

CHAPTER 1

FOUNDATION CONSIDERATIONS: STATUTES, CRIMES, PROOF, PROCESSES, AND PURPOSES

§ 1.02 THE STATUTORY BASIS OF CRIMINAL LAW

Page 9: [After the Notes, add the following:]

STATE v. SANDOVAL, 156 P.3d 60 (Or. 2007). Sometimes, courts ignore statutes, even in the face of clear language. In such a situation, later courts face a dilemma: whether to follow the statute, as they presumably should have done in the first place, or whether to follow the erroneous judicial decision. Sometimes, a later court may correct the error. That is what happened in this case.

Sandoval was convicted of intentional murder. The jury rejected his defense of self-defense. The trial judge had instructed the jury that retreat was necessary, if possible, before the use of deadly force in self-defense: “There must be no reasonable opportunity to escape to avoid the affray and there must be no other means of avoiding or declining the combat.” The trial judge’s instruction was understandable, because this instruction earlier had been mandated by the state supreme court in *State v. Charles*, 647 P.2d 897 (Or. 1982). But the instruction had no basis in the governing statute, which allowed self-defense “from what [the person] reasonably believes to be the use or imminent use of unlawful force” and provided that the person “may use a degree of force which the person reasonably believes to be necessary for the purpose.” The statute did not mention retreat or escape at all. Sandoval argued that the trial court’s instruction was erroneous. The state supreme court agreed, rejected its own *Charles* decision, and reversed the conviction:

[T]he entire analytical flow of the *Charles* opinion is distinctly odd: The court did not examine the wording of either *ORS 161.209* or *161.219 at all*. Instead, the court set out the wording that the Oregon Criminal Law Commission had *proposed* to the legislature regarding the use of deadly force as part of the final draft of the proposed 1971 Criminal Code, which wording explicitly imposed a duty of retreat to avoid the necessity of using deadly force. Then, after noting that the 1971 legislature had *rejected* that wording, the court cited a view expressed in the Oregon Criminal Law Commission’s Commentary to the 1971 Code to the effect that “the statute probably was not necessary” because of existing Oregon case law. Then, without discussing at all the fact that the Oregon legislature had adopted statutes on the subject, the court concluded, inexplicably, that “Oregon case law * * * controls the subject.” . . .

Although . . . it seems surprising that this court would attempt to answer the question presented in *Charles* without resort to the controlling criminal statutes, that is precisely what the *Charles* court did. . . . We conclude, in short, that the legislature’s intent is clear on the face of [the statute]: The legislature did *not* intend to require a person to retreat before using deadly force to defend against the imminent use of deadly physical force by another. It follows from the foregoing that the trial court erred in giving the instruction in question. [Reversed and remanded.]

CHAPTER 2

HOMICIDE

§ 2.04 THE PENNSYLVANIA PATTERN: DEFINING LEVELS OF HOMICIDE

[D] Depraved-Heart Murder: Malice Aforethought in Unintentional Killings

Page 60: [Delete United States v. Fleming and note 1 following it. Substitute the following case and notes. At page 62, renumber existing note 2 as note 6 and place it at the end of the substituted notes.]

PEOPLE v. KNOLLER

59 Cal. Rptr. 3d 157 (California Supreme Court 2007)

KENNARD, J.

On January 26, 2001, two dogs owned by defendant Marjorie Knoller and her husband, codefendant Robert Noel, attacked and killed Diane Whipple in the hallway of an apartment building in San Francisco. Defendant Knoller was charged with second degree murder and involuntary manslaughter; codefendant Noel, who was not present at the time of the attack on Whipple, was charged with involuntary manslaughter but not murder. Both were also charged with owning a mischievous animal that caused the death of a human being

[I. Facts and Proceedings]

[Decedent Whipple lived on the sixth floor in the same San Francisco apartment building as defendants Knoller and Noel. Defendants, who were both attorneys, lived and operated their law practice out of their sixth floor, one and one-half bedroom apartment, which was down the hallway from Whipple. Defendants brought to their apartment a female Presa Canario named Hera in the spring of 2000. In the fall of that year, defendants brought a male Presa Canario named Bane to their home. The following winter, on January 26, 2001, at about 4:00 p.m., Knoller had taken Bane out of defendants' apartment and was returning to her apartment while Whipple was returning home with groceries. Whipple had unlocked her door, but never made it into her apartment before the Presas attacked her, killing her. What actually occurred was not clear from the record, but the record clearly established that Bane killed Whipple and Hera joined in the attack. The Presas had ripped off all of Whipple's clothing. The hallway carpet was soaked in blood, and streaks of blood covered the walls. Groceries and pieces of Whipple's clothing littered the hallway. Whipple had 77 discrete areas of injury, which covered her body "from head to toe." She died of multiple traumatic injuries and extensive blunt force trauma resulting in a loss of one-third of her blood.

[Defendant Knoller denied that the dogs had ever given any reason to believe that either posed any danger to any person. Under the evidence, however, Knoller's testimony was thoroughly incredible. Literature found in her apartment emphatically described the breed in dangerous terms. The original owner, a friend of the defendants, was a prison inmate and member of the Aryan Brotherhood. He had bred the dogs as "guard dogs" and prevented them from becoming "socialized." The prosecution presented a long list of witnesses who testified to conversations with Knoller about the

dogs' dangerousness, events in which the dogs had killed animals, numerous events of aggression toward people by the dogs, and multiple instances of Knoller's and Noel's inability to control them.]

. . . [A] jury convicted defendants on all counts. Both moved for a new trial. (See § 1181, subd. 6 [a trial court may grant a new trial when "the verdict or finding is contrary to law or evidence"].) [California law thus entitles the trial judge to review all of the evidence as a kind of "thirteenth juror" and to grant a new trial on evidentiary grounds even when a directed verdict would be inappropriate.] [The trial court] granted Knoller's motion in part, giving her a new trial on the second degree murder charge, but denying her motion for a new trial on the other two crimes of which she was convicted (involuntary manslaughter and possession of a mischievous animal that causes death).

With respect to Knoller, whose conviction of second degree murder was based on a theory of implied malice, the trial court took the position that, to be guilty of that crime, Knoller must have known that her conduct involved a *high probability of resulting in the death of another*. Finding such awareness lacking, the trial court granted Knoller's motion for a new trial on the second degree murder conviction. [The trial judge indicated that he believed almost all of the prosecution's evidence and disbelieved most of defendant's evidence. Although he concluded that defendants had known subjectively that the dogs were likely to "badly hurt" someone, he was unable to conclude that defendants knew that death, specifically, was a likely result.]

The trial court sentenced both defendants to four years' imprisonment, the maximum term for involuntary manslaughter [T]he People appealed from the order granting Knoller a new trial on the murder count. . . .

The Court of Appeal reversed the trial court's order granting Knoller a new trial on the second degree murder charge. It remanded the case to the trial court for reconsideration of the new trial motion in light of the Court of Appeal's holding that implied malice can be based simply on a defendant's conscious disregard of the risk of *serious bodily injury to another*. In all other respects, the Court of Appeal affirmed the convictions of both defendants. [This court, the California Supreme Court, then granted Knoller's petition to review her conviction for second-degree murder.] . . .

[W]e reaffirm the test of implied malice we set out in *People v. Phillips* (1966) 64 Cal. 2d 574, 51 Cal. Rptr. 225, 414 P.2d 353 and . . . reiterated in many later cases: Malice is implied when the killing is proximately caused by "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another — no more, and no less.

Measured against that test, it becomes apparent that the Court of Appeal set the bar too low, permitting a conviction of second degree murder, based on a theory of implied malice, if the defendant knew his or her conduct risked causing death or *serious bodily injury*. But the trial court set the bar too high, ruling that implied malice requires a defendant's awareness that his or her conduct had a *high probability* of resulting in death Because the trial court used an incorrect test of implied malice . . . , we conclude that it abused its discretion in granting Knoller a new trial on the second degree murder count. It is uncertain whether the court would have granted the new trial had it used correct legal standards. We therefore remand the matter to the Court of Appeal, and direct it to return the case to the trial court with directions to reconsider defendant Knoller's new trial motion in light of the views set out in this opinion.

II. The Elements of Implied Malice

Murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. (§ 188.) At issue here is the definition of “implied malice.”

Defendant Knoller was convicted of second degree murder as a result of the killing of Diane Whipple by defendant’s dog, Bane. Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder. (See §§ 187, subd. (a), 189.) Section 188 provides: “[M]alice may be either express or implied. It is express when there is manifested a deliberate intention to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”

The statutory definition of implied malice, a killing by one with an “abandoned and malignant heart” (§ 188), is far from clear in its meaning. Indeed, an instruction in the statutory language could be misleading, for it “could lead the jury to equate the malignant heart with an evil disposition or a despicable character” instead of focusing on a defendant’s awareness of the risk created by his or her behavior. “Two lines of decisions developed, reflecting judicial attempts ‘to translate this amorphous anatomical characterization of implied malice into a tangible standard a jury can apply.’” (*People v. Nieto Benitez* (1992) 840 P.2d 969, quoting *People v. Protopappas* (1988) 201 Cal. App. 3d 152, 162–163, 246 Cal. Rptr. 915.) Under both lines of decisions, implied malice requires a defendant’s awareness of the risk of death to another.

The earlier of these two lines of decisions . . . originated in Justice Traynor’s concurring opinion in *People v. Thomas* (1953) 41 Cal. 2d 470, 480, 261 P.2d 1, which stated that malice is implied when “the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.” (We here refer to this as the *Thomas* test.) The later line dates from this court’s 1966 decision in *People v. Phillips, supra*: Malice is implied when the killing is proximately caused by “‘an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.’” (The *Phillips* test.)

In *People v. Watson* (1981) 30 Cal. 3d 290, 300, 179 Cal. Rptr. 43, 637 P.2d 279, we held that these two definitions of implied malice in essence articulated the same standard. Concerned, however, that juries might have difficulty understanding the *Thomas* test’s concept of “wanton disregard for human life,” we later emphasized that the “better practice in the future is to charge juries solely in the straightforward language of the ‘conscious disregard for human life’ definition of implied malice,” the definition articulated in the *Phillips* test.* (*People v. Dellinger* (1989) 783 P.2d 200.) The standard jury instructions thereafter did so. (See CALJIC No. 8.11; CALCRIM No. 520.) Since 1989, our decisions have articulated the standard we set out in *Dellinger* and in CALJIC No. 8.11. The trial court here instructed the jury in the language of CALJIC No. 8.11.

III. The Court of Appeal’s Test for Implied Malice

As discussed in the preceding part, the great majority of this court’s decisions establish that a killer acts with implied malice only when acting with an awareness of *endangering human life*. This principle has been well settled for many years, and it is

* In a footnote, the Supreme Court indicated that the “better practice in the future” would be for courts as well as juries to use the *Phillips* “conscious disregard” standard rather than the *Thomas* “wanton disregard” language.

embodied in the standard jury instruction given in murder cases, including this one. The Court of Appeal here, however, held that a second degree murder conviction, based on a theory of implied malice, can be based simply on a defendant's awareness of the risk of causing *serious bodily injury* to another. . . .

. . . We conclude that a conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life. In holding that a defendant's conscious disregard of the risk of serious bodily injury suffices to sustain such a conviction, the Court of Appeal erred.

IV. The Trial Court's Grant of a New Trial on the Second Degree Murder Charge

We now turn to the second issue raised by the petition for review — whether the trial court abused its discretion in granting defendant Knoller a new trial on the second degree murder charge. Such an abuse of discretion arises if the trial court based its decision on impermissible factors.

In granting Knoller a new trial, the trial court properly viewed implied malice as requiring a defendant's awareness of the danger that his or her conduct will result in another's *death* and not merely in serious bodily injury. But the court's ruling was legally flawed in other respects. As we explain below, the trial court based its ruling on an inaccurate definition of implied malice

As discussed earlier, this court before its decision in *People v. Dellinger, supra*, had defined implied malice in two similar but somewhat different ways. Under the *Thomas* test, malice is implied when “the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.” Under the *Phillips* test, malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” . . .

Here, the trial court properly instructed the jury in accordance with the *Phillips* test. But when the court evaluated defendant Knoller's new trial motion, it relied on language from the *Thomas* test, and as explained below, its description of that test was inaccurate. The court stated that a killer acts with implied malice when the killer “*subjectively knows*, based on everything, that the conduct that he or she is about to engage in has a *high probability of death* to another human being” and thus, the issue in this case was “whether or not as a *subjective* matter and as a matter of law Ms. Knoller *knew* that there was a *high probability*” that her conduct would result in someone's death. (Italics added.) But “high probability of death” is the *objective*, not the *subjective*, component of the *Thomas* test, which asks whether the defendant's act or conduct “involves a high probability that it will result in death.” The *subjective* component of the *Thomas* test is whether the defendant acted with “a base, antisocial motive and with wanton disregard for human life.” Nor does the *Phillips* test require a defendant's awareness that his or her conduct has a *high probability* of causing death. Rather, it requires only that a defendant acted with a “conscious disregard for human life.” . . .

V. Conclusion and Disposition

In sum, the trial court abused its discretion in granting defendant Knoller a new trial on the second degree murder charge. That court erroneously concluded both that Knoller could not be guilty of murder, based on a theory of implied malice, unless she appreciated that her conduct created a high probability of someone's death It is uncertain whether the trial court would have reached the same result using correct legal standards. Moreover, the Court of Appeal, in reversing the trial court's order, also erred, mistakenly reasoning that implied malice required only a showing that the defendant appreciated the risk of serious bodily injury. Under these circumstances, we

conclude that the matter should be returned to the trial court to reconsider its new trial order in light of the views set out in this opinion. [Reversed and remanded.]

NOTES AND QUESTIONS

(1) *“Wanton” Disregard Versus “Conscious” Disregard: Are There Really Two Competing Definitions of Implied Malice?* The court points out that some cases imply malice from a “base, antisocial motive . . . with wanton disregard” for life, while others require “conscious disregard for life.” Is the law sufficiently clearly defined, if it depends on such terms as “base,” “antisocial motive,” and “wantonness”? Notice that California courts avoid using these terms in jury instructions. Should judges also avoid basing decisions on them, too, as this court suggests?

(2) *Decades of Confusion.* As you can tell, this *Knoller* opinion was preceded by decades of confusion about the meaning of depraved-heart murder (or abandoned-and-malignant-heart murder, in California). Both the trial judge and the Court of Appeals struggled mightily to conform to the many prior decisions that seemed to point in different directions, and both came to conclusions that this court, the Supreme Court, says were wrong, but wrong for different reasons. This kind of confusion is a bad thing. Above all, crimes should be clearly defined. What do you think caused such deep confusion to persist for so long — and do you think the Supreme Court has finally made the matter clear enough?

(3) *Why Has the Legislature Been Content with the Vague Statutory Language Here, Which Depends Upon Metaphorical Terms Like “Malignant and Abandoned Heart”?* The court criticizes the legislative language, which it calls an “amorphous anatomical metaphor.” The language has been in the statute for well over a century, but the legislature has not refined it. The metaphor is so misleading that the court says it should not be told to juries. Thus the judiciary, the non-democratic branch of government, is left not just to interpret the language, but to abandon it and create its own standard — or so one can argue. Has the legislature failed in its duty to define murder? Has it required the courts to assume more than a judicial role?

(4) *The Model Penal Code (and State Laws Based Upon It).* As we shall see, the Model Penal Code abolishes the concept of implied malice and defines both murder and manslaughter in terms that arguably are clearer. So do the States that have modeled their laws on the MPC. See the later sections of this chapter.

(5) *The Distinction in California Between Depraved-Heart Murder and Involuntary Manslaughter: It Can Be Defined, But Is It Workable?* The court explains that implied malice for depraved-heart murder requires “subjective” awareness of risk. Involuntary manslaughter, in California, is different: It does not require actual awareness of risk. Objective gross negligence is enough for the lesser crime, in California. Thus, the definition seems clear — in theory. Factually, however, it can be hard to apply. If the defendant drives with extreme recklessness while intoxicated, for example, it is difficult to say whether the defendant is subjectively aware of a risk to human life, or is negligent in being unaware of the risk, under a beyond-a-reasonable-doubt standard. Will it be possible for jury verdicts based upon this distinction to be consistent?

§ 2.06 THE FELONY MURDER RULE

[A] The Felony Murder Rule in Practice: Its Definition and Its Limits

[2] Merger of Lesser Offenses

Page 90: [Eliminate the last sentence of note 4, and add the following note:]

(5) *Is There Any Hope for Consistency?: Even Though Shooting at an Occupied Dwelling Can Support Felony Murder, Shooting at an Occupied Vehicle Cannot!* *People v. Bejarano*, 57 Cal. Rptr. 3d 486 (Cal. App. 2007). The defendant in this case shot at rival gang members in an Oldsmobile. One of the occupants was struck and killed. The defendant was convicted of murder based on an instruction that used the felony of discharging a firearm at an occupied motor vehicle, that is, the Oldsmobile. The court held that felony murder could not be based upon this felony. It distinguished *Hansen* on the ground that the defendant, here, had “admitted that he had committed assault with a firearm against the occupants.” He “had no collateral purpose in shooting at the occupants of the Oldsmobile.” In *Hansen*, the felony of shooting at an occupied dwelling could be committed without an intent to kill, but the court distinguished the felony of shooting at an occupied motor vehicle on the ground that this defendant had the intent to shoot someone. Is this distinction valid? (Is there any hope for consistency?) Consider the following case.

CHAPTER 3

THE ELEMENTS OF CRIMES: MENS REA AND ACTUS REUS

§ 3.03 FIVE ELEMENTS OF CRIMES

Page 120: [At the end of Example 3A, add:]

3. *Is Operating a Zamboni on the Ice While Drunk a Crime? No Drunk Driving Charge for Zamboni Operator*, www.msnbc.com/id/17930215, April 3, 2007. Zamboni operator John Peragallo was charged with drunken driving after a fellow employee at a sports arena told police the machine was speeding and nearly crashed into the boards. Peragallo's blood alcohol level was 0.12 percent, well above the .08 percent required for conviction. The trial judge, however, ruled that the four-ton ice rink grooming machines are not motor vehicles because they are not usable on highways and cannot carry passengers. (Peragallo, 64 years old, testified at his trial that he did drink beer and vodka, but not until after he had groomed the ice. However, he had told police that he had a shot of Sambuca with his breakfast coffee and two Valium pills before work.)

§ 3.04 ACTUS REUS: THE REQUIREMENT OF A VOLUNTARY ACT (OR OMISSION)

Page 124: [Insert the following addition to note 1:]

These arguments proved unpersuasive in *People v. Gastello*, 57 Cal. Rptr. 3d 293 (Cal. App. 2007). The defendant was arrested for being under the influence of a controlled substance. Upon being booked into the county jail, he was searched and found to be in possession of methamphetamine. On this basis, he was convicted of bringing drugs into a jail. The court reversed and vacated the conviction. "We are dealing here with a crime requiring an affirmative act (bringing drugs into a jail), not a crime of omission (e.g., failing to file a tax return)." The defendant "omitted to confess to having the drugs, but that is not an affirmative act. Defendant did nothing but submit to the lawful authority of the police."

§ 3.08 MENS REA ELEMENTS IN CRIMES

[A] Defining the Elements and Distinguishing Their Gradations

Page 151: [At the end of the notes, add:]

(5) A "Knowingly Corrupt[]" Crime Requires Consciousness of Wrongdoing: *Arthur Andersen v. United States*, 544 U.S. 696 (2005). The federal Victim and Witness Protection Act, 18 U.S.C. § 1512, makes it a crime for anyone to "knowingly . . . corruptly persuad[e] another person" to withhold or alter documents in an official proceeding. An in-house lawyer for Arthur Andersen, a worldwide accounting firm, circulated a memorandum instructing employees to follow the firm's document destruction policies with respect to information connected with investigations of Enron Corporation by the SEC. The trial judge gave the jury an instruction to convict Andersen even if it "honestly and sincerely believed that its conduct was lawful."

The government argued that the word "knowingly" did not modify the word "corruptly" but merely required that the conduct be undertaken knowingly, if it was in

fact corrupt. The Supreme Court, however, held that the phrase, “knowingly . . . corruptly,” included a requirement of “consciousness of wrongdoing.” The Court observed: “Indeed, it is striking how little culpability the instructions required.” By the time the Supreme Court reviewed the conviction, however, several years after the jury had found Andersen guilty, various states had revoked Andersen’s licenses to practice, and Andersen had ceased to function other than as a shell of its former self.

(6) *Sometimes, “Willfulness” Also Requires Proof of Intent to Violate the Law: United States v. Fields*, 500 F.3d 1327 (11th Cir. 2007). Usually, the defendant need not have a mens rea for violating the law, but if the statute defining the crime requires it, then the prosecution must prove intent to violate the law. The federal Child Support Recovery Act makes it a crime to “willfully” fail to pay a past-due support obligation for a child residing in another state. Is it enough, if the prosecution proves that the defendant willfully failed to pay? Or must it prove that the defendant *knew* that the child was in other state? Yes, said this court. Willfulness requires intent to violate the law, and “Unless the defendant has knowledge of the facts constituting the offense, he cannot be said to have acted with the requisite willfulness to violate the law.”

[B] The Model Penal Code Approach

[1] The Higher Mental States: Intent (“Purposefulness”) and Knowledge

Page 157: [At the end of the notes, add:]

(5) *Can There Be “Intent” or “Knowledge” if the Defendant Does Not Perceive What Is Happening Because of a Mental Disease?: Clark v. Arizona*, 126 S. Ct. 2709 (2006). Clark was convicted of first degree murder under an Arizona statute prohibiting the intentional or knowing killing of a police officer in the line of duty. Evidence showed that Clark had previously stated he wanted to shoot police officers and had lured the victim to the scene to kill him. In defense, Clark offered evidence that he suffered from paranoid schizophrenia with delusions about “aliens” when he killed the officer. In addition to offering this evidence in support of a defense of insanity, Clark offered it to rebut the prosecution’s evidence of mens rea, claiming that he could not have acted intentionally or knowingly to kill an officer because his perception of reality was so severely distorted that he did not know his actions were wrong. But under Arizona’s *Mott* rule, announced in *State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997), psychiatric testimony was inadmissible to negate specific intent. In other words, Arizona did not allow evidence of a mental disorder short of insanity to affect criminal liability. The trial judge, sitting without a jury, rejected Clark’s insanity defense, held that his psychiatric evidence could not be used to rebut the State’s evidence of knowledge and intent, and convicted Clark. Clark argued that this holding violated the due process clause of the Constitution.

The Supreme Court rejected Clark’s argument. Clark was entitled to have the government prove each element of the crime, including his intent; however, it did so, by affirmative evidence. Clark also had a due process right to present evidence favorable to himself on an element that must be proven to convict him, but this right could be curtailed if there was good reason for doing so. Clark was free to offer non-psychiatric evidence, of the everyday “observation” type, to show what was on his mind when he committed the act. But confusion could have resulted if psychiatric evidence were received as relevant to two completely different issues, namely the insanity defense, which is governed by one standard and requires proof from the defendant, as versus the element of intent or knowledge, which was governed by completely different standards and required proof by the prosecution beyond reasonable doubt. Arizona had defined its

criminal doctrines so that nothing short of insanity would suffice to prove that defense, and it was entitled to prohibit psychiatric evidence about mens rea to avoid confusing the standard for that defense.

§ 3.09 TRANSFERRED INTENT, DIFFERING CRIMES, AND THE OSTRICH PROBLEM

[B] The “Ostrich Problem”: Deliberate Ignorance as Knowledge

Page 166: [Delete the citation to *United States v. Sanchez-Robles* in note 2. Also, delete the opinion in *Sanchez-Robles* that appears at pp. 166–68. Delete notes 1 and 2 on page 168. Substitute the following case and notes. At page 168, renumber existing note 3 as note 5 and place it at the end of the substituted notes.]

UNITED STATES V. HEREDIA

483 F.3d 913

(United States Court of Appeals, 9th Circuit 2007) (en banc)

KOZINSKI, CIRCUIT JUDGE.

We revisit *United States v. Jewell*, 532 F.2d 697(9th Cir. 1976) (en banc), and the body of case law applying it. [The *Jewell* case had recognized a jury instruction saying that deliberate ignorance could satisfy a requirement of knowledge. Such an instruction was referred to as a “*Jewell* instruction” or an “ostrich instruction.” A complex and conflicting body of case law had developed about the circumstances in which the instruction might be proper.]

I

Defendant Carmen Heredia was stopped at an inland Border Patrol checkpoint while driving from Nogales to Tucson, Arizona. Heredia was at the wheel and her two children, mother, and one of her aunts were passengers. The border agent at the scene noticed what he described as a “very strong perfume odor” emanating from the car. A second agent searched the trunk and found 349.2 pounds of marijuana surrounded by dryer sheets, apparently used to mask the odor. Heredia was arrested and charged with possessing a controlled substance with intent to distribute under 21 U.S.C. § 841(a)(1).

At trial, Heredia testified that on the day of her arrest she had accompanied her mother on a bus trip from Tucson to Nogales, where her mother had a dentist’s appointment. After the appointment, she borrowed her Aunt Belia’s car to transport her mother back to Tucson. Heredia told DEA Agent Travis Birney at the time of her arrest that, while still in Nogales, she had noticed a “detergent” smell in the car as she prepared for the trip and asked Belia to explain. Belia told her that she had spilled Downey fabric softener in the car a few days earlier, but Heredia found this explanation incredible.

Heredia admitted on the stand that she suspected there might be drugs in the car, based on the fact that her mother was visibly nervous during the trip and carried a large amount of cash, even though she wasn’t working at the time. However, Heredia claimed that her suspicions were not aroused until she had passed the last freeway exit before the checkpoint, by which time it was too dangerous to pull over and investigate.

The government requested a deliberate ignorance instruction [which had originated in the *Jewell* opinion], and the judge obliged, overruling Heredia’s objection. The instruction, cribbed from our circuit’s *Model Jury Instruction 5.7*, read as follows: “You

may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.” On appeal, defendant asks us to overrule *Jewell* and hold that section 841(a)(1) extends liability only to individuals who act with actual knowledge. Should *Jewell* remain good law, she asks us to reverse her conviction because the instruction given to the jury was defective and because there was an insufficient factual basis for issuing the instruction in the first place.

II

While *Jewell* has spawned a great deal of commentary and a somewhat perplexing body of case law, its core holding was a rather straightforward matter of statutory interpretation: “[K]nowingly” in criminal statutes is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it.” In other words, when Congress made it a crime to “knowingly . . . possess with intent to manufacture, distribute, or dispense, a controlled substance,” 21 U.S.C. § 841(a)(1), it meant to punish not only those who know they possess a controlled substance, but also those who don’t know because they don’t want to know.⁴

Overturing a long-standing precedent is never to be done lightly Since *Jewell* was decided in 1976, every regional circuit — with the exception of the D.C. Circuit — has adopted its central holding. Indeed, many colloquially refer to the deliberate ignorance instruction as the “*Jewell* instruction.” Congress has amended section 841 many times since *Jewell* was handed down, but not in a way that would cast doubt on our ruling.⁶ . . .

That said, there are circumstances when a precedent becomes so unworkable that keeping it on the books actually undermines the values of evenhandedness and predictability that the doctrine of stare decisis aims to advance. Here, we recognize that many of our post-*Jewell* cases have created a vexing thicket of precedent that has been difficult for litigants to follow and for district courts—and ourselves—to apply with consistency. But, rather than overturn *Jewell*, we conclude that the better course is to clear away the underbrush that surrounds it.

III

The parties have pointed out one area where our cases have not been consistent: Whether the jury must be instructed that defendant’s motive in deliberately failing to

⁴ As our cases have recognized, deliberate ignorance, otherwise known as willful blindness, is categorically different from negligence or recklessness. See, e.g., *United States v. Fulbright*, 105 F.3d 443, 447 (9th Cir. 1997); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991). A willfully blind defendant is one who took *deliberate* actions to avoid confirming suspicions of criminality. A reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; a negligent defendant is one who should have had similar suspicions but, in fact, did not.

⁶ Our dissenting colleague seeks support for her position from the fact that Congress has, on occasion, defined the scienter requirement in some criminal statutes as “knows, or has reasonable grounds to believe.” But “has reasonable grounds to believe” defines a mental state that is less than actual knowledge. By contrast, *Jewell* defines willful blindness as knowledge — and sets a much higher standard for satisfying it. Thus, under *Jewell*, the prosecution must prove that defendant was aware of a “high probability” that he is in the possession of contraband, and that he “deliberately avoided learning the truth.” This standard focuses on defendant’s actual beliefs and actions, whereas “has reasonable grounds to believe” is an objective standard that could be satisfied by showing what a reasonable person would believe, regardless of defendant’s actual beliefs. . . .

learn the truth was to give himself a defense in case he should be charged with the crime. *Jewell* itself speculated that defendant’s motive for failing to learn the truth in that case was to “avoid responsibility in the event of discovery.” Yet the opinion did not define motive as a separate prong of the deliberate ignorance instruction. And, we affirmed, even though the instruction given at Jewell’s trial made no mention of motive. Since then, we’ve upheld two-pronged instructions, similar to the one given here, in at least four other published opinions.

The first mention of the motive prong came in a dissent by then — Judge Kennedy, who also authored the dissent in *Jewell*. See *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1326 (9th Cir. 1977) (Kennedy, J., dissenting). Judge Kennedy’s chief concern was with what he viewed as the absence of *deliberate* avoidance on the part of the defendant in that case. At any rate, he was not writing for the court. Yet some of our opinions seem to have adopted the motive prong, providing little justification for doing so other than citation to Judge Kennedy’s dissent. . . .

Heredia argues that the motive prong is necessary to avoid punishing individuals who fail to investigate because circumstances render it unsafe or impractical to do so. She claims that she is within this group, because her suspicions did not arise until she was driving on an open highway where it would have been too dangerous to pull over. She thus claims that she had a motive *other* than avoiding criminal culpability for failing to discover the contraband concealed in the trunk.

We believe, however, that the second prong of the instruction, the requirement that defendant have *deliberately* avoided learning the truth, provides sufficient protections for defendants in these situations. A deliberate action is one that is “[i]ntentional; premeditated; fully considered.” BLACK’S LAW DICTIONARY 459 (8th ed. 2004). A decision influenced by coercion, exigent circumstances or lack of meaningful choice is, perforce, not deliberate. A defendant who fails to investigate for these reasons has not deliberately chosen to avoid learning the truth.

We conclude, therefore, that the two-pronged instruction given at defendant’s trial met the requirements of *Jewell* and, to the extent some of our cases have suggested more is required, they are overruled. . . .

IV

Defendant also claims there was insufficient foundation to give the *Jewell* instruction. In order to address this claim, we must first identify the standard by which we review a district court’s decision to issue a *Jewell* instruction.

A. The differing standards of review we apply reflect the relative competencies and functions of the appellate and district courts. Whether a jury instruction was properly given presents two questions, one primarily factual, the other purely legal. Whether the substance of the instruction itself is correct — i.e., whether it accurately describes the elements of the charged crime — is a legal question of the sort we review de novo. But whether an instruction should be given in the first place depends on the theories and evidence presented at trial. This is mostly a factual inquiry, but not entirely. It also requires judgment as to whether the proposed instruction is relevant to the issues presented or would unduly confuse the jury. The district judge’s proximity to the trial and intimate knowledge of the record justify considerable deference to his judgment in these situations. Accordingly, we typically review such decisions for abuse of discretion.

Jewell cases have been an exception to this general order of things, as we have long reviewed a district court’s decision to give a deliberate ignorance instruction de novo. See *Shannon*, 137 F.3d at 1117; *United States v. Fulbright*, 105 F.3d 443, 447 (9th Cir. 1997); *United States v. Asuncion*, 973 F.2d 769, 772 (9th Cir. 1992). This rule derives, not from *Jewell* itself, but from a later case, *Asuncion*. *Asuncion* summarily adopted the de novo standard in *Jewell* cases, purportedly relying on another of our cases, *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991). *Sanchez-Robles* provides

no support for this proposition. It mentions *de novo* review, but only in conjunction with the legal question of whether the jury instruction “misstated elements of a statutory crime.” The rule adopted in *Asuncion* has been followed by no other federal court of appeals.

On reflection, we find no reason to treat *Jewell* instructions differently from other jury instructions. Still, we might have been willing to leave well enough alone had *Asuncion*’s progeny shown promise. But, in the years since, we’ve seen a proliferation of narrow, heavily fact-dependent and at times contradictory opinions that have been difficult for both judges and litigants to navigate.¹² It should not be surprising that our attempt to micromanage the district courts by cataloguing the various situations in which an instruction is justified has yielded such poor results. We therefore abandon the *Asuncion* enterprise and re-adopt the normal rule applicable to jury instructions by reviewing the decision to give a deliberate ignorance instruction for abuse of discretion. Opinions to the contrary are overruled.

B. A district court should approach the government’s request to give a *Jewell* instruction in the same way it deals with any other proposed jury instruction. In general, a party is entitled to an instruction to help it prove its theory of the case, if the instruction is “supported by law and has foundation in the evidence .” *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

In deciding whether to give a particular instruction, the district court must view the evidence in the light most favorable to the party requesting it. When a party requests instructions on alternative theories, the district judge must consider the instructions separately and determine if the evidence could support a verdict on either ground. When knowledge is at issue in a criminal case, the court must first determine whether the evidence of defendant’s mental state, if viewed in the light most favorable to the government, will support a finding of actual knowledge. If so, the court must instruct the jury on this theory. Actual knowledge, of course, is inconsistent with willful blindness. The deliberate ignorance instruction only comes into play, therefore, if the jury rejects the government’s case as to actual knowledge. In deciding whether to give a willful blindness instruction, in addition to an actual knowledge instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government’s evidence of actual knowledge. If so, the court may also give a *Jewell* instruction.

This case well illustrates the point. Taking the evidence in the light most favorable to the government, a reasonable jury could certainly have found that Heredia actually knew about the drugs. . . . Based on this evidence, a jury could easily have inferred that Heredia actually knew about the drugs in the car because she was involved in putting them there.

The analysis in the foregoing paragraph presupposes that the jury believed the government’s case in its entirety, and disbelieved all of Heredia’s exculpatory statements. While this would have been *a* rational course for the jury to take, it was not the only one. For example, a rational jury might have bought Heredia’s basic claim that she didn’t know about the drugs in the trunk, yet disbelieved other aspects of her story. The jury could, for example, have disbelieved Heredia’s story about *when* she first began to suspect she was transporting drugs. . . .

¹² Whether the evidence is sufficient to warrant giving a *Jewell* instruction is an issue that has divided several panels. *See, e.g., Heredia*, 429 F.3d at 820; *United States v. McAllister*, 747 F.2d 1273 (9th Cir. 1984); *United States v. Murrieta-Bejarano*, 552 F.2d 1323 (9th Cir. 1977). In cases where we’ve held that the evidence was insufficient, we’ve often distinguished the facts from those in *Jewell* itself on exceedingly narrow grounds. *See, e.g., Heredia*, 429 F.3d at 827 (distinguishing *Jewell* because defendant’s close relationship with the purported principals mitigated evidence of suspicion); *Baron*, 94 F.3d at 1318 (distinguishing *Jewell* on the basis that defendant was not aware of a secret compartment in the car). The result has been a patchwork of rules that apply only in particular factual situations, such as the rule regarding suspicious scents.

All of these are scenarios the jury could rationally have drawn from the evidence presented, depending on how credible they deemed Heredia's testimony in relation to the other evidence presented. The government has no way of knowing which version of the facts the jury will believe, and it is entitled (like any other litigant) to have the jury instructed in conformity with each of these rational possibilities. That these possibilities are mutually exclusive is of no consequence. A party may present alternative factual theories, and is entitled to instructions supporting all rational inferences the jury might draw from the evidence.

We do not share the worry, expressed in some of our cases, that giving both an actual knowledge and a deliberate ignorance instruction is likely to confuse the jury. A jury is presumed to follow the instructions given to it, and we see no reason to fear that juries will be less able to do so when trying to sort out a criminal defendant's state of mind than any other issue. Nor do we agree that the *Jewell* instruction risks lessening the state of mind that a jury must find to something akin to recklessness or negligence. The instruction requires the jury to find beyond a reasonable doubt that defendant "was aware of a high probability" of criminality and "deliberately avoided learning the truth." Indeed, the instruction actually given in this case told the jurors to acquit if they believed defendant was "simply careless." Recklessness or negligence never comes into play, and there is little reason to suspect that juries will import these concepts, as to which they are not instructed, into their deliberations. *See n. 4 supra*.

Even if the factual predicates of the instruction are present, the district judge has discretion to refuse it. . . . Concerns of this nature are best dealt with by the district judge, whose familiarity with the evidence and the events at trial is necessarily superior to our own. We will second guess his decision only in those rare cases where we find an abuse of discretion. For the reasons explained, the district court did not abuse its discretion by giving the *Jewell* instruction here.

V

We decline the invitation to overrule *Jewell*, and further hold that district judges are owed the usual degree of deference in deciding when a deliberate ignorance instruction is warranted. While the particular form of the instruction can vary, it must, at a minimum, contain the two prongs of suspicion and deliberate avoidance. The district judge may say more, if he deems it advisable to do so, or deny the instruction altogether. We review such decisions for abuse of discretion. The instruction given at defendant's trial met these requirements, and the district judge did not abuse his discretion in issuing it. AFFIRMED.

KLEINFELD, CIRCUIT JUDGE, concurring in the result:

Because the evidence in this case justified a wilful blindness instruction, and the instruction's form (to which no objection was made below) was not *plainly* erroneous, I would affirm Heredia's conviction. But the majority errs in concluding that motivation to avoid criminal responsibility need not be an element of a wilful blindness instruction. . . .

The majority converts the statutory element that the possession be "knowing" into something much less — a requirement that the defendant be suspicious and deliberately avoid investigating. The imposition on people who intend no crime of a duty to investigate has no statutory basis. The majority says that its requirement is enough to protect defendants who cannot investigate because of "coercion, exigent circumstances or lack of meaningful choice." . . . The majority seems to mean that if someone can investigate, they must. A criminal duty to investigate the wrongdoing of others to avoid wrongdoing of one's own is a novelty in the criminal law.

. . . Shall someone who thinks his mother is carrying a stash of marijuana in her suitcase be obligated, when he helps her with it, to rummage through her things?

Should Heredia have carried tools with her, so that (if her story was true) she could open the trunk for which she had no key? Shall all of us who give a ride to child's friend search her purse or his backpack?

No "coercion, exigent circumstances, or lack of meaningful choice" prevents FedEx from opening packages before accepting them, or prevents bus companies from going through the luggage of suspicious looking passengers. But these businesses are not "knowingly" transporting drugs in any particular package, even though they know that in a volume business in all likelihood they sometimes must be. They forego inspection to save time, or money, or offense to customers, not to avoid criminal responsibility. But these reasons for not inspecting are not the ones acceptable to the majority ("coercion, exigent circumstances, or lack of meaningful choice"). The majority opinion apparently makes these businesses felons despite the fact that Congress did not. . . .

. . . A *Jewell* instruction ought to require (1) a belief that drugs are present, (2) avoidance of confirmation of the belief, and (3) wilfulness in that avoidance — that is, choosing not to confirm the belief in order to "be able to deny knowledge if apprehended." The instruction should expressly exclude recklessness, negligence and mistake (the one given only excluded "simpl[e] careless[ness]" and an "actual[] belie[f] that no drugs were in the vehicle"). Anything less supports convictions of persons whom Congress excluded from statutory coverage with the word "knowingly." People who possess drugs, but do not do so "knowingly," are what we traditionally refer to as "innocent."

The reason that I concur instead of dissenting is that defendant did not object to these deficiencies in the instruction, and the deficiencies were not "plain." . . . [Defendant] did not argue in the district court, as she now does on appeal, that the wilful blindness instruction, if given, should include a requirement that a defendant's wilful blindness be motivated by a desire to avoid criminal responsibility. . . .

GRABER, CIRCUIT JUDGE, with whom PREGERSON, THOMAS, and PAEZ, CIRCUIT JUDGES, join, dissenting:

Assuming the *Jewell* instruction to be proper, I agree with the majority that the standard by which to review a district court's decision to give one is "abuse of discretion" in the light of the evidence presented at trial. But as a matter of statutory construction, I believe that the *Jewell* instruction is not proper because it misconstrues, and misleads the jury about, the mens rea required by 21 U.S.C. § 841(a)(1). Under 21 U.S.C. § 841(a)(1), it is a crime to "*knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.*" (Emphasis added.) The plain text of the statute does not make it a crime to have a high probability of awareness of possession — knowledge or intention is required. The majority recognizes that willful blindness is a mens rea separate and distinct from knowledge. . . .

Instead of justifying its sleight-of-hand directly, the majority points to the fact that *Jewell* has been on the books for 30 years and that Congress has not amended the statute in a way that repudiates *Jewell* expressly. I find this reasoning unpersuasive. "[C]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction. . . ." Whatever relevance congressional *inaction* holds in this case is outweighed by actual congressional *action*. Under 21 U.S.C. § 841(a)(1), a person is guilty of a crime only if the requisite act is performed "knowingly or intentionally." By contrast, both before and after *Jewell*, Congress has defined several other crimes in which the mens rea involves a high probability of awareness — but it has done so in phrases dramatically different than the one here, which lists only knowledge and intent. *See, e.g.*, 18 U.S.C. §§ 175b(b)(1) ("knows or has reasonable cause to believe"), 175b(b)(2) (same), 792 ("knows, or has reasonable grounds to believe or suspect"), 842(h) ("knowing or having reasonable cause to

believe”), 2332d(a) (“knowing or having reasonable cause to know”), 2339(a) (“knows, or has reasonable grounds to believe”), 2424(a) (“knowing or in reckless disregard of the fact”). . . .

The majority recognizes that the *Jewell* instruction embodies a substantive decision that those who possess a controlled substance and “don’t know because they don’t want to know” are just as culpable as those who knowingly or intentionally possess a controlled substance. But Congress never made this substantive decision about levels of culpability — the *Jewell* court did. . . . [T]he majority directly contravenes the principle that “[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment.” . . .

I agree with the *Jewell* court that “one ‘knows’ facts of which he is less than absolutely certain.” That being so, the mens rea-reducing *Jewell* instruction not only is wrong, it also is unnecessary in the face of the kind of proof that a prosecutor is likely to produce. For example, if your husband comes home at 1:00 a.m. every Friday (after having left work at 5:00 p.m. the day before as usual), never reveals where he has been, won’t look you in the eye on Fridays, and puts Thursday’s shirts in the hamper bearing lipstick stains, your friends will agree that you “know” he is having an affair even if you refuse to seek confirmation. The role of a jury is to apply common sense to the facts of a given case. A sensible jury will be persuaded that a drug mule “knows” what she is carrying when confronted with evidence of how mules typically operate and how this mule acted — all without reference to a *Jewell* instruction.

Thus, I would overrule *Jewell* and interpret 21 U.S.C. § 841(a) to require exactly what its text requires — a knowing or intentional mens rea. . . .

NOTES AND QUESTIONS

(1) *Differing Ideas of Mens Rea.* These opinions deal with at least six different mens rea concepts: actual knowledge, deliberate ignorance, recklessness, negligence, carelessness, and mistake. Consider whether these really are distinct concepts, or whether they represent a continuum of different degrees of awareness which fade into each other. Given that the dissenters agree with the majority that “knowledge” can be present with less than “certainty,” is deliberate ignorance of a high probability really distinct from knowledge?

(2) *Is There a Danger That Juries Will Import Recklessness or Negligence Standards Into an Ostrich (or Jewell) Instruction?* The majority concludes that the two requirements it approves, (1) that the defendant have actual “awareness” of a “high probability” of the crime and (2) that the defendant “deliberately avoid” learning the truth, are sufficient to prevent a jury finding of knowledge based on mere recklessness or carelessness. The concurring judge argues, however, that the instruction also should require (3) a “motive” to “be able to deny knowledge if apprehended” and (4) an express negation of “recklessness, negligence, and mistake.” Is the concurring judge correct, or do the two protections provided by the majority-approved instruction express the concept so as to distinguish recklessness or negligence?

(3) *Does the Majority’s Deliberate Ignorance Instruction Really Create a New “Duty to Investigate”?* The concurring judge implies that if a mother is suspected sometimes to possess contraband, her son cannot help her with her suitcase without taking on a “duty to investigate.” Is this concern valid, if the son does not have an actual “awareness” of a “high probability” of contraband on this occasion and does not “deliberately avoid” learning the truth? Consider, also, the concurring judge’s example involving FedEx, which is aware that in handling millions of packages, it probably will possess some that contain contraband. Can this example be distinguished on the ground that FedEx does not “deliberately avoid” learning of specific packages containing drugs — or that it is not actually aware of a high probability of drugs in any specific package?

(4) *Does the Majority Violate the Principle That Legislatures, Not Courts, Should Create Crimes?* The dissenters argue that the court is legislating. Are they correct? You might compare this decision with *State v. Sandoval* (in Chapter 1, *supra*) where the court overruled a line of cases, based on one of its own decisions that ignored statutory language and substituted a court-made test. *Sandoval* firmly disapproved this approach. But in the present case, *Heredia*, the majority points to Congressional acquiescence as a reason for retaining *Jewell*. Is this argument persuasive? In the alternative, can it be argued that the majority simply carries out the proper judicial function of interpreting the statute, by defining the word “knowingly”? In this regard, notice that the dissenters recognize that knowledge can be based upon less than certainty, and they offer an example — involving a wife who ignores signs of a husband’s affair — that seems to imply knowledge from awareness of a high probability coupled with deliberate avoidance. If, in this example, the dissenters actually adopt the majority’s concept of “knowledge,” isn’t the majority correct in performing judicial duty to interpret the law?

CHAPTER 4

THE BUREN OF PROOF BEYOND A REASONABLE DOUBT

§ 4.02 THE CONSTITUTIONAL REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

[B] Crime “Elements,” “Defenses,” and “Affirmative Defenses”

Page 198: [At the end of the notes, add:]

(9) *Interpreting Federal Law to Place the Burden of Proving Duress on the Defendant: Dixon v. United States*, 126 S. Ct. 2437 (2006). Dixon was charged with the crime of unlawfully purchasing a firearm. She asserted a defense of duress, to the effect that her boyfriend had threatened to harm her and her daughters. The trial judge instructed the jury that Dixon had the burden to establish her defense by a preponderance of the evidence. Dixon objected, arguing that the due process clause required the government to disprove her defense by evidence beyond a reasonable doubt.

The Supreme Court reasoned that the duress evidence that Dixon had offered did not contradict or tend to disprove any element of her statutory offenses. Therefore, placement of the burden of proof on the defendant did not violate the due process clause. Nor did it violate the intent of Congress, because Congress was presumed to be familiar with the long-established common law rule that a defendant relying on an affirmative defense must set it up and establish it. Question: Does the placement of the burden of proof of duress upon the defendant make sense in policy terms?

§ 4.04 THE RISKS AND CONSEQUENCES OF ERROR (IN DEFINING OR APPLYING THE BURDEN)

[B] The Costs of Erroneous Conviction

Page 213: [At the end of Problem 4D, add:]

(4) *More Exonerations of Prisoners Who Already Have Served Substantial Sentences: DNA Test to Set Man Free After 18 Years*, HOUS. CHRONICLE, Jan. 19, 2006, at A1. Arthur M. Mumphrey, 42, was convicted of rape in an attack on a thirteen-year-old girl in 1986. DNA test results released in 2006, however, eliminated Mumphrey as the rapist. The tests were based upon semen from a vaginal swab stored since 1986. Mumphrey was scheduled to leave his prison unit to attend a hearing at which a state district judge was expected to release him on a personal recognizance bond until he was granted a pardon. He had served 18 years. (The same newspaper story reported on three other local cases where DNA testing led to release after 17 years, 4 1/2 years, and 10 years incarceration, respectively.) See also *DNA Exonerates Convicted Rapist*, HOUS. CHRONICLE, Nov. 8, 2002, at 21A (reporting exoneration in Maryland after 20 years' imprisonment).

Page 216: [At the end of page, add the following new subsection:]

[D] Can We Define Crimes So That We Make Proof of the Guilt-Innocence Distinction Clearer? An Example.

NOTE ON PROOF REQUIREMENTS AND CRIME DEFINITION

(1) *The Costs of Sloppy Crime Definition.* As we have seen in an earlier chapter, it is possible to define a crime so that as a practical matter, guilt is unprovable. It also is possible to define a crime so that proof is unreasonably difficult, or so that the definition is so vague that a great deal is left to guesswork by a jury. Obviously, these are undesirable results.

(2) *Defining Crime with the Burden of Proof in Mind.* This discussion suggests that the drafters of a criminal statute should carefully consider the burden of proof in defining crime elements.

(3) *An Example: Pennsylvania Defines the Crime of Drunk Driving in Terms of Blood Alcohol Content Two Hours After Arrest(!): Commonwealth v. Duda*, 923 A.2d 1138 (Pa. 2007). One issue that sometimes arises in drunk driving cases is that the human body changes blood alcohol content over time. It is possible, for example, for an arrestee to display a forbidden blood-alcohol level *after* the event, but to have not been intoxicated at the time the arrestee was driving. (This occurs if the arrestee drank a large amount in a short time and then drove before it fully entered the bloodstream.) It is usually difficult to impossible for the prosecution to prove exactly when the defendant drank what quantity. In theory, therefore, this uncertainty could automatically create reasonable doubt in many if not most drunk driving cases: a built-in reasonable doubt(!) In response to this possibility, Pennsylvania has created a new crime: driving under circumstances where the driver has a blood alcohol level of 0.08% *within two hours after the event of driving*. In the cited case, the state supreme court upheld the statute.

Is this kind of crime definition wise? What advantages and disadvantages can you see from defining crimes so as to facilitate the proof?

§ 4.05 PARTICULAR KINDS OF EVIDENCE

[A] Circumstantial Evidence

Page 223: [At the end of the notes, add:]

(6) *The Identity of the Homicide Victim Must Be Proved by Admissible Evidence Beyond a Reasonable Doubt, Too: Families Tearfully ID Dead in Driver's Trial*, HOUS. CHRONICLE, Nov. 14, 2006, at B1. Not only the elements contained in the statute, but also the essential elements of the indictment, must be proved beyond a reasonable doubt. This case illustrated the point in an unusual way. Defendant Tyrone Williams was indicted for smuggling illegal immigrants, causing death. In fact, 19 persons died in Williams's sealed, overheated trailer on the highway between the Rio Grande Valley and Houston. The prosecution had the burden of proving the identity of each of the 19 illegal immigrants, as charged in the indictment. Williams's attorneys advised him to stipulate to the identities of the victims and to the illegality of their presence. Against the advice of his attorneys, Williams refused to stipulate, requiring the prosecution to bring family members from Mexico, Honduras, El Salvador, and the Dominican Republic to make identifications from photographs. A few viewed the grisly pictures without showing emotion, but most family members broke into sobs or fought back tears. The wrenching testimony also affected the jurors, some of whom wiped tears from their eyes. Can you see why the defendant's attorneys advised him to stipulate?

[C] Eyewitness Testimony

Page 223: [Renumber note (2) at the bottom of the page as (3). Then, at 233, add:]

(4) *Lineup Reforms in Illinois (and a Surprising Study): “That’s Him! — Or Is It?”*, ABA J., Aug 2006, at 12. The Illinois legislature, concerned about instances of misidentification, enacted reforms requiring lineup administrators to instruct witnesses (1) that the real suspect may not be in the lineup, (2) that they need not make any identification, and (3) that they should not assume the administrator knows who the real suspect is. Furthermore, the legislature required the Illinois state police to conduct a study comparing current lineup methods with a “sequential, double-blind” procedure recommended by experts. “Sequential” lineups amount to showing a witness different suspects one at a time, rather than all at once. Commentators had maintained that sequential lineups would reduce false identifications. “Double-blind” means that the lineup is administered by an officer who does not know who the real suspect is. This method is intended to prevent the administrator from either intentionally or inadvertently steering the witness by clues suggesting whom to identify. The Illinois study was the first to compare the two procedures in the real world.

The results were surprising. The double-blind procedure recommended by the experts produced nearly 15 percent fewer correct suspect identifications than the simultaneous method did. Furthermore, the study showed that when a witness in a sequential lineup did positively identify a suspect, the witness was more than three times as likely to identify the wrong person as a witness to a simultaneous lineup. Witnesses were unable to identify a suspect in 47 percent of the sequential lineups, as opposed to 38 percent of the simultaneous ones. In summary, the study suggested that the “reforms” made lineups worse, not better, both in making correct identifications and in avoiding erroneous ones! “It tells me we shouldn’t be shaping policy based on academic data that may not reflect what is actually happening in the real world,” said the director of the study, who said she was as surprised by the results as anyone. Critics promptly denounced the Illinois study as methodologically flawed.

§ 4.09 REVIEW PROBLEMS BASED ON NEWSPAPER REPORTS

[B] **Headline: Government Unlikely to Convict Top Enron Executive Ken Lay, Experts Say**

Page 241: [Add the following note 3:]

(3) *But Lay Did Get Convicted.* How could the “experts” have been so wrong? Ken Lay did get convicted! The answer lies in the possibility, mentioned in the preceding note, of testimony from other indicted Enron executives. In fact, numerous former Enron officers testified for the Government, and they were able to supply convincing information about Ken Lay’s knowledge. (Lay died after being convicted but before he could appeal, and for that reason his conviction was vacated.)

CHAPTER 6

GENERAL DEFENSES TO CRIMES

§ 6.04 JUSTIFICATION (“I HAD A RIGHT TO DO IT”) AS THE BASIS OF TRUE DEFENSES

[A] Self-Defense

Page 306: [At the top of page, before item [3], add a new note 4:]

(4) *Oregon Adopts the “Stand Your Ground” Rule as a Result of Judicial Reinterpretation of Its Statutes: State v. Sandoval*, 156 P.3d 60 (Or. 2007). As a result of a 1982 interpretation by its state supreme court, Oregon originally followed the rule that retreat was necessary, if possible, before deadly force could be used. In 2007, however, the state supreme court revisited the statute and noted that it made no mention of retreat. Overruling its prior holding, the court held that retreat was not required — essentially adopting the stand-your-ground rule — and reversed a conviction based upon a jury instruction requiring retreat. [A fuller discussion of the court’s holding appears in Chapter 1, above.]

[H] Necessity: The Choice of Evils

Page 326: [Insert the following note after note 6, and renumber later notes:]

(7) *Necessity That Grows Out of Major Disasters, Such as Hurricane Katrina in New Orleans*. Hurricane Katrina swamped most of New Orleans with flood water after breaking the city’s levees. Three days later, the Memorial Medical Center sat in 10 feet of putrid flood waters, with no electrical power and no means of evacuating four terminal patients, ages 62 to 90. Two nurses and a doctor provided higher than usual therapeutic doses of morphine and Versaid, a sedative. The physician, Dr. Anna Pou, later explained “there were some patients there who were critically ill who, regardless of the storm, had the orders of do not resuscitate. In other words, if they died, to allow them to die naturally and to not use heroic methods to resuscitate them.” All four patients did die. Nevertheless, said Pou, “we did everything in our power to give the best treatment that we could to the patients in the hospital to make them comfortable.”

Louisiana’s Attorney General saw the matter differently: “This is not euthanasia. This is homicide.” A grand jury returned an indictment against all three health care workers, accusing them of second degree murder, carrying a mandatory sentence of life in prison.

Less serious acts were pervasive in New Orleans. A man walked down Canal Street with a pallet of food on his head. His wife insisted they were not stealing from the nearby Winn-Dixie supermarket: “It’s about survival right now. We got to feed our children.” At a Walgreen’s drug store in the French Quarter, people ran out with grocery baskets and coolers full of soft drinks, chips, and diapers. But in addition to food and diapers, looters filled industrial-sized garbage cans with clothing and jewelry and floated them down the street on bits of plywood and insulation as the National Guard passed by. To what extent would the defense of necessity apply to these cases of ostensible homicide and theft?

§ 6.05 EXCUSE (“I HAD NO RIGHT BUT I’M NOT RESPONSIBLE”)

[C] Insanity (and Incompetency)

[3] The Model Penal Code: “Substantial Capacity” to “Appreciate” and “Conform”

Page 347: [Add the following to the notes:]

(5) *Does Appreciation of “Wrongfulness” Mean Appreciation of Illegality, or Appreciation of Lack of Moral Justification? United States v. Ewing*, 494 F.3d 607 (7th Cir. 2007). Imagine a defendant who knows that a particular act of killing is illegal and that the public morality condemns it, but who believes that the act of killing is nevertheless justified, for reasons that are delusional. Suppose that a defendant, for example, hears the “voice of God” commanding the killing of an innocent person, obeys the “voice” by carrying out the killing surreptitiously, and hides evidence of the act to avoid detection. Does this killer qualify for the insanity defense on the ground that the delusional moral justification means a lack of appreciation of the “wrongfulness” of the act? Interestingly, the circuits are in conflict. In the Eighth and Ninth Circuits, appreciation of wrongfulness includes both “moral as well as criminal wrongfulness,” and a delusional justification provides an excuse “even if [the defendant] appreciated his acts to be criminal.” In other words, the hypothetical killer could obtain the benefits of the insanity defense in spite of knowing that everyone else would view the killing as a crime. The Seventh Circuit disagrees. In the cited case, that court rejected both the “subjective personal morality” approach of the Eighth and Ninth Circuit and also rejected a narrow “illegality” or knowledge of “criminality” approach. Instead, the court said that wrongfulness “is defined by reference to objective societal or public standards of moral wrongfulness, not the defendant’s subjective personal standards of moral wrongfulness.” Under the Seventh Circuit’s standard, the hypothetical killer who obeys the “voice” does not have an insanity defense, because this killer appreciates the public wrongfulness of the act. Consider which standard is most appropriate.

[4] Modern Approaches That Narrow or Abolish the Insanity Defense

Page 349: [At the end of the notes, add:]

(3) *Severe Restrictions of the Insanity Defense Are Constitutional: Clark v. Arizona*, 126 S. Ct. 2709 (2006). Clark was convicted of first degree murder for the crime of intentionally and knowingly killing a police officer in the line of duty. The evidence indicated that Clark had previously stated he wanted to shoot police officers and had lured the victim to the scene to kill him. Clark raised the affirmative defense of insanity, offering psychiatric evidence that Clark was suffering from paranoid schizophrenia with delusions about “aliens” when he killed the officer. The psychiatrist concluded that Clark was incapable of understanding right from wrong and was insane at the time of the killing.

Arizona, however, had thoroughly retrenched its treatment of insanity. Insanity did not lead to acquittal; it led to a verdict of “guilty but insane.” Furthermore, Arizona labeled insanity an “affirmative” defense, requiring it to be proved by the defendant, rather than by the State. The burden on the defendant was not mere preponderance, but rather required proof of insanity by “clear and convincing evidence.” Furthermore,

although Arizona earlier had followed both prongs of *M’Naghten* — providing for insanity either if the defendant was unable to understand what he was doing or was unable to understand his action was wrong — it dropped the first part. A defendant’s inability to understand what he was doing no longer qualified as insanity; only a failure to understand that the act was wrong would qualify. Clark argued that the “side-by-side” *M’Naghten* test, containing both prongs, was the minimum that a government must provide as a condition of due process.

The Supreme Court rejected Clark’s argument and upheld Arizona’s treatment of the insanity defense. Rather than finding that *M’Naghten* reflected a principle of justice so “fundamental” as to be required as a matter of due process, the Court pointed out that there was a wide diversity of American standards in governing insanity. In addition, Arizona’s revision arguably did not really change the standard, because cognitive incapacity is itself enough to demonstrate moral incapacity. In practical terms, said the Court, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime.

Page 352: [Add the following to note 5:]

In *United States v. Comstock*, 507 F. Supp. 2d 522 (E.D.N.C. 2007), a district judge held the federal Sexually Violent Predator legislation unconstitutional because, among other reasons, the burden of proof the legislation imposed was “clear and convincing evidence.” The court concluded that this proof burden, as opposed to a requirement of proof beyond a reasonable doubt, was a violation of substantive due process.

§ 6.06 REVIEW PROBLEM BASED ON NEWSPAPER CASES

[B] “Psychiatrist Testifies That Mother Who Drowned Her Children Did Not Know Right from Wrong”

Page 370: [At the end of this section, add the following note:]

(4) *Andrea Yates’s Retrial: Acquittal by Reason of Insanity.* Ultimately, in 2006, Yates was retried. This time, she was acquitted—with evidence very similar to that in her first trial and with instructions that were virtually identical. What kind of factors do you think could have led to such a difference in result?

CHAPTER 9

SENTENCING: THEORY AND PRACTICE

§ 9.02 AN INTRODUCTORY PROBLEM ON THE GOALS OF SENTENCING

Page 435: [At the end of the report about *United States v. Olis*, add the following:]

Updating the Olis Case: Ex-Dynegy Executive's Sentence Cut to 6 Years, Hous. CHRONICLE, Sept. 23, 2006, at 1A. In 2005, the United States Supreme Court ruled in an unrelated case that sentencing guidelines were not mandatory. This holding set the stage for Olis's attorney to argue for a new sentence on appeal. Following the Supreme Court's holding, the Fifth Circuit reversed, and it also held that the trial judge needed to give the issue of investor losses greater attention in determining the new sentence. The effect of the Supreme Court's holding was that the guideline sentence was advisory but not mandatory, and the effect of the Fifth Circuit's holding was to undermine the basis of the findings that had led to a guideline sentence of 24 years.

The trial judge heard two days of arguments and evidence about sentencing, ultimately holding, "it is not possible to estimate with any reasonable degree of certainty the actual loss to shareholders." He determined that the \$79 million in taxes that Dynegy had avoided paying to the U.S. Treasury provided a "reasonably certain estimate" of the harm Olis meant to cause. That figure would have meant a sentence of between 12 to 15 years. But the trial judge also took into account that Olis did not have the final say over the scheme, received no personal financial gain, and did not cause the company to collapse. Furthermore, Olis had "led an exemplary life," except for this crime. The trial judge ultimately reduced the sentence from 24 years to 6 years.

§ 9.06 MODERN VARIATIONS ON SENTENCING PHILOSOPHIES

[A] The Expressive Theory of Punishment

Page 461: [Add a new note 4:]

(4) *Increasing Use of Shaming Sanctions: Tennessee to Try Shame as Deterrent*, Hous. CHRONICLE, Jan. 1, 2006, at A4. A new Tennessee statute, effective in 2007, requires convicted drunken drivers to do 24 hours of roadside cleanup while wearing orange vests emblazoned with the phrase, "I am a drunk driver." A research manager at the National Conference of State Legislatures speculated, "If I'm forced to wear a sign saying that I'm a drunk driver, then I'm going to feel worse and worse about myself and I may drink more and more because I feel shunned." The Tennessee Sheriff's Association was concerned that the law would increase counties' costs and create record-keeping headaches. But a State Representative who had sponsored the law said, "You cause them to go out and pick up trash in front of their friends and neighbors, the embarrassment is going to be such that they're never going to want to go through that again."

§ 9.08 CONSTITUTIONAL LIMITS ON LEGISLATIVE SPECIFICATIONS OF SENTENCE LENGTHS

Page 472: [At the end of the notes, add:]

(4) *A Case in Which a Court Was Persuaded to Recognize Disproportion as a Basis for an Eighth Amendment Violation: Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007). The defendant in this case was 17 years old when he participated in a sex act with a 15-year-old girl. The act was willingly participated in by both parties, but the girl's age negated consent and made the act a crime by the seventeen-year-old. The Georgia Supreme Court held that the defendant's ten-year prison sentence was "grossly disproportionate to the crime." The sentence made "no measurable contribution to acceptable goals of punishment," even though it technically was within the range authorized by the legislature.

§ 9.09 SENTENCING OPTIONS

[B] Incarceration

Page 479: [At the end of note 1, add the following:]

In 2004, the prison population grew by 1.9 percent to more than 2.2 million people. Probationers numbered about 4.2 million, and parolees were more than 700,000. *See Number in Prison or on Supervision Nearly 7 Million*, HOUS. CHRONICLE, Nov. 3, 2005, at A12. One in every 31 adults thus was under correctional supervision at the end of 2004, compared with about 1 in 36 in 1995 and about 1 in every 88 in 1980. African Americans made up 41 percent of incarcerated prisoners, Hispanics 12 percent. A late 1990's spike in prison populations was beginning, at the end of 2004, to show up in the number of parolees, as the number of prisoners released rose. Thus, the number of released convicted criminals is on the increase. About 39 percent of discharged parolees had gone back to prison or jail as of 2005.

§ 9.14 CONSTITUTIONAL RESTRICTIONS OF FACTFINDING IN SENTENCING: THE INVALIDATION OF MANDATORY JUDICIAL GUIDELINES

Page 504: [Before § 9.15, add:]

(5) *Can Mandatory Guidelines Narrow the Judge's Discretion in Factfinding, at All? Apparently Not: Cunningham v. California*, 549 U.S. 270 (2007). The California sentencing scheme provided three distinct, alternative sentences for most felonies: a lower term, a middle term, and an upper term. California law further provided that the trial judge "shall impose" the middle term unless the judge found "aggravating factors," in which event the judge could impose the upper term. The United States Supreme Court held that a California judge's finding of "aggravating factors" amounted to a prohibited judicial fact finding that increased the sentence, and it therefore struck down this feature of California law as unconstitutional. After this holding, can a state provide any mandatory guidelines that affect the trial judge's choice within the sentence range?

§ 9.15 THE MECHANICS OF COMPUTING ADVISORY SENTENCES: INSTRUCTIONS, EXCERPTS FROM THE GUIDELINES, AND PROBLEMS

Page 505: [Add the following to the notes:]

(5) *Guideline Sentences Are “Presumptively Reasonable”*: *Rita v. United States*, 127 S. Ct. 2456 (2007). In this case, the defendant argued that federal law encouraged judges to use the Guidelines as a “proxy” for the “individualized” consideration of sentencing factors required by *United States v. Booker*, *supra*. The Court, through Justice Breyer, accepted that this argument “may be correct,” but added, “we do not see how that fact could change the constitutional calculus.” Congress’s goal was to “diminish unwarranted sentencing disparity.” Therefore, courts of appeals reviewing sentences imposed by trial judges should apply a “presumption” that a sentence was reasonable if it was authorized by the guidelines.

This presumption does not bind the trial judge, who retains discretion. But the principle that sentences that deviate from the guidelines must be justified, while sentences within the guidelines will presumptively be adjudged reasonable and affirmed on appeal, obviously means that in spite of the trial judge’s discretion, the Guidelines will determine most sentences.

§ 9.17 THE DEATH PENALTY: JUSTIFYING, OPPOSING, OR LIMITING ITS IMPOSITION

Page 521: [Add the following to the earlier set of notes:]

(7) *Can the Death Penalty Be a Constitutional Sentence for Child Rape?*: *Kennedy v. Louisiana*, 128 S. Ct. 1761 (2008). In *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court held that the death penalty could not constitutionally be imposed for the rape of an adult woman. *Coker* seemed to imply that few if any crimes other than murder could qualify for capital punishment. In *Kennedy*, a 5 to 4 majority decided that the aggravated rape of a child could not constitutionally carry the death penalty either. Louisiana had argued that the number of states that had authorized or proposed capital punishment for this crime had increased in recent years, so that a consensus against it was lacking, but the majority rejected this argument.

CHAPTER 10

PREPARATORY CRIMES

§ 10.06 CONSPIRACY

[D] The Overt Act Requirement

Page 566: [Add this note (3):]

(3) *Federal Conspiracy Law Does Not Require an Overt Act, Unless a Statute Expressly Provides for One:* *Whitfield v. United States*, 543 U.S. 209 (2005). The general federal conspiracy statute requires an overt act, but federal law includes other conspiracy statutes that contain no such requirement. For example, the federal drug conspiracy statute does not expressly require an overt act. In *Whitfield*, the Supreme Court decided that federal laws imposed no overt act requirement in the absence of a statutory provision, and therefore, conviction under the money laundering statute was complete without this requirement. Does this aspect of federal law appropriately enable law enforcers to “nip crime in the bud”—or does it create a danger of “thoughtcrime” convictions?

CHAPTER 13

PERSPECTIVES: NON-CRIMINAL METHODS, VICTIMS' INTERESTS, TERRORISM, PLEA AGREEMENTS, AND LAWYER COMPETENCIES

§ 13.03 TERRORISM AND CRIMINAL JUSTICE

[B] Executive Authority

Page 650: [At the end of note 4, add the following:]

Ultimately, an Italian judge issued arrest warrants for thirteen CIA operatives. The prosecutor's office in Milan announced that these individuals were guilty of kidnapping and of impeding an ongoing investigation conducted by Italy. The suspects, not surprisingly, "remain[ed] at large" — in spite of Italian authorities' requests for assistance in apprehending them. *See Italy Issues Warrant for 13 CIA Officers*, Hous. CHRONICLE, June 25, 2005, at A1.

Page 650: [Add the following to note 5:]

Human Rights Watch alleged that these detentions were excessive and frequently unlawful. *See Groups Claim U.S. Misuses Law to Hold Witnesses*, Hous. CHRONICLE, June 27, 2005, at A3. The allegation was that after arrest at gunpoint, alleged witnesses were held in solitary confinement under "degrading conditions" on the basis of "little threads of evidence" and that most never became witnesses. In response, however, Justice Department officials pointed out that material witness statutes were "designed with judicial oversight safeguards" and stated that they were "critical to . . . criminal investigations" of terrorism.

CHAPTER 14

THE LEGALITY AND JUSTIFICATION OF CRIMINAL LAWS

§ 14.02 THE RULE OF LENITY AND THE PROBLEM OF OVERBREADTH

[A] The Rule of Lenity

Page 694: [At the end of [A], insert this as Problem 14B, and renumber all later problems:]

PROBLEM 14B (LEGALITY OF CRIMINALIZATION): CAN IT BE A CRIME TO USE A PUBLIC RESTROOM?

(1) *State v. Beine*, 162 S.W.3d 483 (Mo. 2005) (en banc). A Missouri statute made it a crime for any person to “[k]nowingly expose the person’s genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age.” Testimony showed that the defendant stood three or four feet from a urinal in an elementary school restroom while relieving himself, that students could see his genitals, and that at one point he turned to discipline some disruptive boys without covering himself.

The appellate court reasoned that, although the defendant stood “a little further distance from the urinal than men usually do,” the statute left adults “in a state of uncertainty about how they may take care of their biological needs” without committing a crime. The court also held that “a person’s right to use a public restroom is as fundamental a right as one can imagine,” and therefore, “the overbreadth doctrine should extend to this case.” Furthermore, “This is constitutionally protected conduct.”

(2) *A Problem of Lenity? Of Statutory Overbreadth? Of Vagueness? Or, What?* Consider whether the rule of lenity is or should be the real basis for the defendant’s exoneration. Notice that the court also raises the related, but separate, issue of statutory vagueness; is this an appropriate basis? Or, instead, is the statute overbroad? Notice that the court focuses on the constitutionality of the statute, rather than upon its meaning or application. But consider the result of striking down the statute itself, as compared to acquitting this particular defendant. Imagine that a defendant in a similar situation deliberately stands by the exit door of the restroom while fully exposed, knowing that it offends the children, but doing it because it gratifies him. In such a situation, isn’t there a need for a statute of this kind?

(3) *Interpreting the Statute: A Better Way?* A dissenting justice would have held the statute constitutional but limited its application by holding that the word “knowingly” applied to all of its provisions, so that Beine could not be convicted unless he “knew” of the danger of “affront or alarm” to children. The majority rejected this approach as “rewrit[ing]” the statute. Is this reasoning persuasive?

