

ASPEN CASEBOOK SERIES

CRIMINAL LAW

DOCTRINE, APPLICATION, AND PRACTICE



Third Edition

JENS DAVID OHLIN

*Allan R. Tessler Dean and Professor of Law
Cornell Law School*



Wolters Kluwer

TABLE OF CONTENTS

<i>Preface</i>	xxxi
<i>Acknowledgments</i>	xxxiii

PART I	
BASIC ELEMENTS OF CRIMINALITY	1

CHAPTER 1	
INTRODUCTION TO THE CRIMINAL PROCESS	3
A. Doctrine	3
1. Criminal Complaint and Investigation	3
2. Arrest	4
3. Indictment and Preliminary Hearings	5
4. Trial	5
5. Sentencing	6
6. Appeal	7
B. Application	7
1. The Presumption of Innocence	7
<i>Owens v. State</i>	8
Notes & Questions on the Presumption of Innocence	11
2. Jury Nullification	12
<i>State v. Ragland</i>	12
Notes & Questions on Jury Nullification	18
C. How to Read a Penal Statute	20
∞ Material elements of the offense	21
∞ Canons of interpretation	22

CHAPTER 2

PUNISHMENT 25

A. Doctrine 25

1. Deterrence, Incapacitation, and Rehabilitation 25

2. Retributivism or “Just Deserts” 26

3. Expressivism 27

B. Application 27

1. Deterrence 27

United States v. Brewer 27

Notes & Questions on Deterrence 31

2. Retributivism 35

United States v. Madoff 35

Notes & Questions on Retributivism 39

3. Shaming Penalties 41

United States v. Gementera 41

Notes & Questions on Shaming Penalties 49

C. Practice & Policy 50

∞ Appealing to emotion 51

∞ The guilt paradox 51

∞ Victim impact statements 51

∞ Sentencing guidelines 52

∞ Consistency in punishment 53

∞ International crimes 54

∞ Consecutive versus concurrent sentences 54

∞ Mass incarceration 55

∞ The case for abolition 56

CHAPTER 3

THE DEATH PENALTY 59

A. Doctrine 59

1. Who Can Be Executed 59

2. Which Crimes Apply 60

3. Racial Disparities 60

4. Methods of Execution 60

B. Application 61

1. Mental Disability 61

Atkins v. Virginia 61

2. The Juvenile Death Penalty 65

Roper v. Simmons 66

Notes & Questions on *Atkins* and *Roper* 70

3. Capital Punishment for Rape 71

Kennedy v. Louisiana 71

Notes & Questions on Offense Restrictions 77

4. Racial Disparities	78
<i>McCleskey v. Kemp</i>	79
5. Methods of Execution	83
<i>Glossip v. Gross</i>	84
Notes & Questions on Execution Methods	88
C. Practice & Policy	90
☞ Bargaining in the shadow of death	90
☞ Return to guided discretion	91
☞ Strategy in bifurcated trials	91
☞ Ariel Castro case redux	92

CHAPTER 4

FUNDAMENTAL PRINCIPLES OF CRIMINAL LAW 93

A. Doctrine	93
1. The Written Statute Requirement	94
2. Retroactivity	94
3. Interpreting Statutes and the Common Law	94
4. Vagueness	95
5. The Rule of Lenity	95
B. Application	96
1. The Written Statute Requirement	96
<i>Street v. State</i>	96
Notes & Questions on Written Statutes	99
2. Retroactivity	100
<i>Rogers v. Tennessee</i>	100
Notes & Questions on Retroactivity	105
3. Statutory Construction and the Common Law	106
<i>Lewis v. Superior Court</i>	107
Notes & Questions on Statutory Construction	111
4. Vagueness	111
<i>City of Chicago v. Morales</i>	112
Notes & Questions on Vagueness	116
5. The Rule of Lenity	118
<i>Bell v. United States</i>	118
Notes & Questions on Lenity	120
C. Practice & Policy	121
☞ Disorderly conduct	121
☞ Endangering the welfare of a child	122

CHAPTER 5

ACT REQUIREMENT 123

A. Doctrine	123
1. Voluntary Acts	123

2. Omissions	124
3. Bystanders	125
B. Application	126
1. Voluntary Acts	126
<i>State v. Utter</i>	126
Notes & Questions on Voluntariness	128
2. Omissions	132
<i>Commonwealth v. Pestinikas</i>	132
Notes & Questions on Omissions	135
3. Bystanders	138
<i>State v. Davis</i>	138
Notes & Questions on Bystander Liability	141
C. Practice & Policy	143
☞ The omission strategy	143
☞ Sleepwalking redux	144

CHAPTER 6

MENTAL STATES	147
A. Doctrine	147
1. Malice	148
2. Acting Purposely	149
3. Acting Knowingly	150
4. Recklessness and Negligence	151
5. Strict Liability Offenses	152
B. Application	152
1. Malice	152
<i>Young v. State</i>	152
Notes & Questions on Malice	156
2. Acting Purposely	156
<i>United States v. Bailey</i>	156
Notes & Questions on Purpose and Intent	161
3. Knowledge and the Problem of “Willful Blindness”	162
<i>Rehaif v. United States</i>	163
<i>United States v. Jewell</i>	166
Notes & Questions on Willful Blindness	171
4. Recklessness Versus Negligence	172
<i>State v. Olsen</i>	173
Notes & Questions on Recklessness and Negligence	175
5. Strict Liability	177
<i>Staples v. United States</i>	177
Questions on Strict Liability	184
C. Practice & Policy	186
☞ Prosecutorial strategy	187
☞ Strategic charging	187

☞ Mental states as sorting mechanisms	188
☞ Mental states in foreign jurisdictions	189
CHAPTER 7	
MISTAKES	191
A. Doctrine	191
1. Mistakes of Fact	191
2. Mistakes of Law	192
B. Application	193
1. Mistakes of Fact	193
<i>People v. Navarro</i>	193
<i>State v. Sexton</i>	195
Notes & Questions on Mistakes of Fact	200
2. Mistakes of Law	202
<i>People v. Weiss</i>	203
<i>People v. Marrero</i>	207
Notes & Questions on Mistakes of Law	211
C. Practice & Policy	213
☞ The dangers of relying on mistake arguments	214
☞ Charging a jury on mistakes	214
☞ Reasonableness redux	215
CHAPTER 8	
CAUSATION	217
A. Doctrine	217
1. Cause in Fact	217
2. Proximate Cause	218
B. Application	219
1. Cause in Fact	219
<i>Oxendine v. State</i>	219
<i>People v. Jennings</i>	223
Notes & Questions on But-For Causation	227
2. Proximate Cause	229
<i>State v. Smith</i>	229
Notes & Questions on Proximate Cause	234
C. Practice & Policy	238
☞ Establishing causation at trial	238
☞ Arguing proximate cause to a jury	240
☞ The Model Penal Code approach	240

PART II
OFFENSES

241

CHAPTER 9

INTENTIONAL MURDER 243

A. Doctrine	243
1. Express Malice Murder	243
2. First-Degree or Aggravated Murder	244
3. Defining Premeditation and Deliberation	245
4. Prior Calculation and Design	245
B. Application	246
1. Express Malice Murder	246
<i>Taylor v. State</i>	246
Notes & Questions on Malice	247
2. Premeditation	248
<i>State v. Guthrie</i>	248
Notes & Questions on Premeditation and Deliberation	252
3. Prior Calculation and Design	255
<i>State v. Walker</i>	255
Notes & Questions on Prior Calculation & Design	259
C. Practice & Policy	259
∞ Proving premeditation	260
∞ Hierarchy of blameworthiness	261

CHAPTER 10

VOLUNTARY MANSLAUGHTER 263

A. Doctrine	263
1. Provocation	263
2. Extreme Emotional Disturbance	264
B. Application	265
1. Provocation	265
<i>Girouard v. State</i>	265
<i>State v. Castagna</i>	270
Notes & Questions on Provocation	274
2. Extreme Emotional Disturbance	277
<i>State v. White</i>	277
Notes & Questions on Extreme Emotional Disturbance	284
C. Practice & Policy	286
∞ Provocation as partial justification	286
∞ Provocation as partial excuse	286
∞ Arguing provocation to the jury	287

∞ Domestic violence and adultery	287
∞ Abolishing provocation	288

CHAPTER 11

RECKLESS KILLINGS 289

A. Doctrine	289
1. Involuntary Manslaughter	289
2. Implied Malice and Extreme Indifference Murder	290
3. Misdemeanor Manslaughter Rule	291
B. Application	291
1. Involuntary Manslaughter	291
<i>People v. Kolzow</i>	291
Notes & Questions on Involuntary Manslaughter	295
2. Implied Malice and Extreme Indifference Murder	297
<i>People v. Knoller</i>	297
<i>People v. Snyder</i>	303
Notes on Implied Malice and Depraved Indifference	307
3. Misdemeanor Manslaughter Rule	308
<i>State v. Biechele</i>	309
Notes & Questions on Misdemeanor Manslaughter	314
C. Practice & Policy	315
∞ Murder and mens rea	316
∞ Murder and sentencing	316
∞ Compromise verdicts	316
∞ New York courts respond	317

CHAPTER 12

FELONY MURDER 319

A. Doctrine	319
1. Independent Felony or “Merger” Limitation	320
2. Inherently Dangerous Felony Limitation	321
3. In Furtherance of the Felony Limitation	321
B. Application	322
1. Independent Felony or “Merger” Limitation	322
<i>Rose v. State</i>	322
Notes & Questions on the Merger Limitation	326
2. Inherently Dangerous Felony Limitation	327
<i>State v. Stewart</i>	327
Notes & Questions on Inherent Dangerousness	330
3. In Furtherance of the Felony Limitation	332
<i>People v. Hernandez</i>	333

<i>State v. Sophophone</i>	337
Notes & Questions on “In Furtherance”	340
C. Practice & Policy	343
∞ The Model Penal Code approach	343
∞ Felony murder in the United States	344
∞ Normative foundation	345
 CHAPTER 13	
NEGLIGENT HOMICIDE	347
A. Doctrine	347
1. Ordinary Negligence	347
2. Gross Negligence	348
B. Application	348
1. Ordinary Negligence	348
<i>People v. Traughber</i>	349
Notes & Questions on Ordinary Negligence	353
2. Gross Negligence	354
<i>State v. Small</i>	354
Notes & Questions on Gross Negligence	357
C. Practice & Policy	359
∞ Model Penal Code approach	360
∞ The in-between standard	360
∞ Subjective or objective	361
∞ Criminal prosecutions for medical negligence	361
 CHAPTER 14	
RAPE	363
A. Doctrine	363
1. Force	364
2. Threats of Force	365
3. Consent	365
4. Rape by Fraud	366
5. Statutory Rape and Lack of Capacity	366
B. Application	367
1. Force	367
<i>State v. Jones</i>	367
Notes & Questions on Force	374
2. Threats of Force	376
<i>Rusk v. State, 43 Md. App. 476 (1979)</i>	376
<i>Rusk v. State, 289 Md. 230 (1981)</i>	381
Notes & Questions on Threats of Force	382
3. Consent	383
<i>Commonwealth v. Lopez</i>	383

<i>People v. Newton</i>	388
Notes & Questions on Consent	390
4. Rape by Fraud	392
<i>Boro v. Superior Court</i>	393
Notes & Questions on Fraud	395
5. Statutory Rape and Legal Barriers to Consent	398
<i>State v. Hirschfelder</i>	398
Notes & Questions on Barriers to Consent	400
C. Practice & Policy	403
∞ Affirmative consent	404
∞ Campus judicial codes	405
∞ The Model Penal Code responds	406
∞ Prosecutorial strategy	406

CHAPTER 15

OTHER OFFENSES AGAINST THE PERSON 409

A. Doctrine	409
1. Physical Battery	410
2. Assault	411
3. Kidnapping	411
B. Application	412
1. Physical Battery	412
<i>People v. Peck</i>	413
Notes & Questions on Physical Battery	414
2. Assault	416
<i>State v. Birthmark</i>	416
<i>State v. Boodoosingh</i>	419
Notes & Questions on Assault	420
3. Kidnapping	422
<i>Goolsby v. State</i>	422
Notes & Questions on Kidnapping	426
C. Practice & Policy	427
∞ Anti-stalking statutes	427
∞ Reasonable apprehension and vagueness	428
∞ Custodial interference	429

CHAPTER 16

THEFT & PROPERTY OFFENSES 431

A. Doctrine	431
1. Unlawful Taking	433
2. Fraud, Extortion, Blackmail, and Embezzlement	433

3. Property	434
4. Intent to Deprive	435
5. Robbery	435
6. Burglary and Arson	436
B. Application	437
1. Unlawful Taking	437
<i>State v. Carswell</i>	437
Notes & Questions on Takings	440
2. Fraud, Extortion, Blackmail, and Embezzlement	441
<i>United States v. Villalobos</i>	441
Notes & Questions on Fraud and Extortion	445
3. Property	447
<i>Penley v. Commonwealth</i>	447
Notes & Questions on Property	449
4. Intent to Deprive Permanently	450
<i>Marsh v. Commonwealth</i>	450
Notes & Questions on Intent to Deprive	454
C. Practice & Policy	455
☞ Securities fraud	456
☞ Insider trading	457

PART III

INCHOATE OFFENSES 459

CHAPTER 17

OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE 461

A. Doctrine	461
1. Obstruction of Justice	461
2. Perjury	462
3. Bribery and Corruption	463
4. Contempt of Court	464
B. Application	465
1. Obstruction of Justice	465
<i>United States v. Aguilar</i>	465
Notes & Questions on Obstruction of Justice	469
2. Perjury	471
<i>State v. Danielson</i>	471
Notes & Questions on Perjury	474
3. Bribery	475
<i>Skilling v. United States</i>	476
Notes & Questions on Bribery	481

4. Contempt of Court	482
<i>In re Jefferson</i>	482
Notes & Questions on Contempt of Court	486
Practice & Policy	486
∞ Presidential obstruction of justice	487
∞ Obstruction of Congress	489

CHAPTER 18

ATTEMPT	493
A. Doctrine	493
1. Specific Intent or Purpose	493
2. Distinguishing Attempts from Mere Preparation	494
3. Impossibility	495
4. Abandonment	496
5. Merger	496
B. Application	497
1. Specific Intent or Purpose	497
<i>People v. Gentry</i>	497
Notes & Questions on Specific Intent or Purpose	501
2. Distinguishing Attempts from Mere Preparation	504
<i>People v. Rizzo</i>	504
Notes & Questions on Dangerous Proximity	506
<i>State v. Reeves</i>	507
Notes & Questions on Substantial Step	513
3. Impossibility	515
<i>People v. Dlugash</i>	515
<i>State v. Smith</i>	518
Notes & Questions on Impossibility	520
4. Abandonment	522
<i>Ross v. Mississippi</i>	522
Notes & Questions on Abandonment	524
C. Practice & Policy	526
∞ Punishing attempts: why and how much	527
∞ Assault and battery	528

CHAPTER 19

INCHOATE CONSPIRACY	529
A. Doctrine	529
1. Agreement to Commit Unlawful Act	529
2. Specific Intent or Purpose	530
3. The Overt Act Requirement	530
4. Renunciation	531
5. Merger	532

B. Application	532
1. Agreement to Commit Unlawful Act	532
<i>State v. Pacheco</i>	532
Notes & Questions on Conspiratorial Agreements	537
2. Specific Intent or Purpose	539
<i>United States v. Valle</i>	539
Notes & Questions on Specific Intent or Purpose	543
3. Overt Act in Furtherance of the Conspiracy	544
<i>United States v. Shabani</i>	544
<i>United States v. Abu Ghayth</i>	546
Notes & Questions on Overt Acts	548
4. Renunciation	550
<i>Commonwealth v. Nee</i>	550
Notes & Questions on Renunciation	554
C. Practice & Policy	554
☞ Common law origins	554
☞ Conspiracy and international law	555
☞ Distinguishing inchoate conspiracy from attempt	556

CHAPTER 20

SOLICITATION 559

A. Doctrine	559
1. Distinguishing Solicitation from Conspiracy	560
2. Distinguishing Solicitation from Attempts	560
3. Merger and Renunciation	561
B. Application	561
1. Distinguishing Solicitation from Conspiracy	561
<i>People v. Breton</i>	562
Notes & Questions on Solicitation Versus Conspiracy	565
2. Distinguishing Solicitation from Attempts	568
<i>People v. Superior Court (Decker)</i>	568
Notes & Questions on Solicitation Versus Attempts	574
C. Practice & Policy	575
☞ Undercover agents and defense arguments	575
☞ The inherent dangerousness of solicitations	575

PART IV

MODES OF LIABILITY 577

CHAPTER 21

ACCOMPLICES 579

A. Doctrine	579
1. Assistance or Support	580

2. Purpose Versus Knowledge	580
3. Natural and Probable Consequences Doctrine	581
4. Innocent Instrumentality Rule	582
5. Defenses	582
B. Application	583
1. Assisting the Principal Perpetrator	583
<i>State v. V.T.</i>	584
Notes & Questions on the Act Requirement	587
2. Purpose Versus Knowledge	590
<i>Rosemond v. United States</i>	590
Notes & Questions on Purpose Versus Knowledge	594
3. The Natural and Probable Consequences Doctrine	598
<i>Waddington v. Sarausad</i>	598
<i>People v. Prettyman</i>	602
Notes & Questions on Natural and Probable Consequences	605
4. Innocent Instrumentality Rule	608
<i>Bailey v. Commonwealth</i>	608
Notes & Questions on Innocent Instrumentalities	612
5. Defenses	613
<i>Standefer v. United States</i>	613
Notes & Questions on Defenses	617
C. Practice & Policy	620
☞ Constitutional constraints on punishing accomplices	620
☞ Victims as accomplices	621
☞ Purpose versus knowledge in human rights	622

CHAPTER 22

CONSPIRACY LIABILITY	625
A. Doctrine	625
1. <i>Pinkerton</i> Liability	625
2. Scope of the Conspiracy	626
3. Withdrawing from a Conspiracy	626
B. Application	627
1. <i>Pinkerton</i> Liability	627
<i>United States v. Alvarez</i>	627
Notes & Questions on <i>Pinkerton</i> Liability	632
2. Scope of the Conspiracy	635
<i>People v. Bruno</i>	636
<i>Kotteakos v. United States</i>	637
Notes & Questions on Conspiratorial Scope	642
3. Withdrawal	644
<i>United States v. Schweih</i>	645
Notes & Questions on Withdrawal	647

C. Practice & Policy	648
☞ Conspiracy as procedure and substance	648
☞ Joint Criminal Enterprise	649

CHAPTER 23

CORPORATE CRIME 651

A. Doctrine	651
1. Prosecuting Corporations	651
2. Punishing Corporations	652
3. Prosecuting Corporate Officers	653
B. Application	653
1. Prosecuting Corporations	653
<i>State v. Far West Water & Sewer Inc.</i>	653
Notes & Questions on Corporate Liability	657
2. Punishing Corporations	660
<i>Principles of Federal Prosecution of Business Organizations</i>	660
Notes & Questions on Corporate Punishment	674
3. Prosecuting Corporate Officers	676
<i>United States v. Park</i>	676
Notes & Questions on Responsible Officers	680
C. Practice & Policy	681
☞ State prosecutions	681
☞ Deferred prosecution agreements	681
☞ Waiving attorney-client privilege	683

PART V

JUSTIFICATIONS & EXCUSES 685

CHAPTER 24

SELF-DEFENSE 687

A. Doctrine	687
1. Imminent Threat	687
2. Necessity and the Duty to Retreat	688
3. Reasonable Belief	689
4. Imperfect Self-Defense	690
B. Application	690
1. Imminence	690
<i>State v. Norman</i>	691
Notes & Questions on Imminence	703
2. Necessity and the Duty to Retreat	704
<i>United States v. Peterson</i>	704
<i>People v. Riddle</i>	709

Notes & Questions on Duty to Retreat	714
3. Reasonable Belief	716
<i>People v. Goetz</i>	717
Notes & Questions on Reasonable Beliefs	724
4. Imperfect Self-Defense	726
<i>People v. Elmore</i>	726
Notes & Questions on Imperfect Self-Defense	730
C. Practice & Policy	733
∞ Stand Your Ground laws	733
∞ Procedural immunity	735
∞ Battered Nation Syndrome	736
∞ Imminence in targeted killing	736

CHAPTER 25

DEFENSIVE FORCE BY POLICE OFFICERS	739
A. Doctrine	739
1. Constitutional Limits	740
2. Civil Rights Violations	741
3. State Statutes Governing Police Use of Force	742
B. Application	743
1. Constitutional Limits	743
<i>Scott v. Harris</i>	743
Notes & Questions on Immediate Danger	748
2. Civil Rights Violations	750
<i>Report Regarding the Criminal Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson</i>	750
Notes & Questions on Objective Reasonableness	759
C. Practice & Policy	761
∞ Abandoning pursuit	761
∞ Body cameras	762

CHAPTER 26

NECESSITY	765
A. Doctrine	765
1. Utilitarian Balancing and “Choice of Evils”	765
2. Defense to Murder	767
3. Necessity and Prison Breaks	767
4. Necessity and Civil Disobedience	768
B. Application	768
1. Utilitarian Balancing and “Choice of Evils”	768
<i>United States v. Ridner</i>	768

Notes & Questions on Utilitarian Balancing	772
2. Defense to Murder	773
<i>The Queen v. Dudley & Stephens</i>	773
Notes & Questions on Necessity and Murder	778
3. Necessity and Prison Breaks	778
<i>United States v. Bailey</i>	779
Notes & Questions on Prison Breaks	784
4. Necessity and Civil Disobedience	785
<i>United States v. Schoon</i>	785
Notes & Questions on Civil Disobedience	790
C. Practice & Policy	791
∞ Torture and terrorism	791
∞ Torture and human dignity	792
∞ Hijacked airliners and human dignity	794

CHAPTER 27

DURESS 797

A. Doctrine	797
1. Threats That Vitiating Autonomy	797
2. The Severity of the Threat	798
3. Defense to Murder	799
4. Recklessness in Creating the Threat	799
B. Application	800
1. Threats That Vitiating Autonomy	800
<i>Dixon v. United States</i>	800
<i>United States v. Contento-Pachon</i>	803
Notes & Questions on Duress and Autonomy	806
2. The Severity of the Threat	807
<i>Commonwealth v. DeMarco</i>	808
Notes & Questions on Reasonable Firmness	814
3. Defense to Murder	816
<i>People v. Anderson</i>	816
Notes & Questions on Duress and Murder	824
C. Practice & Policy	826
∞ Duress and atrocity	826

CHAPTER 28

INTOXICATION 831

A. Doctrine	831
1. Negating Mens Rea	831
2. Eliminating the Defense of Voluntary Intoxication	833
3. Involuntary Intoxication	833

B. Application	834
1. Negating Mens Rea	834
<i>State v. Brown</i>	835
Notes & Questions on Negating Mens Rea	841
2. Eliminating the Intoxication Defense	843
<i>Montana v. Egelhoff</i>	843
Notes & Questions on Eliminating the Defense	848
3. Involuntary Intoxication	850
<i>People v. Garcia</i>	850
Notes & Questions on Involuntary Intoxication	856
C. Practice & Policy	858
☞ Grand schemers	858
☞ The “separate offense” solution	859
☞ Strategic charging and trial decisions	859

CHAPTER 29

INSANITY	861
A. Doctrine	861
1. The Cognitive Test	861
2. The Irresistible Impulse Test	862
3. The Model Penal Code Substantial Capacity Test	862
4. The Definition of Wrongfulness	863
5. Diminished Capacity	863
B. Application	864
1. The Cognitive Test	864
<i>Sanders v. State</i>	864
Notes & Questions on the Cognitive Test	871
2. Irresistible Impulse Test	871
<i>Pollard v. United States</i>	871
Notes & Questions on Irresistible Impulses	877
3. The Model Penal Code Substantial Capacity Test	879
<i>United States v. Freeman</i>	880
Notes & Questions on Substantial Capacity	884
4. The Definition of Wrongfulness	885
<i>State v. Crenshaw</i>	886
Notes & Questions on Wrongfulness	891
5. Diminished Capacity	892
<i>Clark v. Arizona</i>	893
Notes & Questions on Diminished Capacity	902
C. Practice & Policy	904
☞ Separate insanity phase	904
☞ Guilty but mentally ill (GBMI) plea	905

∞ Too crazy to plead insanity	906
∞ The medical model to criminal insanity	906
<i>Appendix: Model Penal Code</i>	909
<i>Table of Cases</i>	969
<i>Index</i>	975