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MAPPING AMERICAN CRIMINAL LAW Variations Across the 50 States: Ch. 14 Insanity Defense

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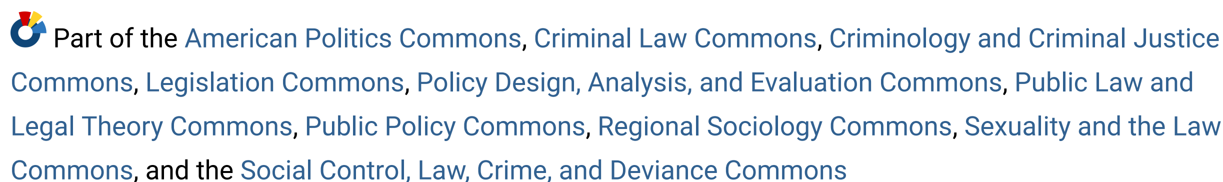
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MAPPING AMERICAN CRIMINAL LAW

VARIATIONS ACROSS THE 50 STATES
Ch. 14 Insanity Defense

Paul H. Robinson
Tyler Scot Williams

January 2, 2017

14. INSANITY DEFENSE

The thirty-year-old defendant has only recently been deinstitutionalized to live with his parents, with the aid of medication that controls his apparently overwhelming impulses to engage in random conduct that he neither wants nor understands. Normally passive and retiring, when he is not fully medicated he sometimes feels compelled to do things that injure himself – once putting his hand into a spinning machine, permanently

losing the end of his fingers – or injure others – he once strangled to death for no apparent reason a neighborhood dog that he liked. Within the last year, however, doctors have found a combination of drugs that seem to effectively control his random impulses.

Today he is waiting on the platform for the subway train that will take him to the rehabilitation center where he works each day at a menial job. Unfortunately, his parents have forgotten to give him his medication this morning. There are several dozen people on the platform, including a uniformed police officer standing several yards away from him. As the train pulls into the station, he deliberately pushes a man standing next to him in front of the train. As the police officer rushes forward and grabs the defendant, the defendant says, "I pushed that man in front of the train. I think I might have hurt him badly." The seriously injured man is pulled from beneath the train and carried away. The policeman asks defendant why he did it. He replies, "I don't know. Whosh, whosh. I just got the idea and I had to do it. I'm so sorry."[1]

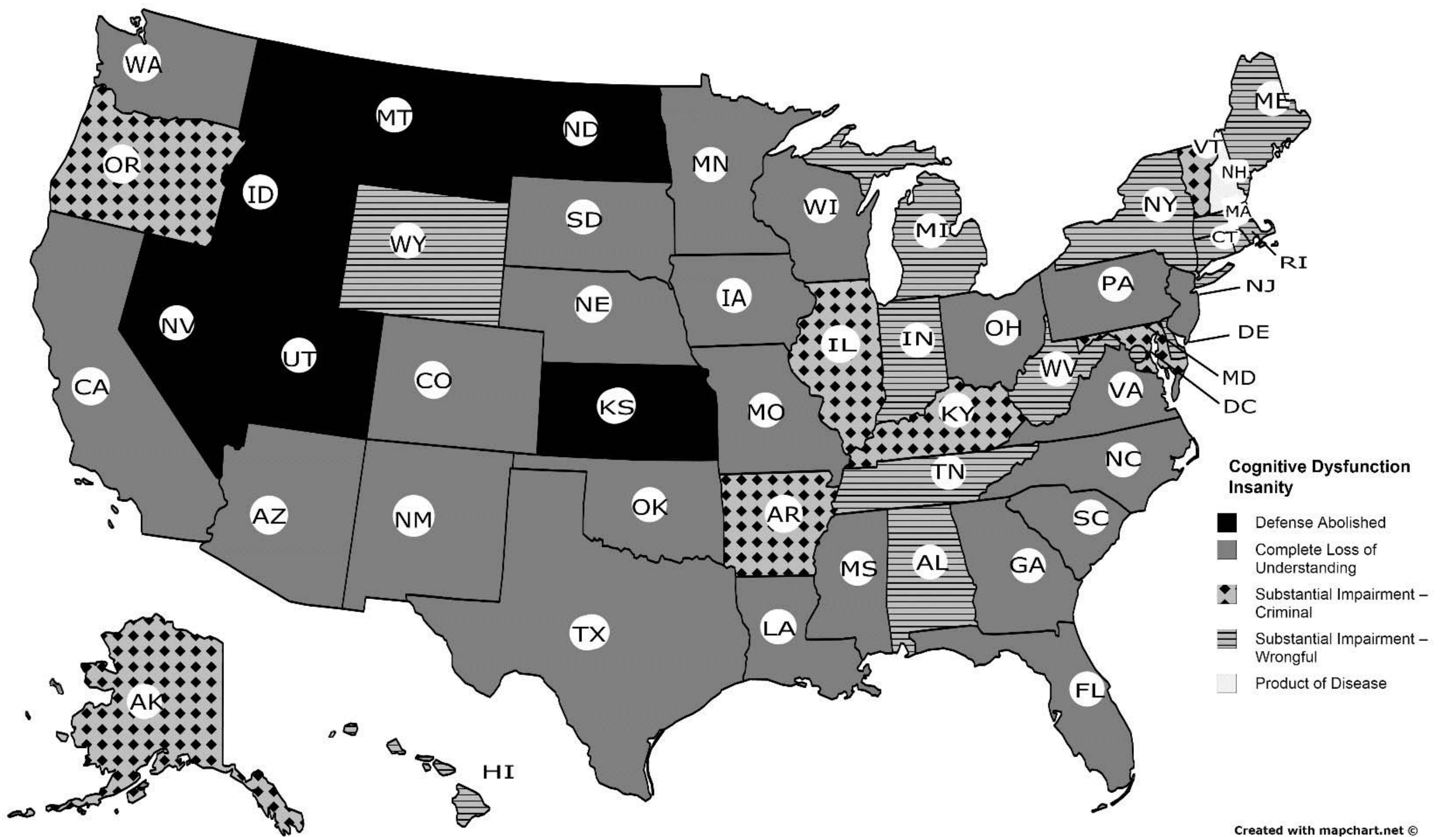
The criminal law generally commits itself to impose criminal liability and punishment only on offenders who are morally blameworthy for their conduct. If the offender's conduct is the result of serious mental illness, it may undermine that required blameworthiness. A person who strangles another to death in a hallucination, believing he is squeezing an orange, simply does not have the kind of moral responsibility for his conduct that would give rise to sufficient blameworthiness to punish.

But how is the criminal law to define the conditions under which mental disease or defect can exculpate an offender for an offense? Certainly, there is a significant portion of the population, some would say a large majority, who have some kind of mental dysfunction, and many kinds of dysfunctions may make it more difficult for a person to remain law-abiding. How does the criminal law draw the line that distinguishes that small group that is so dysfunctional and dysfunctional in such a way as to exculpate them for an offense?

The law has come to distinguish two kinds of mental dysfunction. Cognitive dysfunction occurs when an offender's mental disease or defect distorts his cognitive ability to understand his surroundings, the consequences of his conduct, for the criminal or wrongful nature of his conduct. Control dysfunction occurs when an offender's mental disease or defect impairs his ability to control his conduct (which he may very well know to be criminal and wrongful).

The states may be divided into five categories for the approach they take in recognizing an offender's cognitive dysfunction as the basis for an insanity defense, as presented in the map below.

[1] The facts of this hypothetical are similar in many respects to the case of Andrew Goldstein. *See* People v. Goldstein, 14 A.D.3d 32, 786 N.Y.S.2d 428 (2004), rev'd, 6 N.Y.3d 119, 843 N.E.2d 727 (2005). For a fuller case narrative, see PAUL H. ROBINSON ET AL., CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 713-17 (4th ed., 2016).



A. Defense Abolished

Six states essentially abolish the insanity defense: Idaho, Kansas, Montana, Nevada, North Dakota, and Utah.[2] They are shown in black on the map.

B. Complete Loss of Understanding

Twenty-eight states, with dark sheeting on the map follow the traditional common-law rule in providing an insanity defense where defendant has lost his or her ability to understand the nature of his or her conduct in some very fundamental way. This common position is taken in Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Indiana, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Federal.[3] This position is commonly referred to as the "M'Naghten test," from the old English case

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[2] Idaho Code Ann. § 18- 207; Kan. Stat. Ann. § 21- 5209; State v. Korell, 213 Mont. 316 (1984); Finger v. State, 117 Nev. 548 (2001); N.D. Cent. Code § 12.1- 04.1-01; Utah Code Ann. § 76-2- 305.

[3] Ala. Code § 13A-3-1 ; Alaska Stat. Ann. § 12.47.010 ; Ariz. Rev. Stat. Ann. § 13-502 ; Cal. Penal Code § 25 ; Colo.

that required that the offender "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[4]

The insanity defenses that exist in these jurisdictions stands in contrast with the next two groups, which allow the defense even if the defendant's dysfunction at the time of the offense is not a complete loss of understanding but rather a "substantial impairment" of his or her cognitive capacity. However, some of the 28 jurisdictions leave a little bit of wiggle room by providing defense when the defendant, as a result of mental disease or defect, was "unable to appreciate" the nature and quality of his conduct. The word "appreciate" here might give a court and a jury some ability to move off the demand that the defendant have a total loss of capacity to "know" the nature of his conduct.[5]

C. Substantial Impairment – Criminal

The next lighter shade on the table indicates those states that allow a somewhat broader insanity defense, making it available to defendants who, as noted above, have only a substantial loss in their cognitive functioning rather than a complete loss. This is the approach recommended by the Model Penal Code:

> Section 4.01. Mental Disease or Defect Excluding Responsibility.
> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he *lacks substantial capacity* either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. . . .

Code § 701.4 ; La. Rev. Stat. Ann. § 14:14 ; State v. Rawland, 294 Minn. 17 (1972); Groseclose v. State, 440 So.2d 297 (Miss. 1983); Mo. Ann. Stat. § 552.010 ; State v. Hotz, 281 Neb. 260 (2011) ; N.J. Stat. Ann. § 2C:4- 1 ; State v. Hartley, 90 N.M. 488 (1977) ; State v. Humphrey, 283 N.C. 570 (1973) ; State v. Staten, 18 Ohio St.2d 13 (1969) ; Okla. Stat. tit. 21, § 152; 18 Pa. Cons. Stat. Ann. § 315 ; S.C. Code Ann. § 17-24- 10 ; S.D. Codified Laws § 22- 1-2 ; Tenn. Code Ann. § 39- 11-501 ; Tex. Penal Code Ann. § 8.01 ; Herbin v. Commonwealth, 28 Va.App. 173 (1998); Wash. Rev. Code Ann. § 9A.12.010 ; State v. Esser, 16 Wis.2d 567 (1962) ; 18 U.S.C. § 17.

[4] *Daniel M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843).

[5] See, for example, the Alabama formulation of the defense in Code of Alabama § 13A-3-1. Mental disease or defect:

> (a) It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or

Rev. Stat. Ann. § 16-8-101.5 ; Fla. Stat. Ann. § 775.027 ; Ga. Code Ann. § 16-3- 2 ; Ind. Code § 35-41-3- 6 ; Iowa

defect, was unable to appreciate the nature and quality or wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) "Severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(c) The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Arkansas, Illinois, Kentucky, Maryland, Oregon, and Vermont adopt this substantial-impairment approach.[4] More specifically, they require that the defendant at the time of the offense lacks substantial capacity to appreciate "the criminality" of his conduct.[5]

D. Substantial Impairment – Wrongful

Another eleven jurisdictions – Connecticut, Delaware, District of Columbia, Hawaii, Maine, Massachusetts, Michigan, New York, Rhode Island, West Virginia, and Wyoming[6] – brings the substantial-impairment total to seventeen. These jurisdictions adopt the Model Penal Code's "lacks substantial capacity" formulation but then adopts the Code's bracketed alternative formulation (quote above): the defendant must lack the substantial capacity to appreciate the "wrongfulness" of their conduct rather than the "criminality" of their conduct.[7]

To see how these alternative formulations might have a different effect in practice, measures situation where the mentally ill defendant believes that God has directed him to commit the offense. He would continue to fully appreciate that his

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[4] Ark. Code Ann. § 5-2- 312 ; 720 Ill. Comp. Stat. Ann. 5/6-2 ; Ky. Rev. Stat. Ann. § 504.020 ; Md. Code Ann., Crim. P. § 3-109 ; Or. Rev. Stat. Ann. § 161.295 ; Vt. Stat. Ann. tit. 13, § 4801.

[5] For example, Oregon section 161.295, Mental disease or defect, follows the Model Penal Code formulation:

> (1) A person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person *lacks substantial capacity* either *to appreciate the criminality* of the conduct or to conform the conduct to the requirements of law.
>
> (2) As used in chapter 743, Oregon Laws 1971, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor do they include any abnormality constituting solely a personality disorder.

[6] Conn. Gen. Stat. Ann. § 53a-13; Del. Code Ann. tit. 11, § 401; Howard v. United States, 954 A.2d 415 (D.C. 2008) ; Haw. Rev. Stat. § 704- 400; Me. Rev. Stat. Ann. tit. 17-A, § 39; Com. v. McHoul, 352 Mass. 544 (1967) ; Mi. Comp. Laws Ann. § 768.21a ; N.Y. Penal Law § 40.15 ; State v. Johnson, 121 R.I. 254 (1979) ; State v. Parsons, 181 W.Va. 131 (1989) ; Wyo. Stat. Ann. § 7-11- 304.

[7] See, for example, the formulation in Hawaii § 704-400. Physical or mental disease, disorder, or defect excluding penal responsibility: "(1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law." [10] State v. Fichera, 153 N.H. 588 (2006).

conduct was "criminal" although his mental illness would also lead him to conclude that it was not "wrongful" in some larger moral sense. Thus, he would get a defense under the wrongfulness formulation but not under the criminality formulation.

E. Product of Disease

One jurisdiction, New Hampshire,[10] rejects even the Model Penal Code's "substantial impairment" limitation on the insanity defense. It requires nothing more than the fact that the defendant would not have committed the offense but for his or her mental disease or defect. That is, it is enough that the offense was "the product of" mental disease.[8]

In our hypothetical at the beginning of this chapter, the mentally ill man who pushes another in front of the subway train is suffering from a purely control dysfunction. He fully understands the criminality and wrongfulness of his conduct. Thus, he would be ineligible for a defense under a cognitive prong. (He probably would get a

Control Impairment Insanity
No control prong
Irresistible impulse
MPC substantial impairment
Product test

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[8] "A defendant asserting an insanity defense must prove two elements: first, that at the time he acted, he was suffering from a mental disease or defect; and, second, that a mental disease or defect caused his actions." State v. Fichera, 153 N.H. 588, 593, 903 A.2d 1030, 1034 (2006).

defense under New Hampshire's "product test.") If he is to get defense, it can only be under an insanity defense "control prong" yet, as the map below indicates, twenty-eight states – the majority of American jurisdictions – and the federal system do not recognize control dysfunction as a basis for an insanity defense.

F. No Control Prong

All of the black states on the map have only the cognitive impairment form of the insanity defense, discussed in the subsections above, or no insanity defense at all. Only the non-black states allow an insanity defense where the offender's dysfunction is a control problem rather than the cognitive dysfunction. These twenty-eight states include Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, and Wisconsin, as well as the Federal system.[9] (The six states that have abolished the insanity defense, noted in Section A above, also obviously will not be providing a defense in control-dysfunction cases.)

As the map illustrates, however, some states go beyond the loss or impairment of cognitive functioning as a basis for an insanity defense and recognize the loss or impairment of a person's ability to control his or her conduct as the potential basis for a defense.

G. Irresistible Impulse

Three jurisdictions, with medium shading on the map, adopt what have been called "irresistible impulse" formulations: New Mexico, Ohio, and Virginia.[10] This essentially requires that the defendant at the time of the offense no longer had any choice with regard to his engaging in the offense conduct. He had lost all ability to control it.

H. MPC Substantial Impairment

Compare that formulation with the Model Penal Code's "lacks substantial capacity" formulation, which is adopted by the thirteen jurisdictions in light shading on

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[9] *See supra* note 3; *see also* Paul H. Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. Legal Analysis 77-79 (2015) (cataloguing jurisdictions that expressly embrace M'Naghten language or are for other reasons *de facto* M'Naghten jurisdictions).

[10] State v. Hartley, 90 N.M. 488, 490 (1977); State v. Staten, 18 Ohio St.2d 13 (1969); Herbin v. Commonwealth, 28 Va.App. 173, 181-83 (1998).

the map: Arkansas, Connecticut, District of Columbia, Hawaii, Kentucky, Maryland, Massachusetts, Michigan, Oregon, Rhode Island, Vermont, West Virginia, and Wyoming.[11] Under this approach, the defendant may gain an insanity defense, as long as the jury concludes that the extent of his impairment of control is sufficient to render him blameless. Under the language of the Model Penal Code quoted above, he "lacks substantial capacity… to conform his conduct to the requirements of law." Taken together, the three irresistible-impulse jurisdictions plus the thirteen substantial-impairment jurisdictions plus New Hampshire's product test means that only seventeen of the fifty-two American jurisdictions recognize a control prong for the insanity defense. It is only in these jurisdictions that the mentally-ill offender in our train station hypothetical would be eligible for defense.

I. Observations and Speculations

The disagreement that we see among the jurisdictions moves along two dimensions. On the one hand, jurisdictions disagree about how severe a dysfunction must be in affecting the offender's conduct in order to entitle the offender to an excuse. The M'Naghten test and the irresistible impulse test require complete loss of cognitive ability and control, respectively. In contrast, the Model Penal Code's insanity formulation requires only a "substantial impairment" of the offender's ability to appreciate the criminality or wrongfulness of his conduct or of its ability to conform his conduct to the requirements of law.

Why do we see the pattern that we see between the complete-loss states and the substantial-impairment states? It may well reflect some general reservation about how easy or hard it is for the insanity defense to be abused. Studies have shown that, while there is a common perception that the insanity defense is frequently given – too frequently given – the reality is that even the substantial-impairment form is a very difficult defense for a defendant to obtain.[12]

Perhaps even more interesting, the evidence suggests that the particular formulation of the defense given to a jury may make little difference – the academic and legislative skirmishing on the issue may be all for nothing. There is evidence that, no matter what instruction a jury is given, its members tend to look to their own shared

[11] Model Penal Code § 4.01(1); Ark. Code Ann. § 5-2- 312; Conn. Gen. Stat. Ann. § 53a-13; Howard v. United States, 954 A.2d 415 (D.C. 2008); Haw. Rev. Stat. § 704-400; Ky. Rev. Stat. Ann. § 504.020; Md. Code Ann., Crim. P. § 3109; Com. v. McHoul, 352 Mass. 544 (1967); Mi. Comp. Laws Ann. § 768.21a; Or. Rev. Stat. Ann. § 161.295; State v. Johnson, 121 R.I. 254 (1979); Vt. Stat. Ann. tit. 13, § 4801; State v. Parsons, 181 W.Va. 131 (1989); Wyo. Stat. Ann. § 7-11- 304.

[12] *See* Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 334 (1991).

intuitions of justice in deciding whether a particular defendant's mental illness in a given case renders him sufficiently blameless to deserve a defense.[13]

A second dimension of disagreement among the states is whether to recognize control dysfunction (of any sort) as an adequate basis for an insanity defense. Recall that our hypothetical train-station offender at the beginning of the chapter could not obtain an insanity defense of any kind in those jurisdictions that have no control prong. It used to be the case that a majority of states had a control prong. The Model Penal Code formulation, which has a control prong, was influential in this regard in encouraging states to adopt it in their new codifications in the 1960s and 1970s. But the legal landscape changed after the successful insanity defense of John Hinckley for the attempted assassination of President Reagan. By September 1985, 36 states had reformed their insanity defense, and no fewer than five states dropped the control prong or repealed the defense altogether.[14]

Again, the split among the states may reflect different degrees of skepticism about whether recognition of a control prong promotes abuse of the insanity defense, a concern highlighted by the Hinckley acquittal. Ironically, Hinckley obtained an insanity defense probably not because the District of Columbia formulation had a control prong but rather because the District had an unusual, and probably unwise, rule that put the burden on the prosecution to disprove the insanity defense rather than on the defense to prove it.[15] A more appropriate legislative reform response would have been to make clear that the burden of persuasion was on the defendant rather than the government, rather than in dropping the control prong altogether.

Unlike the disagreement among the states about whether to require a complete loss versus a substantial impairment – a difference that may in practice have little effect on juries – the removal of the control prong will have a dramatic practical effect. It means that in cases where the dysfunction effects control (rather than cognitive functioning), even a dramatic loss of control – an irresistible impulse – the jury may never hear about the offender's mental illness. In states that have only a cognitive prong, only mental illness producing cognitive dysfunction is relevant under the legal rules; evidence of control dysfunction, no matter how dramatic the dysfunction, may be simply irrelevant and therefore inadmissible at trial.

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[13] *See* Jennifer L. Skeem & Stephen L. Golding, *Describing Jurors' Personal Conceptions of Insanity and Their Relationship to Case Judgments*, 7 PSYCHOL. PUB. POL'Y & L. 561 (2001) (cataloguing empirical studies that suggest that jurors "do not apply judicial instruction on legal definitions of insanity," but instead "rely on their own conceptions of insanity to decide whether a defendant is insane").

[14] *See* Lisa Callahan et al., *Insanity Defense Reform in the United States-Post Hinckley*, MENTAL & PHYS. DISABILITY L.REP. 54-59 (1987).

[15] *See* HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 63-64 (1993).

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PREFACE

It is common for criminal law scholars from outside the United States to discuss the "American rule" and compare it to the rule of other countries.[1] As this volume makes clear, however, there is no such thing as an "American rule." Each of the states, plus the District of Columbia and the federal system, have their own criminal law; there are fifty-two American criminal codes.

American criminal law scholars know this, of course, but they too commonly speak of the "general rule" as if it reflects some consensus or near consensus position among the states. But the truth is that the landscape of American criminal law is one of almost endless diversity, with few, if any, areas in which there is a consensus or near consensus. Even most American criminal law scholars seem to fail to appreciate the enormous diversity and disagreement among the fifty-two American jurisdictions.

The best one can do in most instances is to talk of a "majority rule," but even this is extremely difficult business. Every jurisdiction recognizes a person's right to defend himself against unlawful force, for example. But what is the "majority rule" in the United States in the formulation of that defense? Jurisdictions disagree on a wide variety of issues within selfdefense, most prominently: (a) What constitutes the "unlawful force" that triggers a right to use defensive force? (b) What temporal requirement must be met for an actor's conduct to be truly "necessary" at that time? (c) What amount of force may be used? (d) When may deadly force may be employed? (e) When may an initial aggressor claim self-defense? (f) What is the legal effect, if any, of the defendant provoking the encounter? (g) What is the legal effect of mutual combat on self-defense? (h) Is there a right to resist an unlawful arrest? (i) Is there a duty to retreat from unlawful aggression before using deadly force?[2] There is disagreement among the states on every one of these issues.[3]

Further, as some of us have demonstrated elsewhere, even when the research is done, it is not so easy to construct the majority American rule. To continue with the selfdefense example above, not only do American jurisdictions disagree on each of the selfdefense issues listed above, but the pattern of states making up the majority view on each individual issue varies from issue to issue. In other words, at the end of the day the "majority rule" for self-defense in the United States is a rule that no jurisdiction actually adopts. It is necessarily a composite of the American "majority rule" on each of the sub- issues.[4]

Unfortunately, there has been little work done to map the enormous diversity among the states, perhaps because it is an extremely burdensome project, in part for the reasons just noted. Every legal issue requires a major research project investigating the criminal codes and/or caselaw of all fifty-two American jurisdictions, and a single legal doctrine may have a half-dozen dozen sub-issues that must each be separately resolved.

While the paucity of such diversity research is understandable, it is nonetheless most regrettable, for it is the matters of disagreement that often point to the most interesting issues for scholars. Why is it that there is disagreement on a particular point? Why hasn't a consensus formed? What are the advantages and disadvantages of the each of the alternative positions such that none have won the day? Or, is it simply out of ignorance among the legislatures of the alternative positions that has perpetuated the continuing differences? That is, does diversity exist not because of genuine disputes about which position is best but rather because there is simply no debate on the issue because the conflicting positions are not readily known?

The goal of this volume is, first, to raise awareness of the enormous diversity among the states on issues across the criminal law landscape, to document this diversity with a host of specific illustrations on a wide range of issues, to encourage criminal law scholars to investigate these and the many other points of disagreement that exist among the states, and to encourage legislatures to look to this new diversity scholarship and to the positions taken by other states when the legislature sets out to codify or recodify their criminal law (or to encourage judges to do the same in those jurisdictions that continue to allow judicial criminal law making[5]).

In each of the next thirty-two chapters, we examine the different areas of American criminal law and identify the major groupings among the states on an issue in each area. This is hardly a comprehensive list of the issues on which there are disagreement; it is only a representative sampling. Indeed, we know of no area of American criminal law on which there is not disagreement among the jurisdictions. The only American criminal law universal is its universal diversity.

Nor are the points of disagreement that we map the only points of diversity within each of the thirty-two issues that we examine. On the contrary, we commonly pick one particular point of disagreement among the states that seems particularly interesting or important, but it is commonly only one of many points of inter-state disagreement on the issue.

For the issue that we take up in each chapter, we group all the American jurisdictions according to the position they take. However, there is such diversity in approach that even jurisdictions within the same group commonly take slightly different approaches (which we generally attempt to document in footnotes). Thus, even our groupings of states, usually three to seven groups on each issue, understates the extent of American criminal law diversity.

Each chapter provides a map of the United States with each of the states visually coded according to its approach to the issue. These maps, the reader will see, often raise interesting hypotheses about geographic or other state factors that might explain the patterns of agreement and disagreement (red states versus blue states, rural versus urban, rich versus poor, West Coast versus East Coast, etc.). The last two chapters of the book illustrate how this mountain of research and the state groupings for each issue can be used by scholars in many disciplines – including political scientists, criminologists, criminal law scholars, and sociologists, among others – to investigate alternative hypotheses about why we see the patterns of agreement and disagreement that we see.