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A STATUTORY APPROACH TO CRIMINAL LAW

KEVIN C. McMUNIGAL*

A few years ago at an AALS hiring conference, several colleagues and I interviewed a bright, well-qualified faculty candidate interested in teaching Criminal Law. During the interview, he told us he wanted to teach Criminal Law because it was a common law course and he was interested in how judges shape legal rules through the common law process.

Criminal Law, though, has not been a true common law subject for many years. The Supreme Court, for example, announced almost 200 years ago that there are no federal common law crimes.[1] As a result of the nineteenth century codification movement, every American state has for decades accepted the notion of legislative supremacy in Criminal Law—the idea that legislators rather than judges should create and define criminal offenses. How could a recent graduate of a top law school have missed this point in his Criminal Law course?

Quite understandably it turns out. This young man's conception of Criminal Law arose in all likelihood not from some peculiar lack of perceptiveness on his part. Instead, his attitude was a predictable product of current teaching methodology. Despite the fact that statutory rather than common law crimes have long been the norm in this country, legislators and statutes receive scant attention in modern Criminal Law casebooks and classrooms. Legality, legislative supremacy, and the demise of common law crimes make a brief appearance in the first act of the typical Criminal Law course, but then judges and their opinions take center stage for the rest of the semester. As the word *casebook* announces, judicial opinions are the primary vehicles used to teach the substance of Criminal Law. Casebooks spotlight the judge as lawmaker and leave the legislator lurking in the shadows. A first year Criminal Law casebook, for example, is usually indistinguishable from casebooks in subjects where judges *are* the primary lawmakers through a common law process, such as Torts, Contracts, and Property. It is little wonder, then, that the young man I interviewed thought of Criminal Law as a common law course. In most law schools, Criminal Law, along with Torts,

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1. *See* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416-17 (1816).

Contracts, and Property are still treated as courses that "teach the substance, and the methodology, of the common law."[2]

In order to give students a more current and accurate view of criminal law as a statutory field, I recommend the incorporation of a statutory approach. My suggestion is not to replace cases entirely. Cases are wonderful teaching tools, allowing students to see the criminal law applied to concrete and often compelling factual scenarios and to gain insight into the policies behind the law from the rationales provided for deciding cases. Analyzing cases is a crucial skill for students to master.

But it makes sense today to balance the traditional use of judicial opinions by giving equal time and attention to statutes. Combining augmented use of statutes with problems and other exercises requires students to work directly with the text of statutes to grasp the substance of Criminal Law. The starting point for analysis in any criminal case is typically the statute under which the defendant was charged. So students currently encounter statutes in reading cases, but they do so in a relatively passive way—reading how a judge analyzes or interprets a particular statute. A statutory approach casts students in an active role, requiring them to analyze and interpret statutes without guidance from a judicial opinion. It fosters in students an appreciation of judicial opinions as exercises in interpretation rather than law creation. Blending a statutory approach with customary case-oriented methodology also fosters greater exploration of the roles the various branches of government play in shaping the criminal law than use of cases alone.

There are a number of reasons to incorporate a statutory approach into teaching Criminal Law. One is that a statutory approach conveys to students the reality of the importance of statutes in the modern legal world, including criminal law. A second reason is that use of statutes better prepares students for the practice of law by giving them confidence and analytical skills in dealing with statutes, skills that will be vital to them regardless of the subject matter or locale of their practice. A third reason is that incorporating a statutory approach can make the course more engaging. It prompts students to confront some of the central issues in criminal law today, such as the roles played by the various branches of government in shaping the substantive criminal law. It facilitates students joining current debates about the proper method judges should use in interpreting legal text, whether the language is part of a statute, a rule of evidence, an administrative regulation, or a clause in a constitution. Finally, using statutes has pragmatic advantages. A criminal

2. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3 (1997)("The overwhelming majority of the courses taught in that first year [of law school], and surely the ones that have the most profound effect, teach the substance, and the methodology, of the common law – torts, for example; contracts; property; criminal law.").

statute is often relatively compact in comparison to a judicial opinion. As a consequence, one can bring four or five statutes representing an array of policy approaches to a particular criminal law issue to the students' attention in one or two pages. Covering a similar range of viewpoints through cases requires more space and time. For the same reason, a statute also lends itself to student drafting exercises more easily than does a judicial opinion.

In the following pages, I discuss each of these rationales in more detail and provide examples of how to incorporate a statutory approach.

I. THE IMPORTANCE OF STATUTES IN THE MODERN LEGAL WORLD

Over-reliance on cases does students a disservice because it fails to give them an accurate view of the importance of statutes in criminal law today. Many states and the federal government have abolished common law crimes entirely. Some states retain common law crimes as long as the legislature has not enacted a statute on the subject.[3] Though such statutes give judges in some states the theoretical power to create new crimes, that power is rarely used.[4] Professor Wayne LaFave's hornbook gives examples of new crimes created by judges in states retaining common law crimes.[5] Almost all are from the nineteenth century or early decades of the twentieth century. Recently, while working on a new first-year Criminal Law text,[6] I was looking for judicial opinions that would allow students to juxtapose cases with opposing points of view on common law crimes and would prompt students to think about the relative strengths and weaknesses of judges and legislators as lawmakers. The selection of cases from within American jurisdictions in which a court created a new offense were so meager and dated, that I decided to use a relatively recent Scottish case to demonstrate the common law approach to creating and defining crimes. In that case, a man was convicted and sentenced to prison for selling glue-sniffing materials to children, despite a prior legislative decision not to criminalize such behavior.[7]

The dominant attitude expressed in American jurisdictions is one of legislative supremacy and exclusivity. This modern notion is reflected in the following passage from a Florida Supreme Court opinion reversing a woman's controversial drug distribution conviction for exposing the fetus she was carrying to cocaine:

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3. *See, e.g.*, N.M. STAT. ANN. § 30-1-3 (Michie 1978), Construction of Criminal Code ("In criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several states of the Union, shall govern.").

4. A relatively recent exception is *People v. Kevorkian*, 527 N.W.2d 714, 739 (1994)(recognizing assisting suicide as a common law offense).

5. WAYNE R. LAFAVE, CRIMINAL LAW, 78-83 (4th ed. 2003).

6. Kate E. Bloch & Kevin C. McMunigal, CRIMINAL LAW: A CONTEMPORARY APPROACH (forthcoming Aspen 2004).

7. *See* Khaliq v. Her Majesty's Advocate, 1984 SCCR 23 (17 November, 1983).

> Neither judges nor prosecutors can make criminal laws. This is the purview of the Legislature. If the Legislature wanted to punish the uterine transfer of cocaine from a mother to her fetus, it would be up to the Legislature to consider the attending public policy and constitutional arguments and then pass its Legislation. The Legislature has not done so and the court has no power to make such a law.[8]

In failing to approach Criminal Law as a statutory course, teachers fail to recognize the reality of the importance of statutes both in criminal law and other fields of law.

The common law of crimes cannot and should not be banished from the Criminal Law classroom any more than judicial opinions should be. But it should be viewed as the historical backdrop to today's statutory offenses and a significant resource in statutory interpretation, helping define terms and providing context for deciphering legislative intent. At times, a legislature enacts a statute with the intent of simply codifying the common law. At other times, it uses terms borrowed from the common law without defining those terms. In either case, the courts must draw on the common law to make sense of the statute and act in accordance with legislative intent. A statutory approach helps students see the common law of crimes as a resource used in drafting and interpreting criminal statutes, rather than the current source of criminal law.

Criminal law is not alone as a field in which statutory law dominates. Rather, it is typical of what students will encounter in the vast majority of areas of practice. Consider, for example, the following descriptions of the importance of statutes. Each reflects the modern legal reality that prompted Judge Guido Calabresi more than twenty years ago to label the age in which modern lawyers work an "age of statutes."[9]

> We live in an age of statutes in which the nation's legislatures serve actively as the dominant institutions for determining public policy and translating it into law.[10]

> We live in an age of legislation, and most new law is statutory law.[11]

> Statutory interpretation is what most lawyers do for a good deal of their time. Today, the boundaries of most legal inquiry are structured by statutes and administrative regulations, not the common law.[12]

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8. Johnson v. State, 602 So. 2d 1288, 1294 (Fla. 1992) (quoting People v. Bremer, No. 90-32227-FH (Mich. Cir. Ct. Jan. 31, 1991)).

9. Guido Calabresi, A COMMON LAW FOR THE AGE OF STATUTES (1982).

10. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS xv (1997).

11. SCALIA, *supra* note 2, at 13.

12. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 2 (2000).

The recent trend toward legal globalization provides another reason to expose students to statutes as well as cases.[13] Due to the tightening of the international economic, political, and social fabric, lawyers today are much more likely than those who graduated even twenty or thirty years ago to engage with legal cultures based in the civil law tradition in which codes rather than judicial opinions are the primary source of law.

Law school curricula do not adequately prepare students for a legal world in which statutes play such an important role. The first-year curriculum in particular, with its heavy reliance on common law courses, fails to give students a solid grounding in statutory analysis at a point in their legal education when they are most open to learning legal methods and analysis. Criminal Law is an ideal place to remedy this failure.

II. TEACHING STATUTORY ANALYSIS AND INTERPRETATION

Most of the students we teach in Criminal Law will not practice criminal law. What then do we want them to take from the course? One of the things a statutory approach gives students is a set of skills in analyzing, interpreting and drafting statutes, skills that will be useful in virtually every area of modern law practice. Due to the dominance of common law courses in the first-year curriculum, they are unlikely to obtain these skills elsewhere during their first year.

The typical starting point for any criminal prosecution is a statute. Often, though, teachers and students are hard-pressed to find the complete text of that statute in first-year Criminal Law casebooks. Sometimes the judge who wrote the opinion chose not to include the text of the applicable statute. At other times, the casebook's authors removed the statutory text in editing an opinion. When the text of a statute is provided, it often appears in the fine print of a footnote. This restricted access sends the message that the text of a statute is of little if any importance. The judicial opinion is the main event in terms of classroom time, preparation, and analysis.

If one relies exclusively on cases, students never confront, as they will in practice, a set of facts and the bare text of a rule or statute. Under the case method, students become acclimated to having a judge as a tour guide to a statute. The professor often asks a student after reading a case to evaluate the judge's analysis of a statute rather than to analyze it herself. The students are cast as observers of rather than participants in the analytical and interpretive process. The case method trains students to look not to a statute's language to discern its meaning, but to the collection of annotated cases that typically follows statutes in published codes.

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13. Edward J. Imwinkelried, *Using the Evidence Course as a Vehicle for Teaching Legisprudential Skills*, 21 QUINNIPIAC L. REV. 907, 908 (2003).

A statutory approach casts the students in an active role. It has them read lots of criminal statutes and uses questions and problems to force them to grapple with and derive the substance of the criminal law from those statutes. Two types of exercises that help students develop confidence and skills regarding statutes are statutory interpretation and drafting exercises.

A. Statutory Interpretation Problems

Traditional treatment of the conduct component of crime focuses on issues such as voluntariness, omission, and status. Each is a useful vehicle for probing the purposes and boundaries of criminal liability. Rarely investigated, though, is the task of determining what conduct falls within a particular statute's language. Here is an example of a statutory interpretation exercise I use in examining the conduct component of a criminal offense.

PROBLEM

You are a justice of a state supreme court. You and the other justices have agreed to review a series of cases raising questions about the scope of the following criminal statute:

> *Driving while under the influence of alcohol or drugs*
>
> *No person shall operate any vehicle, streetcar, or trackless trolley within this state if the person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse.*

The facts in the cases are as follows:

Case 1. At 1:30 a.m. in the middle of a cold and snowy January night, the sound of a car motor running in his driveway awoke Timothy. When he investigated, he found that a stranger, Allen, had parked his car in Timothy's driveway with the motor running. Allen was asleep in the driver's seat and did not awake or stir when Timothy shone a flashlight through the car window into his face. Timothy called the police. The arresting officer concluded that Allen had been in Timothy's driveway a considerable time since no tire tracks were visible behind Allen's car in the freshly fallen snow.

Case 2. After ending a fifteen hour work shift at 10 p.m., Elaine drove to McDuffie's Bar, parked her car and went inside where she stayed until the bar closed at 2:30 a.m. Police found Elaine passed out and slumped over the steering wheel of her car, which was still in the same space in McDuffie's lot

where she had parked it at 10 p.m. The motor was running at high speed and Elaine's foot was on the accelerator. The car was not in gear and the emergency brake was engaged. Elaine admitted to the arresting police officers that she was intoxicated and told them she had decided to follow her lawyer's advice not to drive if she "had more than two beers."

Case 3. Police found Bradley asleep in the driver's seat of his car. The car was parked in a lot belonging to a county park. Its motor was not running, but its radio was on. The key was in the ignition, but turned to the left or "ACC" position. The key needs to be turned in the opposite direction, to the right, to start the engine.

Allen, Elaine, and Bradley were each charged with violating the above statute. The lower courts have disagreed on whether or not Allen, Elaine, and Bradley fall within the statute. How would you rule in each case? Assume that the prosecutor can prove that each defendant was under the influence of alcohol at the time he entered his car.

B. *Statutory Drafting Exercises*

A great way to teach students statutory analysis and sensitize them to drafting and interpretation issues is to have them draft a few statutes. Early in the semester, after my class has read *Keeler v. Superior Court of Amador County*,[14] I give my students the drafting exercise that appears below. In *Keeler*, the California Supreme Court found that the conduct of a husband who assaulted his wife with the purpose of killing the fetus she was carrying did not fall within the California homicide statute.[15] The students usually feel that the defendant's actions should be subject to criminal sanction, so I ask them to put themselves in the position of the California legislature immediately after the California Supreme Court announced its decision in *Keeler*.

Problem: Drafting a Feticide Statute

You are the legislative assistant to a member of the California legislature who, after reading the *Keeler* case, wants to enact legislation making feticide a crime. She asks you to draft a criminal statute that would make Keeler's actions a crime. In drafting the statute, she asks you also to consider how to address the following:

14. 470 P.2d 617 (Cal. 1970).
15. *Id.* at 639.

(a) a medical doctor performing an abortion;

(b) a driver who causes an auto accident resulting in a pregnant woman losing the fetus she is carrying;

(c) a pregnant woman whose fetus dies because she abused cocaine during the pregnancy.

Should the actors in these three situations be included or excluded from the crime of feticide? Write your statute so that it reflects your answers to the previous question.

This exercise comes early in the semester and the students' statutes vary in quality. But it helps them to understand that a legislator needs to anticipate a statute being applied to a wide variety of factual scenarios. The students have to decide how they want to resolve each of the fact patterns presented in the exercise as a matter of criminal justice policy. Then, they need to choose language that gives effect to those decisions.

In drafting these feticide statutes, first-year students encounter many of the same problems legislators confront in drafting real statutes. For example, their statutes are often quite imprecise about mental state in terms of (1) what level of mental state is required for conviction and (2) to what non-mental element(s) the mental state relates. As in homicide, the key mental state in feticide is usually the one regarding the death of the fetus. The students often write their statutes so that whatever mental state they have chosen appears to apply to the conduct element and the mental state regarding death is unclear. Students also often bootleg mental state language from some other statute, often a homicide statute, into their feticide statutes without knowing precisely (or even vaguely) what it means.

I usually pick a handful of the students' feticide statutes and project them on a Smartboard in class. One could just as easily photocopy them onto transparencies and show them with an overhead projector. We focus on how word choice in a statute reflects underlying decisions about criminal policy and affects the outcomes of cases. The students' feticide statutes are a great tool to use later in the semester when covering the mental state component of crime. As stated previously, the students' own work illustrates problems legislatures and judges struggle with in drafting and interpreting statutory language regarding mental state. This drafting exercise allows students to use mistakes as learning opportunities and to appreciate what it takes to draft clear legislation. As the students gain analytic and drafting skills during the semester, they are often able to redraft their feticide statutes to remedy ambiguities, giving them a genuine sense of accomplishment when they produce a statute clearer than many produced by legislatures.

III. ADDING NEW DIMENSIONS TO A CRIMINAL LAW COURSE

A balanced use of statutes and cases facilitates adding dimensions to a Criminal Law course that are often left unexamined. Two I will discuss here are (1) comparative analysis of the branches of our state and federal governments as makers of criminal law and (2) methods of statutory interpretation.

A. Who Should Create and Define Crimes?

Primary focal points in any Criminal Law course are the policy choices that shape the contours and boundaries of criminal liability. Who should make those choices for our society? In other words, who should create and define crimes? The statutory approach I suggest has students closely examine the competence of each of the three branches of government as lawmakers. The question of who should act as lawmaker arises in virtually every law school course, but it is often left unexplored. Evidence books and courses, for example, are so absorbed with what the law of evidence is and should be they typically give little attention to the question of who should make evidence law, despite the fact that the transformation of American evidence law from common law to written rules is a relatively recent phenomenon of the late twentieth century.

What, for example, justifies the modern preference for legislative supremacy in criminal law? Are the arguments valid? Why are we reluctant to accept judges as lawmakers in criminal law, when we allow them to act as lawmakers in areas such as torts and contracts? What are the relative advantages and disadvantages of statutory and common law? Which makes law more accessible to the public? Which has greater legitimacy in the eyes of the public? Are judges or legislators most likely to keep the law in touch with the current needs of society?

In my Criminal Law class, we address these questions at length at the outset of the semester and return to them throughout the semester. Once students are sensitized to these issues, they naturally raise them in class. And the students' thinking about them often changes and becomes more insightful and sophisticated as they see for themselves the virtues and vices of the criminal statutes legislatures produce and the judicial opinions judges produce.

B. Who Does Create and Define Crimes?

Another interesting question a statutory approach facilitates addressing throughout the semester is who actually does create and define crimes? Despite the acceptance of the ideal of legislative supremacy in the United States, students discover as they proceed through their Criminal Law course that the distribution of power in regard to criminal lawmaking is considerably more complex and nuanced than the notion of legislative supremacy indicates

and that all three branches of government exercise power in shaping criminal law.

When a legislature enacts a vague statute, for example, it functions as an implicit grant of power to both executive branch officials and judges to participate in defining crimes. Judges retain an important role as lawmakers under the legislative supremacy model by interpreting statutes and by setting limits on statutes through enforcement of constitutional provisions. In addition, there are some areas of criminal law, such as defenses, which the judges of many jurisdictions continue to control through a common law process.

C. Methods of Statutory Interpretation

Due to the demise of common law crimes, the typical prosecution students read about in a criminal law casebook starts with a statute as the primary reference point in defining the applicable law. So students encounter statutory interpretation in virtually every case. But seldom does the judge explicitly articulate the choices and values that lie behind the choice of interpretative method. Similarly, in most Criminal Law courses, interpretative method is not examined in any systematic way and statutory interpretation is not a focus for class attention. The thinking tends to be that explicit consideration of interpretative method should be restricted to courses in Legislation or perhaps Constitutional Law. At best, the student ends a semester of Criminal Law with a modest and motley assortment of interpretative aids, such as the rule of lenity and using common law as a means of discerning legislative intent.

In the early weeks of the semester, I introduce students to three schools of interpretation—textualism, intentionalism, and dynamic statutory interpretation[16]—and discuss arguments for and against each method. Variations of intentionalist interpretation are the norm in criminal cases. Our discussions of textualism and dynamic statutory interpretation provide a context for understanding and critically evaluating intentionalism. Discussion of textualism and dynamic statutory interpretation also reinforce the importance of paying close attention to the text of a statute because all three of these methods of interpretation make use of the statute's text.

Introducing methods of interpretation early in the course and early in a student's legal education is valuable. It allows students to understand and participate in a significant current controversy in law. Because that controversy revolves in large part around the issue of how much power judges should exercise, discussion of interpretative methods integrates nicely with the question of who should create and define criminal offenses. Familiarity with

16. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

these various methods also encourages students to think critically about the statutory interpretation they encounter in the cases they read.

IV. CONCLUSION

I hope this essay will convince some Criminal Law teachers to seriously consider incorporating a statutory approach into their Criminal Law courses. By blending statutes with cases, they can give their students a more accurate and useful view of criminal law, provide statutory skills, and make their courses more relevant and engaging. The statutory approach redresses the lack of attention given to statutes in the first-year curriculum and provides students with an early foundation upon which to build throughout their law school careers.