawful Possession	213
Fraud	214
False Pretenses	214
Representation	215
Present or Past Fact	215
Title	216
Mens Rea, Knowledge, and Intent to Defraud	216
Puffing and Opinion	217
Confusion	217
Grading	218
The Model Penal Code	219
Examples and Explanations	221
Chapter 11. Solicitation	227
Overview	227
Definition	228
The Common Law	228
The Model Penal Code	229
Another Version of Solicitation	229
The Mens Rea of Solicitation	229
The Common Law	229
The Model Penal Code	230
The Actus Reus of Solicitation	230
The Common Law	230
The Model Penal Code	230
The Relationship Between Solicitation and Conspiracy	231
Responsibility for Crime Solicited	231
Solicitation and Immunity for Crime Solicited	231
Solicitation and Innocent Agents	232
Impossibility	232
The Common Law	232
Legal Impossibility	232
Factual Impossibility	233
The Model Penal Code	233
Abandonment	233