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Features

Let's face it, legal textbooks can be dry. This is unfortunate because law, especially criminal law, is an intrinsically compelling topic. To hold your attention and keep you alert, *Criminal Law* employs a variety of instructional techniques that should engage you from start to finish.

First, chapters contain embedded videos, ethical scenarios, charts, diagrams, and tables to demonstrate the legal concepts and examples provided. These enhancements break up the text and also appeal to various learning styles.

In addition, instead of wasting valuable textbook space by reprinting edited cases, *Criminal Law* links to cases online. You can read more cases that way, and cases are like examples—they demonstrate the application of law to facts. Also, you can read the entire case exactly the way the judge wrote it, instead of an edited version that has been shrunk to fit into a limited amount of pages.

Have you ever tried to check your answers to review questions in a textbook, only to find that the correct answers are nowhere in sight? *Criminal Law* gives you the answer to every question at the end of each chapter. Go ahead and check the answers first. Contrary to popular belief, this actually improves—and does not detract from—learning.

In addition, *Criminal Law* includes hundreds of footnotes that link to online cases and statutes; supplementary links to articles, websites, and statistics online; and plenty of reference material for a term paper or other research project. In short, *Criminal Law* should contain everything you need to successfully complete your course. It is also a valuable guide to which you can refer throughout your criminal justice career.

Goals

Although academic success is important, I wrote *Criminal Law* to increase your awareness as you read the newspaper (or read the news online), watch television, or discuss legal situations with friends and colleagues. Law is an integral part of life, yet most people lack the most fundamental understanding of legal concepts. My sincere hope is that once you have finished reading *Criminal Law*, you will become your own most trusted legal authority.

Chapter 1

Introduction to Criminal Law

This book focuses on criminal law, but it occasionally touches on issues of criminal procedure, so it is important to differentiate between the two.

Criminal law generally defines the *rights* and *obligations* of individuals in society. Some common issues in criminal law are the elements of specific crimes and the elements of various criminal defenses. Criminal procedure generally concerns the *enforcement* of individuals' rights during the criminal process. Examples of procedural issues are individuals' rights during law enforcement investigation, arrest, filing of charges, trial, and appeal.

Example of Criminal Law Issues

Clara and Linda go on a shopping spree. Linda insists that they browse an expensive department store. Moments after they enter the lingerie department, Linda surreptitiously places a bra in her purse. Clara watches, horrified, but does not say anything, even though a security guard is standing nearby. This example illustrates two issues of criminal law: (1) Which crime did Linda commit when she shoplifted the bra? (2) Did Clara commit a crime when she failed to alert the security guard to Linda's shoplifting? You learn the answer to issue (1) in [Chapter 11 "Crimes against Property"](#) and issue (2) in [Chapter 4 "The Elements of a Crime"](#) and [Chapter 7 "Parties to Crime"](#).

Example of Criminal Procedure Issues

Review the example in [Section 1.2.1 "Example of Criminal Law Issues"](#). Assume that Linda and Clara attempt to leave the store and an alarm is activated. Linda begins sprinting down the street. Colin, a police officer, just happens to be driving by with the window of his patrol car open. He hears the store alarm, sees Linda running, and begins shooting at Linda from the car. Linda is shot in the leg and collapses. Linda is treated at the hospital for her injury, and when she is released, Colin arrests her and transports her to the police station. He brings her to an isolated room and leaves her there alone. Twelve hours later, he reenters the room and begins questioning Linda. Linda immediately requests an attorney. Colin ignores this request and continues to question Linda about the reason the department store alarm went off. Whether Colin properly arrested and interrogated Linda are **criminal procedure** issues beyond the scope of this book. However, this example does illustrate one criminal law issue: did Colin *commit a crime* when he shot Linda in the leg? You learn the answer to this question in [Chapter 5 "Criminal Defenses, Part 1"](#).

Figure 1.1 Criminal Law and Criminal Procedure



KEY TAKEAWAY

- Criminal law generally defines the rights and obligations of individuals in society. Criminal procedure generally concerns the enforcement of individuals' rights during the criminal process.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Paul, a law enforcement officer, arrests Barney for creating a disturbance at a subway station. While Barney is handcuffed facedown on the ground, Paul shoots and kills him. Paul claims that he accidentally grabbed his gun instead of his Taser. Is this an issue of criminal law or criminal procedure?
2. Read *Payton v. New York*, 445 U.S. 573 (1980). In *Payton*, the US Supreme Court held a New York statute unconstitutional under the Fourth Amendment. Did the *Payton* ruling focus on criminal law or criminal procedure? The case is available at this link: <http://supreme.justia.com/us/445/573>.

1.3 The Difference between Civil and Criminal Law

LEARNING OBJECTIVES

prosecution because *the Constitution is in effect* in any criminal proceeding. The Constitution provides for the assistance of counsel in the Sixth Amendment, so *every* criminal defendant facing incarceration has the right to legal representation, regardless of wealth.

The presence of the Constitution at every phase of a criminal prosecution changes the proceedings significantly from the civil lawsuit. The criminal defendant receives many constitutional *protections*, including the right to remain silent, the right to due process of law, the freedom from double jeopardy, and the right to a jury trial, among others.

Goal of a Criminal Prosecution

Another substantial difference between civil litigation and criminal prosecution is the *goal*. Recall that the goal of civil litigation is to compensate the plaintiff for injuries. In contrast, the goal of a criminal prosecution is to *punish* the defendant.

One consequence of the goal of punishment in a criminal prosecution is that *fault* is almost always an element in any criminal proceeding. This is unlike civil litigation, where the ability to pay is a priority consideration. Clearly, it is unfair to punish a defendant who did nothing wrong. This makes criminal law justice oriented and very satisfying for most students.

Injury and a victim are *not* necessary components of a criminal prosecution because punishment is the objective, and there is no plaintiff. This behavior can be criminal even if it is essentially harmless. Society does not condone or pardon conduct simply because it fails to produce a tangible loss.

Examples of Victimless and Harmless Crimes

Steven is angry because his friend Bob broke his skateboard. Steven gets his gun, which has a silencer on it, and puts it in the glove compartment of his car. He then begins driving to Bob's house. While Steven is driving, he exceeds the speed limit on three different occasions. Steven arrives at Bob's house and then he hides in the bushes by the mailbox and waits. After an hour, Bob opens the front door and walks to the mailbox. Bob gets his mail, turns around, and begins walking back to the house. Steven shoots at Bob three different times but misses, and the bullets end up landing in the dirt. Bob does not notice the shots because of the silencer.

In this example, Steven has committed several crimes: (1) If Steven does not have a special permit to carry a concealed weapon, putting the gun in his glove compartment is probably a crime in most states. (2) If Steven does not have a special permit to own a silencer for his gun, this is probably a crime in most states.

(3) If Steven does not put the gun in a locked container when he transports it, this is probably a crime in most states. (4) Steven committed a crime each time he exceeded the speed limit. (5) Each time Steven shot at Bob and missed, he probably committed the crime of attempted murder or assault with a deadly weapon in most states. Notice that none of the crimes Steven committed caused any discernible harm. However, common sense dictates that Steven should be punished so he does not commit a criminal act in the future that *may* result in harm.

Table 1.1 Comparison of Criminal Prosecution and Civil Litigation

Feature	Criminal Prosecution	Civil Litigation
Victim	No	Yes. This is the plaintiff.
Harm	No	Yes. This is the basis for damages.
Initiator of lawsuit	Federal or state government	Plaintiff
Attorney for the initiator	US Attorney or state prosecutor	Private attorney
Attorney for the defendant	Private attorney or public defender	Private attorney
Constitutional protections	Yes	No

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Figure 1.7 *Keeler Case Brief*

1. *Keeler v. Superior Court*, 470 P.2d 617 (1970).

2. A. (Procedural Facts) The defendant seeks a writ of prohibition, CA Supreme Court.
B. (Substantive Facts) The defendant became upset when he saw that his ex-wife was pregnant. After stating "I'm going to stomp it out of you," he kned his ex-wife in the abdomen. She survived, but the baby was stillborn, the cause of death a fractured skull. The defendant was charged with murder under Cal. Penal Code § 187, which defined murder as the malicious and unlawful killing of a human being. The defendant sought a writ of prohibition to disallow the murder charge, because he killed a fetus.

3. (Issue) Can a defendant be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being?

4. A. (Substantive Holding) A defendant cannot be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being.
B. (Procedural Holding) Writ of prohibition granted, murder charge disallowed.

6. (Rationale) The Court examined the common-law definition of human being, and held that it did not include a fetus. Charging the defendant with murder of a fetus when the murder statute criminalizes only murder of a human being born alive, would violate: due process by not giving the defendant notice of what is criminal, separation of powers by allowing a court to create crimes, which is the legislature's responsibility, and California Penal Code § 187, which specifically prohibits common-law crimes.

Read this case at the following

link: http://scholar.google.com/scholar_case?case=2140632244672927312&hl=en&as_sdt=2&as_vis=1&oi=scholar

Published judicial opinions are written by judges and can be lengthy. They can also contain more than one case law, depending on the number of issues addressed. Case briefs reduce a judicial opinion to its essentials and can be instrumental in understanding the most important aspects of the case. Standard case brief formats can differ, but one format that attorneys and paralegals commonly use is explained in the following paragraph.

Review the *Keeler* case brief. The case brief should begin with the **title of the case**, including the **citation**. The next component of the case brief should be the **procedural facts**. The procedural facts should include two pieces of information: *who is appealing* and *which court* the case is in. As you can see from the *Keeler* case brief, Keeler brought an application for a writ of prohibition, and the court is the California Supreme Court. Following the procedural facts are the **substantive facts**, which should be a short description of the facts that instigated the court trial and appeal. The procedural and substantive facts are followed by the **issue**. The issue is the question the

[8] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), accessed February 15, 2010, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZS.html.

1.7 End-of-Chapter Material

Summary

A crime is action or inaction in violation of a criminal law. Criminal laws vary from state to state and from state to federal.

The study of criminal law defines crimes and defenses to crimes. The study of criminal procedure focuses on the enforcement of rights by individuals while submitting to government investigation, arrest, interrogation, trial, and appeal.

A civil lawsuit or civil litigation matter resolves a dispute between individuals, called a plaintiff (the injured party) and defendant (the alleged wrongdoer). Every civil litigation matter includes a victim (the plaintiff), which has suffered harm. The goal of the civil litigation matter is to compensate the plaintiff for injury. The court can compensate the plaintiff by awarding money, which is called damages. Both parties in a civil litigation matter must represent themselves or hire private attorneys.

A criminal prosecution takes place when the government, represented by a prosecutor, takes legal action against the defendant (the alleged wrongdoer) for committing a crime. Some criminal prosecutions do not include a victim, or harm, because the goal of the criminal prosecution is punishment, not compensation. Every criminal prosecution involves the government, so the US and state constitutions provide the criminal defendant with extra protections not present in a civil lawsuit, such as free counsel when the defendant is indigent and facing incarceration.

Crimes can be classified according to the severity of punishment. The most serious crimes with the entire range of sentencing options available are felonies. Misdemeanors are less serious than felonies and have less severe sentencing options. Felony-misdemeanors can be prosecuted and punished as a felony or a misdemeanor, depending on the circumstances. Infractions, also called violations, are the least serious crimes and generally do not involve incarceration. The purposes of punishing a criminal defendant are both specific and general deterrence, incapacitation, rehabilitation, retribution, and restitution.

Law comes from three sources: the Constitution, a statute, or a case. The Constitution is the highest source of law but is only applicable when there is government action. Statutory law applies to individuals

powers expressly granted in the Constitution. Courts have interpreted the last two powers mentioned in the commerce clause and the necessary and proper clause to be the *broadest* sources of federal regulatory authority.

To simplify and summarize precedent defining federal regulatory authority, federal laws are meant to regulate in two areas. First, federal laws regulate issues that concern the *country*, rather than just one city, county, or state. The federal government regulates in the area of foreign affairs, for example, because this affects the United States of America, not just one particular region. Second, federal laws regulate commerce, which is economic activity, that *crosses from state to state*. Some common examples are television broadcasts, the Internet, and any form of transportation such as the airlines.

Federal Criminal Laws

The original intent was for the federal government to be a *limited* government, with the bulk of regulatory authority residing in the *states*. The only *crimes* Congress is specifically authorized to punish are piracies and felonies on the high seas, counterfeiting, and treason; however, case precedent has expanded the federal government's power to enact criminal laws based on the commerce clause and the necessary and proper clause.^[1] Still, there must be some connection to an issue of national character and interstate commerce, or the federal government will overstep its authority. In general, federal criminal laws target conduct that occurs on federal property or conduct involving federal employees, currency, coin, treason, national security, rights secured by the Constitution, or commerce that crosses state lines. Currently, over five hundred crimes are listed in Part I, Title 18 of the United States Code, which codifies criminal laws for the federal government.

Figure 2.1 Diagram of Federal Laws

The Legislative Branch

The **legislative branch** is responsible for creating statutory laws. Citizens of a state can vote for some state statutes by ballot, but the **federal legislative branch** enacts all federal statutes. In the federal government, the legislative branch is headed by Congress. States' legislative branches are headed by a state legislature. Congress is bicameral, which means it is made up of two houses. This system provides equal representation among the several states and by citizens of the United States. States are represented by the Senate. Every state, no matter how large or small, gets two senators. Citizens are represented by the House of Representatives. Membership in the House of Representatives is based on population. A heavily populated state, like California, has more representatives than a sparsely populated state, like Alaska. States' legislatures are generally bicameral and have a similar structure to the federal system.

Figure 2.4 Diagram of the Legislative Branch

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states that within the city limits, marijuana is legal to possess and use. Which constitutional principle is the mayor violating? Which branch of government should check and balance the mayor's behavior in this matter?

2. Read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown*, President Truman seized control of steel mills to avert a strike, using his authority as commander in chief of the armed forces. President Truman wanted to ensure steel production during the Korean War. Did the US Supreme Court uphold President Truman's action? Why or why not? The case is available at this link: <http://supreme.justia.com/us/343/579/>.
3. Read *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, the US Supreme Court reviewed the US Court of Appeals for the Fourth Circuit's decision prohibiting the release of a US citizen who was held as an enemy combatant in Virginia during the Afghanistan War. The citizen's detention was based on a federal statute that deprived him of the opportunity to consult with an attorney or have a trial. Did the US Supreme Court defer to the federal statute? Why or why not? The case is available at this link: http://scholar.courtswatch.com/scholar/case/case-6173897153146757813&hl=en&as_sdt=18a-ws=1&oi=scholar

2.3 The Court System

LEARNING OBJECTIVES

1. Compare federal and state courts.
2. Define jurisdiction.
3. Compare original and appellate jurisdiction.
4. Identify the federal courts and determine each court's jurisdiction.
5. Identify the state courts and determine each court's jurisdiction.

Every state has *two* court systems: the *federal* court system, which is the same in all fifty states, and the *state* court system, which varies slightly in each state. Federal courts are fewer in number than state courts. Because of the Tenth Amendment, discussed earlier in [Section 2.1.2 "The Scope of State Law"](#), most laws are state laws and therefore most legal disputes go through the state court system.

Federal courts are exclusive; they adjudicate only *federal* matters. This means that a case can go through the federal court system only if it is based on a federal *statute* or the federal *Constitution*. One exception is called **diversity of citizenship**.^[1] If citizens from different states are involved in a civil lawsuit and the amount in controversy exceeds \$75,000, the lawsuit can take place in federal court. All federal *criminal prosecutions* take place in federal courts.

State courts are nonexclusive; they can adjudicate state or federal matters. Thus an individual who wants to sue civilly for a federal matter has the option of proceeding in state or federal court. In addition, someone involved in a lawsuit based on a federal statute or the federal Constitution can remove a lawsuit filed in state court to federal court.^[2] All state *criminal prosecutions* take place in state courts.

Jurisdiction

Determining which court is appropriate for a particular lawsuit depends on the concept of jurisdiction. Jurisdiction has two meanings. A court's jurisdiction is the power or authority to hear the case in front of it. If a court does not have jurisdiction, it cannot hear the case. Jurisdiction can also be a geographic area over which the court's authority extends.

There are two prominent types of court jurisdiction. Original jurisdiction means that the court has the power to hear a trial. Usually, only *one* opportunity exists for a trial, although some actions result in both a criminal and a civil trial, discussed previously in [Chapter 1 "Introduction to Criminal Law"](#). During the trial, evidence is presented to a trier of fact, which can be either a judge or a jury. The trier of fact determines the facts of a dispute and decides which party prevails at trial by applying the law to those facts. Once the trial has concluded, the next step is an appeal. During an appeal, *no evidence is presented*; the appellate court simply reviews what took place at trial and determines whether or not any major errors occurred.

The power to hear an appeal is called appellate jurisdiction. Courts that have appellate jurisdiction review the **trial record** for error. The trial record includes a court reporter's **transcript**, which is typed notes of the words spoken during the trial and pretrial hearings. In general, with exceptions, appellate courts cannot review a trial record until the trial has ended with a *final judgment*. Once the appellate court has made its review, it has the ability to take three actions. If it finds no compelling or prejudicial errors, it can affirm the judgment of the trial court, which means that the judgment remains the same. If it finds a significant error, it can reverse the judgment of the trial court, which means that the judgment becomes



Inference and Presumption

Parties can use two tools to help meet the burden of proof: inference and presumption. Jury instructions can include inferences and presumptions and are often instrumental in the successful outcome of a case. An inference is a conclusion that the judge or jury *may* make under the circumstances. An inference is never mandatory but is a choice. For example, if the prosecution proves that the defendant punched the victim in the face after screaming, “I hate you!” the judge or jury can infer that the punch was thrown intentionally.

- [11] *Gooding v. Wilson*, 405 U.S. 518, 528 (1972), quoting *Herndon v. Lowry*, 301 U.S. 242, 263 (1937), accessed October 7, 2010, http://scholar.google.com/scholar_case?case=3138831397470557431&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [12] *Brandenburg v. Ohio*, 395 U.S. 444 (1969), accessed October 6, 2010, <http://supreme.justia.com/us/395/444/case.html>.
- [13] *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), accessed October 6, 2010, <http://supreme.justia.com/us/395/444/case.html>.
- [14] *Wisconsin v. Mitchell*, 508 U.S. 47 (1993), accessed October 7, 2010, <http://www.law.cornell.edu/supct/html/92-515.ZO.html>.
- [15] *Virginia v. Black*, 535 U.S. 343 (2003), accessed October 5, 2010, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=01-1107>.
- [16] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), accessed October 5, 2010, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=505&invol=377>.
- [17] *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), accessed October 5, 2010, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=505&invol=377>.
- [18] *Virginia v. Black*, 535 U.S. 343 (2003), accessed October 5, 2010, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=01-1107>.
- [19] *Roth v. United States*, 354 U.S. 476 (1957), accessed October 7, 2010, <http://supreme.justia.com/us/354/476/case.html>.
- [20] *Miller v. California*, 413 U.S. 15 (1973), accessed October 7, 2010, http://scholar.google.com/scholar_case?case=287180442152313659&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [21] *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), accessed October 7, 2010, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=418&invol=153>.
- [22] *City of Erie et al v. Pap's A.M.*, 529 U.S. 277 (2000), accessed October 11, 2010, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=98-1161>.

3.4 The Right to Privacy

LEARNING OBJECTIVES

Example of a Right to Privacy Analysis

Most states have statutes criminalizing consensual incest, which is sexual intercourse between family members who cannot legally marry. If an individual attacks a consensual incest statute as unconstitutional under the right to privacy, the court will balance the state's interest in preventing harm to an infant, such as birth defects, with an individual's interest in having consensual sexual intercourse with a family member, using *strict scrutiny*. If the court finds that the government interest is compelling, it can uphold the statute as long as it is not vague or overbroad.

Figure 3.6 *The Right to Privacy*

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Disproportionate Punishment

Disproportionate punishment is a different issue than inhumane punishment, but it is still within the parameters of the Eighth Amendment. Disproportionate punishment asserts that a criminal punishment is *too severe* for the crime. Two criminal punishments garner many disproportionate punishment claims: **capital punishment** and punishment pursuant to three-strikes statutes.

Capital Punishment as Disproportionate

Capital punishment can be disproportionate because it is too severe for the *crime* or because it is too severe for the *criminal defendant*.

Examples of Capital Punishment That Is Disproportionate to the Crime

Death is the ultimate punishment, so it must be equivalent to the crime the defendant committed.

Although the states and the federal government have designated many capital crimes that may not result in death, for example, treason that does not lead to death, the US Supreme Court has confirmed that the death penalty is too severe for most crimes. In [Coker v. Georgia](#), 433 U.S. 584 (1977), the Court held that capital punishment is disproportionate for the crime of raping an adult woman. Many years later in [Kennedy v. Louisiana](#), 128 S. Ct. 2661 (2008), the Court extended the disproportionality principle to invalidate the death penalty for child rape. *Kennedy* maintained the distinction between crimes committed against individuals and crimes committed against the *government*, like treason. The only crime against an individual that currently merits the death penalty is criminal homicide, which is the unlawful killing of one human being by another. Criminal homicide is discussed in detail in [Chapter 9 "Criminal Homicide"](#).

Figure 3.8 *Crack the Code*

Examples of Capital Punishment That Are Disproportionate to the Criminal Defendant

Recent US Supreme Court precedent has targeted specific classifications of criminal defendants for whom capital punishment is overly severe. Recent cases hold that the death penalty is cruel and unusual punishment for a criminal defendant who was *ajvenile* when the crime was committed,^[7] who is *mentally ill*,^[8] or has an *intellectual disability*^[9] at the time of the scheduled execution. Although states vary in their classifications of juveniles (discussed in detail in [Chapter 6 "Criminal Defenses, Part 2"](#)), the Eighth Amendment prohibits capital punishment for an individual who was under eighteen years of age when he or she committed criminal homicide. Mental illness could cover a variety of disorders, but the US Supreme Court has held that a criminal defendant has a constitutional right to a determination of sanity before execution.^[10] Intellectual disability is distinct from mental illness and is defined by the US Supreme Court as a substantial intellectual impairment that impacts everyday life, and was present at the defendant's birth or during childhood.^[11] However, this standard is broad, so states vary in their legislative definitions of this classification.^[12]

Example of Capital Punishment That Is Inhumane and Disproportionate to the Crime and the Criminal Defendant

Jerry is sentenced to death for rape. The state death penalty statute specifies death by decapitation. While on death row, Jerry begins to hear voices and is diagnosed as schizophrenic by the prison psychiatrist. The state schedules the execution anyway. In this example, the state death penalty statute is *inhumane* because death by decapitation is too severe a punishment for any crime. The death penalty statute is also *disproportionate* to the *crime* because execution is not a constitutional punishment for the crime of rape. Lastly, the death penalty statute is *disproportionate* to Jerry, *the criminal defendant*, because it is cruel and unusual to execute someone who is mentally ill.

Disproportionate Punishment Pursuant to Three-Strikes Laws

California was the first state to enact a "three strikes and you're out" law.^[13] Generally, three-strikes statutes punish habitual offenders more harshly when they commit a second or third felony after an initial serious or violent felony.^[14] To date, California's three-strikes law is the toughest in the nation; it mandates a minimum twenty-five-year- to life sentence for felons convicted of a third strike. California enacted its three-strikes legislation after the kidnapping, rape, and murder of Polly Klaas by a habitual

sentencing and the roles of the judge and jury is necessary to a fundamental understanding of this important trial right, as is set forth in the following section.

The Role of the Judge and Jury in Sentencing Fact-Finding

As stated in [Chapter 2 "The Legal System in the United States"](#), the trier of fact decides the facts and renders a decision on innocence or guilt using **beyond a reasonable doubt** as the standard for the burden of proof. The trier of fact in a criminal prosecution is almost always a *jury* because of the right to a jury trial in the Sixth Amendment. Occasionally, the defendant waives the right to a jury trial and has a bench trial with a judge playing the role of trier of fact. Although the jury determines innocence or guilt during a jury trial, the verdict defines the end of their role as the trier of fact, and the *judge* sets the sentence. The death penalty is an exception to the jury's limited role in sentencing; a jury must decide whether to sentence the defendant to death at a separate hearing after the trial has concluded. Generally, criminal sentencing takes place after the trial. Although the sentencing procedure varies from state to state and from state to federal, a sentencing hearing is typically held after guilt has been determined at trial or after a guilty plea. For many years, judges have had almost *exclusive* control of sentencing. Although judges are restricted by the fact-finding done at trial, they can receive new evidence at sentencing if it is relevant. For example, a judge is bound by a jury determination that the defendant used a weapon when committing an armed robbery. However, the judge can accept new evidence at sentencing that reveals the defendant had two prior convictions for armed robbery and can enhance the sentence under a habitual offender or three-strikes statute.

Sentencing Enhancement by Judges

Until recently, judges could use evidence received at the sentencing hearing to enhance a sentence beyond the statutory maximum by making a determination of the *new* facts to a **preponderance of evidence**. However, in [Apprendi v. New Jersey](#), 530 U.S. 466 (2000), the US Supreme Court held that the right to a jury trial prohibits judges from enhancing criminal sentences beyond the statutory maximum based on facts not determined by a jury **beyond a reasonable doubt**. In *Apprendi*, the trial court enhanced the defendant's sentence beyond the statutory maximum for possession of a firearm with an unlawful purpose under New Jersey's hate crimes statute. Although the jury did not determine that the defendant's crime was a hate crime, the judge accepted new evidence at sentencing that indicated the defendant's shooting into a residence was racially motivated. The US Supreme Court reversed the New Jersey Supreme Court,

prohibited only acts that “materially interfered with schoolwork,” which is not protected by the First Amendment.

- Justice O’Connor said that the Texas sodomy statute was unconstitutional pursuant to the **equal protection clause**. The statute only criminalized sodomy between *persons of the same sex*, so it targeted gay couples without a rational basis.

Answers to Exercises

From [Section 3.3 "Freedom of Speech"](#)

- The statute does not violate the First Amendment’s free speech protection because *battery* is not speech and is not covered by the First Amendment.
- The US Supreme Court held that the provisions were unconstitutional under the First Amendment because they were *vague* and *content based*. The Act did not specifically define “indecent” communications, or demonstrate that offensive material had any value under the three-part test for obscenity set forth in *Miller*.
- The US Supreme Court upheld 18 U.S.C. § 2385B(1) as applied. The Court ruled that the federal government can prohibit aid to terrorist groups, even if it consists of training and advice on *legal* activities, without violating the First Amendment.

Answers to Exercises

From [Section 3.4 "The Right to Privacy"](#)

- The court will probably analyze whether the statute is constitutional under the **right to privacy** and the **equal protection clause**. The right to privacy analysis will use *strict scrutiny* because the right to privacy is *fundamental*. The state must demonstrate a *compelling* state interest in regulating sex in prison. The state’s arguments will probably focus on maintaining integrity, safety, and security in the institution. Under the equal protection clause analysis, the state has to show a *legitimate* state interest pursuant to the rational basis test because the category targeted—inmates in prison—is *rational*, not arbitrary.
- The Court upheld the statute, even though this case was post-*Roe v. Wade*. The Court reaffirmed *Roe*, but imposed a new standard for abortion laws. The new standard analyzes whether a state abortion law places an *undue burden* on a woman seeking an

abortion. The Court held that the twenty-four-hour waiting period and informed consent for minors do not place such a burden. The Court did strike a separate requirement, which mandated husband notification before an abortion could take place.

Answers to Exercises

From [Section 3.5 "The Right to Bear Arms"](#)

1. The court will uphold the order under the Second Amendment if the defendant was convicted of a felony. The recent US Supreme Court precedent in *Heller* and *McDonald* both *exclude* convicted felons from their holdings. However, if the defendant was convicted of a *misdemeanor*, the court has to determine whether *Heller* and *McDonald* extend the Second Amendment's right to possess a usable handgun in the home for self-defense to a convicted police officer who wants to resume his career.
2. The US Supreme Court upheld the conviction, stating that a defendant convicted unconstitutionally can and should challenge that conviction before owning or possessing a firearm.
3. A state could criminalize firearm possession near schools because two recent US Supreme Court rulings (*Heller* and *McDonald*) both exempt firearms near schools from their protection of individual gun ownership and possession.

Answers to Exercises

From [Section 3.6 "Excessive Punishment"](#)

1. The eye-for-an-eye statute is unconstitutional because it mandates an inhumane punishment under the Eighth Amendment. Torture is too severe a punishment for *any* crime.
2. The defendant's sentence was two consecutive terms of twenty-five years to life in prison under California's three-strikes statute. The defendant's crime(s) were stealing five videotapes from Kmart worth \$84.70 on one occasion and stealing four videotapes from Kmart worth \$68.84 on another, with two previous strikes. The US Supreme Court *upheld* the sentence and denied the defendant's petition for habeas corpus.

3. The US Court of Appeals for the Ninth Circuit held that the gas chamber under California's protocol was *cruel and unusual punishment* in violation of the Eighth Amendment.
4. The US Supreme Court reversed the US Court of Appeals for the Eighth Circuit, which held that the sentence was unreasonable according to the US Sentencing Guidelines. The Court reaffirmed that the Guidelines were advisory, but stated that the trial court has *great discretion* in setting the sentence, as long as the basis of the sentence is explained on the record.

Answers to Law and Ethics Questions

1. The *categorization* of some speech as outside the First Amendment's protection generally focuses on speech that can produce immediate or imminent harm or lawless action, like **fighting words**, or speech that is devoid of social value, like **obscenity**. Depictions of animal cruelty probably fall within the second category. Whether you believe depictions of animal cruelty should be criminalized depends on whether you feel another category should be added to the list. The US Supreme Court was reluctant to expand categorization, indicating that First Amendment protections far exceed government interests in content-based regulations.
2. Some possible consequences of expanding categorization are the increase of government censorship into areas that may have value, either literary, artistic, political, or scientific. Any time case precedent limits the First Amendment, individual rights of expression are likewise inhibited, and the government's power to regulate and enact laws encroaching upon individual freedoms is *enhanced*.

Answers to You Be the Legislative Analyst

1. (1) The **ex post facto clause** is relevant. (2) The statute is most likely **constitutional**. (3) Even though the statute is retroactive, the statute is not a criminal law, but a tax increase, so there is no violation of the ex post facto clause.
2. (1) The **First Amendment** and the **due process clause** in the Fourteenth Amendment are relevant. (2) The proposed statute is most likely **unconstitutional**. (3) The statute is probably void for vagueness and overbroad. The word "art" can be



Statutory Example:

Section 13A-6-43 – Kidnapping in the first degree.

(a) A person commits a crime of kidnapping in the first degree if he **abducts another person** with intent to

- (1) Hold him for ransom or reward; or
- (2) Use him as a shield or hostage; or
- (3) Accomplish or aid the commission of any felony or flight therefrom; or
- (4) Inflict physical injury upon him, or to violate or abuse him sexually; or
- (5) Terrorize him or a third person; or
- (6) Interfere with the performance of any governmental or political function.

Criminal act

The Requirement of Voluntariness

One requirement of criminal act is that the defendant perform it *voluntarily*. In other words, the defendant must *control* the act. It would not serve the policy of specific deterrence to punish the defendant for irrepressible acts. The Model Penal Code gives the following examples of acts that are not voluntary and, therefore, not criminal: reflexes, convulsions, bodily movements during unconsciousness or sleep, conduct during hypnosis or resulting from hypnotic suggestion, or a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual (Model Penal Code § 2.01 (2)). *One voluntary act* is enough to fulfill the voluntary act requirement. Thus if

not prove that *he knew* the weapon was automatic, and the prosecution must prove this knowledge to convict under the statute. Did the US Supreme Court reverse the defendant's conviction? Why or why not? The case is available at this link: <http://www.law.cornell.edu/supct/html/92-1441.ZO.html>.

- [1] N.Y. Penal Law § 15.00, accessed October 25, 2010, http://law.onecle.com/new-york/penal/PEN015.00_15.00.html.
- [2] *Govt. of Virgin Islands v. Smith*, 278 F.2d 169 (1960), accessed October 26, 2010, <http://openjurist.org/278/f2d/169/government-of-the-virgin-islands-v-smith>.
- [3] N.Y. Penal Law § 15.00, accessed October 25, 2010, http://law.onecle.com/new-york/penal/PEN015.00_15.00.html.
- [4] 26 U.S.C. § 7203, accessed October 25, 2010, http://www.law.cornell.edu/uscode/26/uscode_sec_26_00007203----000-.html.
- [5] Fla. Stat. Ann. § 790.24, accessed October 25, 2010, <http://law.onecle.com/florida/crimes/790.24.html>.
- [6] Ky. Rev. Stat. Ann. § 620.030, accessed October 25, 2010, <http://www.legis.ky.gov/krs/620-00/030.pdf>.
- [7] Minnesota Code § 604A.01, accessed October 25, 2010, <http://law.justia.com/minnesota/codes/2005/595/604a-s01.html>.
- [8] *State ex rel. Kuntz v. Thirteenth Jud. Dist.*, 995 P.2d 951 (2000), accessed October 25, 2010, <http://caselaw.findlaw.com/mt-supreme-court/1434948.html>.
- [9] *Jones v. U.S.*, 308 F.2d 307 (1962), accessed October 25, 2010, http://scholar.google.com/scholar_case?case=14703438613582917232&hl=en&as_sdt=2002&as_vis=1.
- [10] *State v. Davis*, 84 Conn. App. 505 (2004), accessed February 13, 2011, http://scholar.google.com/scholar_case?case=12496216636522596448&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [11] Connecticut Jury Instructions No. 2.11-1, accessed February 13, 2011, <http://www.jud.ct.gov/ji/criminal/part2/2.11-1.htm>.

4.2 Criminal Intent

LEARNING OBJECTIVES

Second, the defendant must take an unjustifiable risk, meaning that no valid reason exists for the risk. The standard for this prong is objective; if a *reasonable person* would not take the risk, then the defendant's action in taking it is **reckless**. As the Model Penal Code states, "[t]he risk must be of such a nature and degree that...its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation" (Model Penal Code § 2.02(2) (c)).

Example of Recklessly

Review the example in , where Victor shoots into a crowd of subway travelers and kills Monica. Change the example, and imagine that the subway train has only three passengers. Victor easily shoots in between them, yet the bullet ricochets off one of the seats and strikes Monica, killing her. Victor would be acting with **reckless** rather than **knowing** intent in this situation. Victor's knowledge and awareness of the *risk* of injury or death when shooting a gun inside a subway car containing three passengers is probably *substantial*. A reasonable, law-abiding person would probably *not* take this action under these circumstances. Thus Victor might be charged with a lower-level form of criminal homicide like **manslaughter** in this case. The difference between murder and manslaughter is discussed in detail in .

Negligently

Negligent intent crimes are less culpable than reckless intent crimes and are also less common. The difference between reckless and negligent intent is the defendant's *lack of awareness*. While defendants committing negligent intent crimes are also faced with a **substantial** and **unjustifiable** risk, they are *unaware* of it, even though a reasonable person would be. ^[9] Thus the first prong of the reckless intent test is simply changed from a subjective to objective standard. As the Model Penal Code states, "[a] person acts negligently...when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct"(Model Penal Code § 2.02(2) (d)).

Example of Negligently

Review the example in , where Victor shoots into a crowd of subway travelers and kills Monica. Change the example, and imagine that the subway train has no passengers. Victor brags to Tanya that he can shoot a crumpled napkin on the floor. Tanya challenges him to try it. Victor shoots at the napkin and misses, and the bullet ricochets three times off three different seats, travels backward, and strikes Tanya in the forehead, killing her instantly. In this case, Victor may be *unaware* of the bullet's potential to

ricochet several times and actually travel backward. However, the trier of fact can determine that a “reasonable person” would be aware that shooting a gun inside a small subway train could result in injury or death. This would be a finding that Victor acted **negligently**, under the circumstances. If the state in which Victor shot Tanya criminalizes negligent killings, then Victor could be found guilty of criminal homicide in this case.

Figure 4.8 *Model Penal Code Criminal Intents Ranked from Most Serious to Least Serious*



Elements and Criminal Intent

Occasionally, *different* criminal intents support the various elements of an offense. If a crime requires more than one criminal intent, each criminal intent must be proven beyond a reasonable doubt for each element.

Under the common law, every offense had just *one* criminal intent. In modern society, every offense has one criminal intent *unless* a statute specifies otherwise. As the Model Penal Code states, “[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all of the

underage person like Ashley, even though Don did not *personally* participate in the sale. Because Don is James's employer, he may be vicariously liable for James's on-the-job conduct in this instance.

Concurrence of Act and Intent

Another element of most criminal offenses is the requirement that the criminal act and criminal intent exist at the same moment. ^[14] This element is called concurrence. Concurrence is rarely an issue in a criminal prosecution because the criminal intent usually generates the bodily response (criminal act).

However, in some rare instances, the criminal act and intent are separated by time, in which case concurrence is lacking and the defendant cannot be convicted of a crime.

Example of a Situation Lacking Concurrence

Sherree decides she wants to kill her husband using a handgun. As Sherree is driving to the local gun shop to purchase the handgun, her husband is distracted and steps in front of her car. Sherree slams on the brakes as a reflex, but unfortunately she is unable to avoid striking and killing her husband. Sherree cannot be prosecuted for criminal homicide in this case. Although Sherree had formulated the intent to kill, the intent to kill did not exist at the moment she committed the criminal act of hitting her husband with her vehicle. In fact, Sherree was trying to avoid hitting her husband at the moment he was killed. Thus this case lacks concurrence of act and intent, and Sherree is not guilty of criminal homicide.

KEY TAKEAWAYS

- One important function of intent is the determination of punishment. In general, the more evil the intent, the more severe the punishment.
- The three common-law intents ranked in order of culpability are malice aforethought, specific intent, and general intent.
- Specific intent is the intent to bring about a certain result, do something other than the criminal act, or scienter. General intent is simply the intent to perform the criminal act.
- With a general intent crime, the trier of fact may infer intent from the criminal act. This alleviates the prosecution's burden of proving criminal intent.
- Motive is the reason the defendant commits the criminal act. Motive standing alone is not enough to prove criminal intent.
- The Model Penal Code's criminal states of mind ranked in order of culpability are purposely, knowingly, recklessly, and negligently. Purposely is similar to specific intent to

cause a particular result. Knowingly is awareness that results are practically certain to occur. Recklessly is a subjective awareness of a risk of harm, and an objective and unjustified disregard of that risk. Negligently is not being aware of a substantial risk of harm when a reasonable person would be.

- The exception to the requirement that every crime contain a criminal intent element is strict liability.
- Transferred intent promotes justice by holding a defendant responsible for his or her criminal conduct, even though the conduct was intended to harm a different victim.
- Vicarious liability is the transfer of criminal liability from one criminal defendant to another based on a special relationship.
- Concurrence requires that act and intent exist at the same moment.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. As Jordan is driving to school, she takes her eyes off the road for a moment and rummages through her purse for her phone. This causes her to run a stop sign. Jordan is thereafter pulled over by law enforcement and issued a traffic ticket. What is Jordan's criminal intent in this case? Is Jordan criminally responsible for running the stop sign? Why or why not?
2. Read *Morrisette v. U.S.*, 342 U.S. 246 (1952). In *Morrisette*, the defendant was convicted of unlawful conversion of federal property for gathering and selling spent bomb casings dropped during US Air Force practice maneuvers. The statute required "knowing" conversion of the property, and the defendant claimed he believed the property was *abandoned*. Did the US Supreme Court uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=787130527265701764&hl=en&as_sdt=2&as_vis=1&oi=scholar.
3. Read *State v. Crosby*, 154 P.3d 97 (2007). In *Crosby*, the defendant was convicted of manslaughter of a dependent person by neglect. The defendant's mother died of "sepsis" and was brought to the hospital covered with feces and bedsores. The

constructive if within an area of the defendant's control, like inside the defendant's house or vehicle. More than one defendant can be in possession of one item. Criminal possession should be supported by the intent of awareness because it is passive.

Criminal intent is an important element because it is often one factor considered in the grading of criminal offenses. The three common-law criminal intents are malice aforethought, which is intent to kill, specific intent, and general intent. Specific intent is the intent to bring about a particular result, a higher level of awareness than is required to perform the criminal act, or scienter, which is knowledge that a criminal act is unlawful. General intent is the intent to do the act and can often give rise to an inference of criminal intent from proof of the criminal act. Motive should not be confused with or replace intent. Motive is the reason the defendant develops criminal intent.

The Model Penal Code describes four criminal states of mind, which are purposely, knowingly, recklessly, and negligently. Purposely is similar to specific intent to cause a particular result. Knowingly is awareness that results are practically certain to occur. Recklessly is a subjective awareness of a risk of harm and an objective and unjustified disregard of that risk. Negligently is not being aware of a substantial risk of harm when a reasonable person would be. Offense elements, including specific attendant circumstances, may require different mental states. If so, the prosecution must prove each mental state for every element beyond a reasonable doubt.

Strict liability crimes do not require an intent element and are generally malum prohibitum, with a less severe punishment. Transferred intent is a legal fiction that transfers a defendant's criminal intent to an unintended victim for the purpose of fairness. Pursuant to transferred intent, the defendant may be responsible for two crimes: attempt and the completed crime, depending on the circumstances. Vicarious liability transfers a defendant's criminal liability to a different defendant based on a special relationship. Corporate liability is a type of vicarious liability that holds a corporation responsible for crimes apart from its owners, agents, and employees. Concurrence is also a criminal element that requires the criminal act and criminal intent exist at the same moment.

When the crime requires a bad result, the defendant must cause the harm. The defendant must be the factual and legal cause. Factual cause means that the defendant starts the chain of events that leads to the bad result. Legal or proximate cause means that it is objectively foreseeable that the end result will occur when the defendant commits the criminal act. An intervening superseding cause breaks the chain of

practical driving tests that emphasize this fact. Whether Jordan's intent is reckless or negligent is probably irrelevant because most states make running a stop sign a **strict liability** offense with no criminal intent required.

2. The US Supreme Court reversed the defendant's conviction. The Court disagreed with the lower court that this was a strict liability public welfare offense and determined that a *presumption* of intent was inappropriate. The Court held that criminal intent was an element of the offense that the trier of fact needed to find beyond a reasonable doubt.
3. The Oregon Supreme Court reversed and held that the substantial risk applied to the victim's *death* (bad result), not the victim's *bedsores* (attendant circumstances).
4. The Ohio Supreme Court held that the indictment was valid and that the statute clearly intended for aggravated robbery to be a *strict liability* offense lacking mens rea.

Answers to Exercises

From [Section 4.3 "Causation and Harm"](#)

1. Phillipa's act is the **factual** and **legal cause** of Fred's death. Phillipa's act in jumping out of the bushes screaming caused Fred to run onto the highway, so Phillipa's act is the factual cause of Fred's death. In addition, a reasonable person could *foresee* that frightening someone next to a major highway might result in them trying to escape onto the highway, where a vehicle traveling at a high rate of speed could hit them. Thus Phillipa's act is *also* the legal cause of Fred's death.
2. The Delaware Supreme Court reversed the defendant's conviction based on a jury instruction that did not include the *victim's actions*. The Delaware Supreme Court held that the defendant's acts could not be the legal cause of death unless the result of the defendant's acts was foreseeable. Foreseeability in this case could only be analyzed if the jury instructions address the victim's behavior.
3. The Massachusetts Supreme Judicial Court upheld the defendant's indictment, and did not create a new death timeline rule.

Answer to Law and Ethics Question

1. Although ten years is a lengthy prison sentence, it may be ethical even for a criminal act committed without criminal *intent* if there is a potential for **harm**. In *Dean*, the

the example given in [Section 5 "Example of an Affirmative Defense"](#), for Jasmine's self-defense claim, Jasmine must prove she was defending herself by meeting either the burden of production or the burden of production and persuasion to a preponderance of evidence, depending on the jurisdiction.

Figure 5.2 Diagram of the Criminal Burden of Proof



Definition of Imperfect and Perfect Defenses

As stated previously, a defense can reduce the severity of the offense, or completely exonerate the defendant from criminal responsibility. If a defense reduces the severity of the offense, it is called an imperfect defense. If a defense results in an acquittal, it is called a perfect defense. The difference

that raises an issue separate from the elements of the crime. Most affirmative defenses are based on justification or excuse and must be raised before or during the trial to preserve the issue for appeal.

- An imperfect defense reduces the severity of the offense; a perfect defense results in an acquittal.
- If the basis for a defense is an issue of fact, it is called a factual defense. If the basis for a defense is an issue of law, it is called a legal defense.
- An example of a factual defense is an alibi defense, which asserts that the defendant could not have committed the crime because he or she was somewhere else when the crime occurred. An example of a legal defense is a claim that the statute of limitations has expired, which asserts that it is too late for the government to prosecute the defendant for the crime.
- An affirmative defense is based on justification when it claims that criminal conduct is justified under the circumstances. An affirmative defense is based on excuse when it claims that the criminal defendant should be excused for his or her conduct.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Carol is on trial for battery, a general intent crime. Carol puts on a defense that proves her conduct was accidental, *not* intentional. Is this an affirmative defense? Why or why not?
2. Read *State v. Burkhardt*, 565 S.E.2d 298 (2002). In *Burkhardt*, the defendant was convicted of three counts of murder. The defendant claimed he acted in self-defense. The jury instruction given during the defendant's trial stated that the prosecution had the burden of disproving self-defense. However, the instruction did not state that the prosecution's burden of disproving self-defense was *beyond a reasonable doubt*. Did the Supreme Court of South Carolina uphold the defendant's conviction for the murders? The case is available at this

link: http://scholar.google.com/scholar_case?case=1066148868024499763&hl=en&as_sdt=2&as_vis=1&oi=scholar.



Statutory Example:

§35.15 Justification; use of physical force in defense of a person.

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, **unless:**

- (b) **The actor was the initial aggressor;** except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force;

**Withdrawal
exception**

this situation. Of course, if Kelsey pulls out a gun and shoots Keith, she could not claim defense of property because deadly force is never justifiable to protect real or personal property from harm.

Ejection of Trespasser

A simple trespasser is an individual who is present on real property without consent of the owner.

Property owners have the legal right to *eject* trespassers under certain specified circumstances.

Most states authorize the ejection of a trespasser if the trespasser is first asked to leave and fails to comply within a reasonable time. ^[7] The degree of force that can be used to eject the trespasser is *reasonable*

force, under the circumstances. ^[8] Deadly force is never reasonable to eject a trespasser unless the

trespasser threatens imminent deadly force against the defendant or another individual. ^[9] Deadly force under these circumstances is justified by **self-defense** or **defense of others**, *not* ejection of trespasser.

Example of Ejection of Trespasser

Sam sees Burt sitting on his lawn. Sam goes up to Burt and asks him to “move along.” Burt looks up, but does not stand. Sam goes into the house and calls law enforcement, but they inform Sam that there is a local emergency, and they cannot come and eject Burt for at least five hours. Sam goes back outside and sees that Burt is now sprawled out across the lawn. Sam grabs Burt, pins him to his feet, and pushes him off the lawn and onto the sidewalk. Sam can probably use **ejection of trespasser** as a defense to battery of Burt. Sam asked Burt the trespasser to leave, and Burt ignored him. Sam’s attempt to rely on law enforcement was likewise unsuccessful. Sam’s use of nondeadly force appears objectively reasonable.

Thus Sam’s ejection of a trespasser is most likely appropriate under these circumstances.

Defense of Habitation

Defense of habitation is a defense that applies specifically to the defendant’s *residence*. At early common law, a person’s home was as sacred as his or her person, and deadly force could be employed to protect it. The majority of states have since enacted modern castle laws that embody this common-law doctrine.

Other than the use of deadly force, defense of habitation generally follows the same rules as defense of property, self-defense, and defense of others. Thus this defense of habitation discussion focuses primarily on the use of deadly force.

The first state to expand the defense of habitation to include the use of deadly force was Colorado, with its “make my day” self-defense statute. ^[10] In 2005, Florida began a wave of castle law modifications that resulted in most states revising their defense of habitation laws. ^[11] Generally, three elements must be

Currently, most jurisdictions have statutes protecting law enforcement's reasonable use of force when effectuating an arrest or apprehending a fleeing suspect. Under *Garner*, these statutes must restrict the lawful use of deadly force to potentially deadly situations. If a law enforcement officer exceeds the use of force permitted under the circumstances, the law enforcement officer could be prosecuted for a *crime* or sued for *civil damages* (or both).

Example of Reasonable Force by Law Enforcement to Arrest

Review the example in [Chapter 1 "Introduction to Criminal Law", Section 1.2.1 "Example of Criminal Law Issues"](#). In that example, Linda puts a bra in her purse without paying for it at an expensive department store. When she attempts to leave the store, an alarm is activated. Linda begins sprinting down the street. Colin, a police officer, just happens to be driving by with the window of his patrol car open. He hears the store alarm, sees Linda running, and begins shooting at Linda from the car. Linda is shot in the leg and collapses. In this example, no facts exist to indicate that Linda poses a potentially **deadly** threat to Colin or others. The fact that Linda is running down the street and an alarm is going off does not demonstrate that Linda has committed a crime necessitating deadly force to arrest. Thus Colin can use only **nondeadly** force to arrest Linda, such as his hands, or possibly a stun gun or Taser to subdue her. If Linda is *unarmed* and *does not* have a firearm to subdue her, the utilization of deadly force is excessive under these circumstances and Colin has no defense to assault with a deadly weapon or to attempted murder. Change this example and imagine that Colin pulls over and attempts to arrest Linda. Linda removes a gun from her purse. Under most modern statutes, Colin does not have a duty to retreat and can use deadly force to arrest or apprehend Linda. Under *Garner*, it is reasonable to believe that Linda poses a danger of death or serious bodily injury to Colin or others. Thus Colin can constitutionally use **deadly force** to protect himself and the public from harm in this situation. Note that Linda's theft is probably *amisdemeanor*, not a *felony*. However, it is Linda's exhibition of deadly force to resist arrest that triggers Colin's deadly force response. Under these circumstances, Colin's use of deadly force is justified and can operate as a legal defense in a criminal prosecution or civil suit for damages.

Figure 5.5 Diagram of Use-of-Force Defenses

the Supreme Court of Virginia uphold the defendant's conviction? The case is available at this link: <http://caselaw.findlaw.com/va-supreme-court/1454888.html>.

3. Read *Dutton v. Hayes-Pupko*, No. 03-06-00438 (2008). In *Dutton*, a law enforcement officer asked the victim for her name and date of birth after she allegedly sprayed her neighbors with a hose. The victim refused to respond, and the law enforcement officer handcuffed her and forced her into his vehicle, injuring her wrist. The victim sued for use of excessive force in arrest. Did the Texas Court of Appeals hold that the victim had the right to sue the officer for use of excessive force in arrest? The case is available at this link: http://scholar.google.com/scholar_case?case=17543977294597089197&q=Dutton+v.+Hayes-Pupko&hl=en&as_sdt=2,5&as_vis=1.

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- [1] *People v. Kurr*, 654 N.W.2d 651 (2002), accessed November 14, 2010, http://scholar.google.com/scholar_case?case=1499269862941178127&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [2] *Commonwealth v. Miranda*, No. 631-F-2094 (2010), accessed November 14, 2010, <http://www.mgaia.com/slip.htm?cid=19939&slip=119>.
- [3] California Criminal Jury Instructions No. 476, accessed November 15, 2010, <http://www.justia.com/criminal/docs/calcrim/3400/3476.html>.
- [4] K.S.A. § 21-3213, accessed November 15, 2010, http://kansasstatutes.lesterama.org/Chapter_21/Article_32/21-3213.html.
- [5] Conn. Gen. Stat. § 53a-21, accessed November 15, 2010, <http://www.cga.ct.gov/2009/pub/chap951.htm#Sec53a-21.htm>.
- [6] Fla. Stat. Ann. § 776.031, accessed November 16, 2010, http://law.justia.com/florida/codes/2007/TitleXLVI/chapter776/776_031.html.
- [7] N.J. Stat. § 2C:3-6, accessed November 15, 2010, <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/3-6.html>.
- [8] Iowa Code § 704.4, accessed November 15, 2010, <http://coolice.legis.state.ia.us/coolice/default.asp?category=billinfo&service=iowacode&ga=83&input=704#704.4>.

Example of Involuntary Consent

Change the example with Gina and Geoff. Imagine that Gina just arrived at the party and has not consumed any alcohol. Geoff tells Gina he will poke out her eye with a pin if she does not volunteer to be the donkey in the pin the tail on the donkey game. He exemplifies his threat by making stabbing gestures at Gina's eye with the pin. Frightened, Gina goes to the front of the room and poses in front of the donkey poster until Geoff stabs her in the buttocks with the pin. Geoff probably cannot claim **consent** as a defense to battery in this case. Gina consented in response to Geoff's threat of physical harm. Thus her consent was not given **voluntarily** and was ineffective in this situation.

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Figure 5.7 Delaware Code Annotated



Statutory Example:

§453. Circumstances negating consent as defense.

Unless otherwise provided by this Criminal Code or by the law defining the offense, consent of the victim does not constitute a defense if:

(1) It is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense, unless the defendant believes the victim is legally competent; or

(2) It is given by a person who, because of youth, mental illness, mental defect or intoxication is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(3) It is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or

(4) It is induced by force, duress or deception.

Unknown
consent

Involuntary
consent

Some jurisdictions require the defendant to retreat before resorting to deadly force, while others allow the defendant to stand his or her ground.

In most states, an individual can defend another to the same extent as self-defense. If a defendant is honestly but unreasonably mistaken about the fact that he or she needs to respond in self-defense or defense of others, imperfect self-defense or defense of others may be appropriate, depending on the jurisdiction. A defendant can also defend property using nondeadly force from an imminent threat of damage, loss, or theft. Real property is land and anything permanently attached to it, while personal property is any movable object. In many jurisdictions, a trespasser may be ejected from real property using nondeadly force after the trespasser has been requested to leave.

Defense of habitation is distinct from defense of real property in most states. Modern laws called castle laws expand the use of force to defend habitation. Castle laws eliminate the duty to retreat when in the home and provide civil and criminal immunity from prosecution for the use of deadly force. Deadly force can be used against a trespasser who enters occupied premises without consent of the owner when there is an objectively reasonable belief that the occupants will be seriously injured or killed.

Law enforcement can also use force to arrest or apprehend a criminal. If the force is deadly, it is considered a seizure under the Fourth Amendment and is scrutinized under an objectively reasonable standard.

The defense of choice of evils (called the necessity defense in some jurisdictions) permits the defendant to commit a crime if the harm caused is less severe than harm that will occur if the crime is not committed.

In general, criminal homicide cannot be defended by choice of evils. Duress, a closely related defense, can sanction the use of force when the defendant is imminently threatened with serious bodily injury or death.

Like choice of evils, the degree of force used pursuant to duress should be nondeadly.

The victim can also consent to the defendant's conduct, creating a consent defense, as long as the consent is given knowingly and voluntarily, the conduct is sexual or occurs during a sporting event, and the conduct does not involve serious bodily injury or death.

YOU BE THE DEFENSE ATTORNEY

You are a well-known private defense attorney with a perfect record. Read the prompt, review the case, and then decide whether you would **accept** or **reject** it if you want to maintain your level of success. Check your answers using the answer key at the end of the chapter.

under a claim of *medical necessity*. Will you accept or reject the case? Read *U.S. v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). The case is available at this link: <http://www.law.cornell.edu/supct/pdf/00-151P.ZO>.

Cases of Interest

- *Acers v. United States*, 164 U.S. 388 (1896), discusses deadly force and self-defense: <http://supreme.justia.com/us/164/388>.
- *Graham v. Connor*, 490 U.S. 386 (1989), discusses force used in arrest: <http://supreme.justia.com/us/490/386>.
- *State v. Rogers*, 912 S.W.2d 670 (1995), discusses duress: http://scholar.google.com/scholar_case?case=4913796561906479282&hl=en&as_sdt=2&as_vis=1&oi=scholar.

Articles of Interest

- Affirmative defenses: http://www.fd.org/pdf_lib/Beneman_Affirmative_Defenses_materials.pdf
- Self-defense and martial arts: <http://www.ittendojo.org/articles/general-4.htm>
- Castle laws: <http://www.harvardjoi.com/wp-content/uploads/2010/07/523-554.pdf>
- Necessity and duress defenses: <http://wings.buffalo.edu/law/bclc/bclarticles/6/2/westen.pdf>

Websites of Interest

- Castle laws by state: http://www.readytodefend.com/index.php?main_page=page&id=5&chapter=12
- Criminal defense attorneys for all fifty states: <http://www.hg.org/law-firms/USA-Criminal-Defense.html>

Statistics of Interest

- Violence used during household burglaries in the United States: <http://bjs.ojp.usdoj.gov/content/pub/press/vdhubpr.cfm>
- US law enforcement officers killed and assaulted: <http://www.fbi.gov/about-us/cjis/ucr/leoka/2009/leoka-2009>

Answers to Exercises

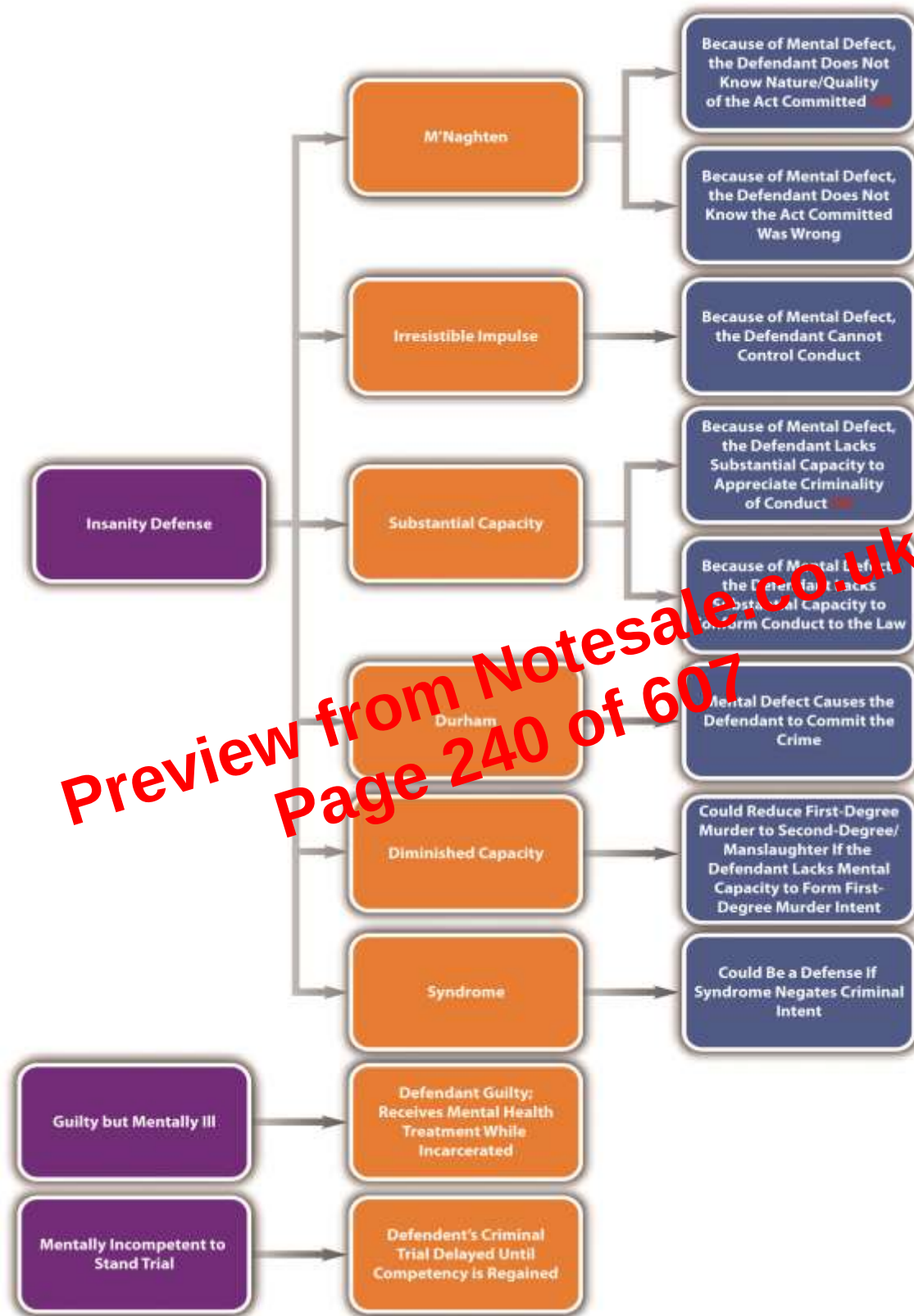
From [Section 5.1 "Criminal Defenses"](#)

M’Naghten and irresistible impulse insanity defenses. The second element combines the **cognitive** standard with **volitional**, like the irresistible impulse insanity defense supplementing the M’Naghten insanity defense. In general, it is easier to establish insanity under the substantial capacity test because both the cognitive and volitional requirements are scaled down to more flexible standards. Unlike the M’Naghten insanity defense, the substantial capacity test relaxes the requirement for complete inability to understand or know the difference between right and wrong. Instead, the defendant must lack *substantial*, not total, capacity. The “wrong” in the substantial capacity test is “criminality,” which is a *legal* rather than moral wrong. In addition, unlike the irresistible impulse insanity defense, the defendant must lack *substantial*, not total, ability to conform conduct to the requirements of the law. Another difference in the substantial capacity test is the use of the word “appreciate” rather than “know.” As stated previously, appreciate incorporates an emotional quality, which means that evidence of the defendant’s character or personality is relevant and most likely admissible to support the defense.

Example of the Substantial Capacity Test

Loreen has been diagnosed with psychosis and spent most of her life in a mental hospital. While at the mental hospital, Loreen made friends with many of the patients and health care personnel. From time to time, Loreen would play jokes on these friends. Most of these “jokes” consisted of putting her antidepressants into their food. Loreen was always reprimanded and often sternly punished for these escapades. After her release from the mental hospital at age twenty-one, Loreen falls in love with Aidan, a man who works in a bookstore near her apartment. Loreen decides to make Aidan fall in love with her by feeding him a magic potion, which she concocts out of a mixture of her antidepressants. Loreen buys a book from Aidan and casually asks if he would like her to buy him a coffee. Aidan shrugs and says, “Sure, but I don’t have a break for another two hours.” Loreen offers to bring him the coffee. Before bringing the drink to Aidan, she puts her “magic potion” in it. While Aidan is sipping the coffee, Loreen declares her love for him. She then states, “I know I shouldn’t have, but I put a love potion in your coffee. I hope it doesn’t hurt you.” Aidan becomes seriously ill after drinking the coffee and is hospitalized.

Loreen claims she is not guilty for battering Aidan by reason of insanity. If Loreen is in a jurisdiction that recognizes the substantial capacity test, she may be successful with her claim. Loreen has a mental disease or defect, **psychosis**. Loreen’s statement to Aidan indicates that she lacks the *substantial* capacity to appreciate the criminality of her conduct. Note that if Loreen were in a M’Naghten jurisdiction, her statement “I know I shouldn’t have” could prove her awareness that her conduct was *wrong*, defeating her



- The four states that do not recognize the insanity defense are Montana, Utah, Kansas, and Idaho.
- The four versions of the insanity defense are M’Naghten, irresistible impulse, substantial capacity, and Durham.

- The two elements of the M’Naghten insanity defense are the following:
 - The defendant must be suffering from a mental defect or disease at the time of the crime.
 - The defendant did not know the nature or quality of the criminal act he or she committed or that the act was wrong because of the mental defect or disease.

- The two elements of the irresistible impulse insanity defense are the following:
 - The defendant must be suffering from a mental defect or disease at the time of the crime.
 - The defendant could not control his or her criminal conduct because of the mental defect or disease.

- The substantial capacity test softens the second element of the M’Naghten and irresistible impulse insanity defenses. Under the substantial capacity test, the defendant must lack substantial, not total, capacity to appreciate the criminality of conduct or to control or conform conduct to the law.
- The Durham insanity defense excuses criminal conduct when it is caused by a mental disease or defect.
- The criminal defendant pleading not guilty by reason of insanity must produce evidence to rebut the presumption that criminal defendants are sane. Thereafter, either the prosecution has the burden of disproving insanity to a certain evidentiary standard or the defendant has the burden of proving insanity to a preponderance of evidence or clear and convincing evidence.
- The diminished capacity defense is a failure of proof imperfect defense that may reduce a first-degree murder to second-degree murder or manslaughter if the defendant did not

If Mitchell had not committed federal crimes, he might *still* be awaiting trial in Utah.

1. What is the purpose of putting Mitchell on trial rather than delaying the trial for mental incompetency? Is this purpose *ethical*?

Check your answer using the answer key at the end of the chapter.

Read about Mitchell's sentencing

at <http://content.usatoday.com/communities/ondeadline/post/2011/05/elizabeth-smarts-kidnapper-sentenced-to-xx-years-in-prison/1>.

[1] 18 U.S.C. § 17, accessed November 28, 2010, http://www.law.cornell.edu/uscode/18/usc_sec_18_00000017----000-.html.

[2] Findlaw.com, "The Insanity Defense among the States," findlaw.com website, accessed November 29, 2010, <http://criminal.findlaw.com/crimes/more-criminal-topics/insanity-defense/the-insanity-defense-among-the-states.html>.

[3] *Queen v. M'Naghten*, 10 Clark & F.200, 2 Eng. Rep. 718 (H.L. 1843), accessed November 29, 2010, http://users.phhp.ufl.edu/rbauer/forensic_neurophysiology/mcnaghten.pdf.

[4] Iowa Code § 701.4, accessed November 30, 2010, http://coolice.legis.state.ia.us/coolice/default.asp?contenttype=info&service=iowa_code&ga=83&input=701.

[5] Cal. Penal Code § 25, accessed November 30, 2010, <http://law.onecle.com/california/penal/25.html>.

[6] Ala. Code § 13A-3-1, accessed November 30, 2010, <http://law.onecle.com/alabama/criminal-code/13A-3-1.html>.

[7] *State v. Crenshaw*, 659 P.2d 488 (1983), accessed November 30, 2010, http://lawschool.courtroomview.com/acf_cases/8790-state-v-crenshaw.

[8] *State v. Skaggs*, 586 P.2d 1279 (1978), accessed November 30, 2010, http://www.leagle.com/xmlResult.aspx?xmlDoc=1978587120Ariz467_1470.xml&docbase=CSLWAR1-1950-1985.

[9] *State v. Worlock*, 569 A.2d 1314 (1990), accessed November 30, 2010, http://www.leagle.com/xmlResult.aspx?xmlDoc=1990713117NJ596_1172.xml&docbase=CSLWAR2-1986-2006.

[10] 18 U.S.C. § 17, accessed November 28, 2010, http://www.law.cornell.edu/uscode/18/usc_sec_18_00000017---000-.html.

Crack the Code

Compare the following state laws:

Alaska Stat. § 11.81.630:

Voluntary intoxication is not a defense to a prosecution for an offense, but evidence that the defendant was intoxicated may be offered whenever it is relevant to **negate an element of the offense** that requires that the defendant intentionally cause a result.

Fla. Stat. Ann. § 775.051:

Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance as described in chapter 893 is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was **pursuant to a lawful prescription** issued to the defendant by a practitioner as defined in s. 893.02.

One important difference between Alaska and Florida is that in Alaska, voluntary intoxication is not a defense if it negates criminal intent; in Florida, it is not. Unless intoxication is pursuant to a lawful prescription, it is not a defense.

Ignorance and Mistake

Occasionally, a defendant's **mistake** negates the criminal intent required for an offense. Mistakes can be a mistake of law or a mistake of fact. Mistake of law and fact defenses can be statutory or common law, perfect or imperfect, depending on the jurisdiction.

Mistake of Law

The basis of the mistake of law defense is that the defendant believes his or her *criminal* conduct is *legal*. The defense could be a failure of proof defense or an affirmative defense of excuse, depending on the jurisdiction. ^[9] The Model Penal Code provides, "Ignorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or

link: http://scholar.google.com/scholar_case?case=7939192026130608711&hl=en&as_sdt=2002&as_vis=1.

Cases of Interest

- *U.S. v. Hinckley*, 493 F.Supp. 2d 65 (2007), discusses St. Elizabeth Hospital's proposal for the conditional release of John W. Hinckley: <http://fl1.findlaw.com/news.findlaw.com/wp/docs/hinckley/ushinckley121703opn.pdf>.
- *Graham v. Florida*, 130 S. Ct. 2011(2010), discusses sentencing a juvenile offender to life in prison: http://scholar.google.com/scholar_case?case=6982366090819046045&q=Graham+v.+Florida&hl=en&as_sdt=2.5.
- *Legue v. State*, 688 N.E.2d 408 (1997), discusses voluntary intoxication: http://scholar.google.com/scholar_case?case=17249524331562340362&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- *U.S. v. Albertini*, 830 F.2d 985 (1987), discusses mistake of law: <http://lawschool.watroomview.com/cf/cases/8647-united-states-v-albertini>.

Articles of Interest

- The insanity defense and recent US Supreme Court decisions: http://www.law.indiana.edu/ilj/volumes/v81/no4/14_Grachek.pdf
- The insanity defense for Jared Lee Loughner, the shooter of US Representative Gabrielle Giffords (D-AZ): <http://www.nwherald.com/2011/01/10/insanity-defense-difficult-for-loughner/a8b43du>
- The ruling that Jared Lee Loughner is incompetent to stand trial for the shooting of Representative Giffords: http://www.msnbc.msn.com/id/43165830/ns/us_news-crime_and_courts/t/ariz-shooting-spre-suspect-incompetent-trial
- The defense of caffeine overdose: <http://www.aolnews.com/2010/09/20/caffeine-intoxication-insanity-as-legal-defense-strategy>
- Entrapment: <http://www.allbusiness.com/legal/laws/885814-1.html>

Websites of Interest

consequences doctrine would extend Abel's accomplice liability to these crimes. If Abel is not in a natural and probable consequences jurisdiction, the trier of fact must separately determine that Abel had the criminal intent required to be an accomplice to *battery*, *burglary*, and *rape*; Abel's intent will be ascertained according to the jurisdiction's accomplice intent requirement—either **specific intent** or **purposely** or **general intent** or **knowingly**.

Figure 7.1 *Diagram of Accomplice Liability*



Consequences of Accomplice Liability

An accomplice is criminally responsible for the crime(s) the **principal** commits. Although the *sentencing* may vary based on a defendant-accomplice's criminal record or other sentencing circumstances related to sentencing, such as prior strikes; in theory, the accomplice is liable to the *same* degree as the principal. So if accomplice liability is established in the examples given in [Section 7.1.2 "Accomplice Elements"](#); Phoebe is criminally responsible for battery and child endangerment, Joullian is criminally responsible for prostitution, and Abel is criminally responsible for battery and possibly burglary and rape. The **principal** should *also* be criminally responsible for his or her own actions. However, occasionally a situation arises where the principal is *not prosecuted* or *acquitted* because of a procedural technicality, evidentiary problems, or a plea bargain, as is discussed in [Section 7 "Prosecution of an Accomplice When the Principal Is Not Prosecuted or Is Acquitted"](#).

Prosecution of an Accomplice When the Principal Is Not Prosecuted or Is Acquitted

Although accomplice liability is derivative, in many jurisdictions the trier of fact can determine that a defendant is an accomplice even if the criminal actor or principal is not prosecuted or has been tried and acquitted for the offense. ^[13] Thus a defendant can be liable for a crime even though he or she *did not* commit it and the defendant who *did* was spared prosecution or found *not guilty*. While this situation appears anomalous, if a defendant helps another commit a crime with the intent to further the crime's

Individual Criminal Vicarious Liability

Generally speaking, criminal law disfavors **criminal vicarious liability**, the exception being corporate liability discussed in [Section 7.2.1 "Corporate Liability"](#). Criminal vicarious liability violates the basic precept that individuals should be criminally accountable for their own conduct, not the conduct of others. ^[3] Although accomplice liability appears to hold an accomplice responsible for principals' conduct, in reality the accomplice is committing a criminal act supported by criminal intent and is punished accordingly. In addition, other statutes that appear to impose criminal liability vicariously are actually holding individuals responsible for their *own* criminal conduct. Some examples are statutes holding **parents** criminally responsible when their **children** commit crimes that involve weapons belonging to the parents, and offenses criminalizing contributing to the delinquency of a minor. In both of these examples, the parents are held accountable for *their* conduct, such as allowing children to access their guns or be truant from school. The law is evolving in this area because the incidence of juveniles committing crimes is becoming increasingly prevalent.

KEY TAKEAWAYS

- Accomplice liability holds an accomplice accountable when he or she is complicit with the principal; vicarious liability imposes criminal responsibility on a defendant because of a special relationship with the criminal actor.
- In many jurisdictions, corporations are vicariously liable for crimes committed by employees or agents acting within the scope of employment. Individual criminal vicarious liability is frowned on, but the law in this area is evolving as the incidence of juveniles committing crimes increases.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Brad, the president and CEO of ABC Corporation, recklessly hits and kills a pedestrian as he is driving home from work. Could ABC Corporation be held vicariously liable for criminal homicide? Why or why not?
2. Read *People v. Premier House, Inc.*, 662 N.Y.S 2d 1006 (1997). In *Premier House*, the defendant, a housing cooperative that was incorporated, and members of the housing cooperative board of directors were ordered to stand trial for violating a New York law

2. Define the criminal act element required for an accessory.
3. Define the criminal intent element required for an accessory.
4. Compare various approaches to grading the crime of accessory.

As stated in , at early common law, a defendant who helped plan the offense but was not present at the scene when the principal committed the crime was an **accessory before the fact**. A defendant who helped the principal avoid detection after the principal committed the crime was an **accessory after the fact**. In modern times, an accessory before the fact is an **accomplice**, and an accessory after the fact is an accessory, which is a separate and distinct offense. Some states still call the crime of accessory “accessory after the fact” ^[1] or “hindering prosecution.” ^[2] The difference between an accomplice and an accessory is crucial. An accomplice is responsible for the offense the *principal* commits. An accessory, on the other hand, is guilty of a *separate crime* that is almost always a misdemeanor.

Accessory Act

The **criminal act** element required for an accessory in the majority of jurisdictions is aiding or assisting a principal in escape, concealment, or evasion of arrest and prosecution or conviction after the principal commits a **felony**. ^[3] In most states, a defendant cannot be an accessory to a misdemeanor, although in some states a defendant can be an accessory to a high-level or gross misdemeanor. ^[4] In a minority of states, the defendant can be an accessory to any crime. ^[5]

In many states, **words** are enough to constitute the accessory criminal act element. ^[6] Often special categories of individuals are exempted from liability as an accessory, typically family members by blood or marriage. ^[7]

Example of Accessory Act

Jim wakes up late at night to the sound of someone pounding on his door. He gets out of bed, walks down the stairs, and opens the door. His father James is on the doorstep. James’s eyes are bloodshot and he is swaying slightly on his feet. He tells Jim that he just got into a car accident and needs to come inside before the police find out about it and begin an investigation. Jim steps aside and lets his father enter the house. The smell of alcohol on his father’s breath is apparent. He thereafter allows his father to spend the night without contacting the police about the accident.

Jim has probably committed the **criminal act** element required for an accessory in many jurisdictions. Jim allowed his father to *escape arrest* and *evade* an alcohol screening after leaving the scene of a car

- [6] Minn. Stat. Ann. § 609.495, accessed December 23, 2010, <https://www.revisor.mn.gov/statutes/?id=609.495&year=2010>.
- [7] Vt. Stat. Ann. tit. 13 § 5, accessed December 23, 2010, <http://www.leg.state.vt.us/statutes/fullchapter.cfm?Title=13&Chapter=001>.
- [8] Mass. Gen. Laws ch. 274 § 4, accessed December 26, 2010, <http://law.onecle.com/massachusetts/274/4.html>.
- [9] Haw. Rev. Stat. § 710-1030, accessed January 9, 2011, <http://law.justia.com/codes/hawaii/2009/volume-14/title-37/chapter-710/hrs-0710-1030-hm/>.
- [10] Idaho Code Ann. § 18-206, accessed January 9, 2011, <http://www.legislature.idaho.gov/idstat/Title18/T18CH2SECT18-206.htm>.

7.4 End-of-Chapter Material

Summary

Often more than one criminal defendant participates in the commission of a crime. Defendants working together with a common criminal purpose are acting with *common purpose* and are responsible for the same crimes, to the same degree.

At early common law, there were four parties to a crime. A principal in the first degree actually committed the crime. A principal in the second degree was present at the crime scene and assisted in the crime's commission. An accessory before the fact was not present at the crime scene but helped prepare for the crime's commission. An accessory after the fact helped a party after he or she committed a crime by providing aid in escaping or avoiding arrest and prosecution or conviction. In modern times, there are only two parties to a crime: a principal, who is in the same category with his or her accomplice(s), and accessory(ies). Principals actually commit the crime, and they and their accomplices are criminally responsible for it. Accessories play the same role as accessories after the fact at common law.

The criminal act element required to be an accomplice in most jurisdictions is assistance in the commission of a crime. Words are enough to constitute the accomplice criminal act. Mere presence at the scene, even presence at the scene combined with flight after the crime's commission, is not enough to constitute the accomplice criminal act unless there is a legal duty to act.

The criminal intent element required for accomplice liability in many jurisdictions is specific intent or purposely to commit the crime at issue. In some states, general intent or knowingly that the principal will

8.1 Attempt

LEARNING OBJECTIVES

1. Define an inchoate crime.
2. Distinguish between general and specific attempt statutes.
3. Identify and describe the four tests jurisdictions use to ascertain the criminal act element required for attempt.
4. Define preparatory crimes.
5. Define the criminal intent element required for attempt.
6. Identify two potential defenses to attempt.
7. Distinguish between factual and legal impossibility.
8. Define voluntary abandonment.
9. Describe merger and explain the way it affects attempt crimes.
10. Analyze the relationship between transferred intent and attempt.
11. Distinguish between the grading of attempt and the completed crime.

Attempt, conspiracy, and solicitation are considered inchoate crimes. Inchoate means “just begun, incipient, in the early stages.”^[1] Inchoate crimes can be left unfinished or incomplete. Although attempt never results in the finished criminal offense, both conspiracy and solicitation could give rise to separate completed crimes.

The rationale supporting punishment for an inchoate crime is **prevention** and **deterrence**. If a defendant could not be apprehended until a crime is finished, law enforcement would not be able to intervene and avert injury to victim(s) or property. In addition, a defendant who is unable to complete a crime would try again and again, free from any criminal consequences.

The difficulty in holding a defendant accountable for an inchoate or incomplete crime is ascertaining the *level of progress* necessary to impute criminal responsibility, which is especially daunting with **attempt**, because in every instance the crime is left unfinished, as is discussed in .

Synopsis of the History of Attempt

At early English common law, attempt was not a crime.^[2] Gradually, the law evolved, and a defendant who committed attempt resulting in severe harm was punished for a minor crime, typically a misdemeanor. One of the first documented cases of attempt was *Rex v. Scofield*, Cald. 397 (1784).^[3] In *Scofield*, a servant was convicted of a misdemeanor for attempting to burn down his master's

and pays him. Unfortunately for Harry, Joe is a law enforcement decoy. If the state in which Harry paid Joe recognizes the **res ipsa loquitur** or **unequivocal test**, Harry has most likely committed attempted murder (along with **solicitation** to commit murder, which is discussed shortly).

Harry's *actions* in contacting and thereafter hiring and paying Joe to kill Ethel indicate that he has no other purpose than the commission of Ethel's murder. Hiring and paying a hit man is more than just *preparation*. Note that evidence of Ethel's life insurance policy is not needed to prove the attempt act. Harry's conduct "speaks for itself," which is the essence of *res ipsa loquitur* or unequivocality.

Probable Desistance Test

The **probable desistance test** examines *how far* the defendant has progressed toward commission of the crime, rather than analyzing *how much* the defendant has left to accomplish. Pursuant to this test, a defendant commits attempt when he or she has crossed a line beyond which it is **probable** he or she will not **desist** unless there is an interruption from some outside source, law enforcement, or circumstances beyond his or her control. ^[13]

Example of the Probable Desistance Test

Judy, who works at Zales jewelry store, tells her Facebook friends that she is going to steal a diamond necklace out of the safe that evening. Judy drives to Zales at eleven o'clock after the store has closed. She enters the building using her key and quickly disables the store alarm. She then turns off the store security camera. As she crouches down by the safe and begins to enter the combination, all the lights go on and she blinks, startled by the sight of several police officers pointing their guns at her. If the state in which Judy lives follows the **probable desistance test**, Judy has most likely committed attempted larceny, along with burglary. Judy informed others of her plan, drove to the crime scene, entered the building unlawfully, disabled the store alarm, and turned off the store security camera. This series of actions indicate that Judy crossed a point of no return. It is unlikely that Judy would have *desisted* without the law enforcement interruption, which fulfills the attempt act requirement pursuant to the probable desistance test.

Model Penal Code Substantial Steps Test

The Model Penal Code developed the **substantial steps** test in response to the large variance between different jurisdictions in evaluating the criminal act element required for attempt. The substantial steps test is intended to clarify and simplify the attempt act analysis, to prevent *arbitrary* application. It is also

their jurisdiction, Shelley and Sam most likely have completed the crime of conspiracy and may be prosecuted for this offense whether or not the robbery actually takes place.

Conspiracy Parties

Similar to **accomplice liability**, the acquittal of or failure to prosecute one party to the conspiracy does not relieve a coconspirator from criminal responsibility in many states.^[11] In addition, a coconspirator does not need to *know* every other coconspirator to be accountable as a member of the conspiracy.^[12] As long as the conspiracy defendant is aware that other coconspirators exist, the mens rea for conspiracy is present. As the Model Penal Code states, “[i]f a person guilty of conspiracy...knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity” (Model Penal Code § 5.03(2)). Large-scale conspiracies, such as conspiracies to distribute contraband or illegal firearms, may result in each member sharing criminal responsibility for the conspiracy and every separate conspiracy transaction.

A conspiracy that has more than one criminal objective still can be just *one* conspiracy. Under the Model Penal Code, “[i]f a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship” (Model Penal Code § 5.03(3)).

It is useful to understand two basic large-scale conspiracy organizational formats: wheel and chain conspiracies. A wheel conspiracy consists of a single conspirator, generally the ringleader who is interconnected to every other coconspirator. The ringleader is the hub; the other coconspirators are the spokes of the wheel. An example of a wheel conspiracy would be a mob boss linked to individual members of the mob following his or her commands. A chain conspiracy consists of coconspirators connected to each other like links in a chain but without a central interconnected ringleader. An example of a chain conspiracy is a conspiracy to manufacture and distribute a controlled substance, with the manufacturer linked to the transporter, who sells to a large-quantity dealer, who thereafter sells to a smaller-quantity dealer, who sells to a customer. Whether the conspiracy is wheel, chain, or otherwise, if the jurisdiction has a statute or common-law rule that each member does not need to personally know every other member as discussed previously, the coconspirators may be criminally responsible for the **conspiracy** and the crime(s) it furthers.

conspiracy *and* any crime the conspiracy furthers, as is discussed more fully in [Section 8.2.4](#) "Consequences of Conspiracy".

Figure 8.6 *Defenses to Conspiracy*



Conspiracy Grading

Some states **grade** conspiracy the same as the most serious offense that is the conspiracy's object. ^[19] Others grade conspiracy lower than the most serious conspired offense and do not criminalize the conspiracy to commit a simple, low-level misdemeanor. ^[20] Another view is to set a separate penalty for the conspiracy to commit specific crimes. ^[21] It is not unconstitutional to punish conspiracy more severely than the crime conspired. ^[22]

- [9] Connecticut Criminal Jury Instructions 3.3-1, accessed January 1, 2011, <http://www.jud.ct.gov/ji/criminal/part3/3.3-1.htm>.
- [10] *State v. Lewis*, 220 Conn. 602 (1991), accessed January 2, 2011, http://scholar.google.com/scholar_case?case=6997065715061309373&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [11] Tex. Penal Code § 15.02(c), accessed January 3, 2011, <http://law.onecle.com/texas/penal/15.02.00.html>.
- [12] Neb. Rev. Stat. Ann. § 28-202(2), accessed January 3, 2011, <http://law.justia.com/nebraska/codes/2006/s28index/s2802002000.html>.
- [13] *U.S. v. Castaneda*, 9 F.3d 761 (1993), accessed January 3, 2011, http://scholar.google.com/scholar_case?case=13576116398000833345&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [14] *U.S. v. Castaneda*, 9 F.3d 761 (1993), accessed January 3, 2011, http://scholar.google.com/scholar_case?case=13576116398000833345&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [15] USLegal, "Definition of Wharton's Rule," USLegal.com website, accessed January 3, 2011, <http://definitions.uslegal.com/w/whartons-rule/>.
- [16] *Lanier v. U.S.*, 420 U.S. 770 (1975), accessed January 3, 2011, http://scholar.google.com/scholar_case?case=16942118715212641737&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [17] N.J. Stat. § 2c: 5-2e, accessed January 4, 2011, <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/5-2.html>.
- [18] *Callanan v. U.S.*, 364 U.S. 587 (1961), accessed January 4, 2011, http://scholar.google.com/scholar_case?case=10261023883092961366&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [19] 18 Pa. Cons. Stat. § 905, accessed January 4, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.009.005.000.html>.
- [20] Tenn. Code Ann. §39-12-107(c), accessed January 4, 2011, <http://law.justia.com/tennessee/codes/2010/title-39/chapter-12/part-1/39-12-107>.
- [21] Cal. Penal Code § 182, accessed January 4, 2011, <http://law.onecle.com/california/penal/182.html>.

without a buyer. Thus you would lose on the solicitation charge and should **reject** the case.

Chapter 9

Criminal Homicide

[W]hether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon...

Acers v. U.S., cited in *Section 9 "Inference of Intent"*

9.1 Homicide

LEARNING OBJECTIVES

1. Define homicide.
2. Recognize that all homicides are not criminal.
3. Identify the corpus delicti components in a criminal homicide.
4. Compare the definition of felonies in criminal homicide and feticide statutes.
5. Compare common law feticide and suicide with modern views.
6. Ascertain whether it is constitutional to criminalize assisted suicide.

In this section, you learn the definition of homicide and the meaning of *human being*, which vary from state to state. You also learn that suicide is not criminal, but *assisted suicide* might be, depending on the jurisdiction.

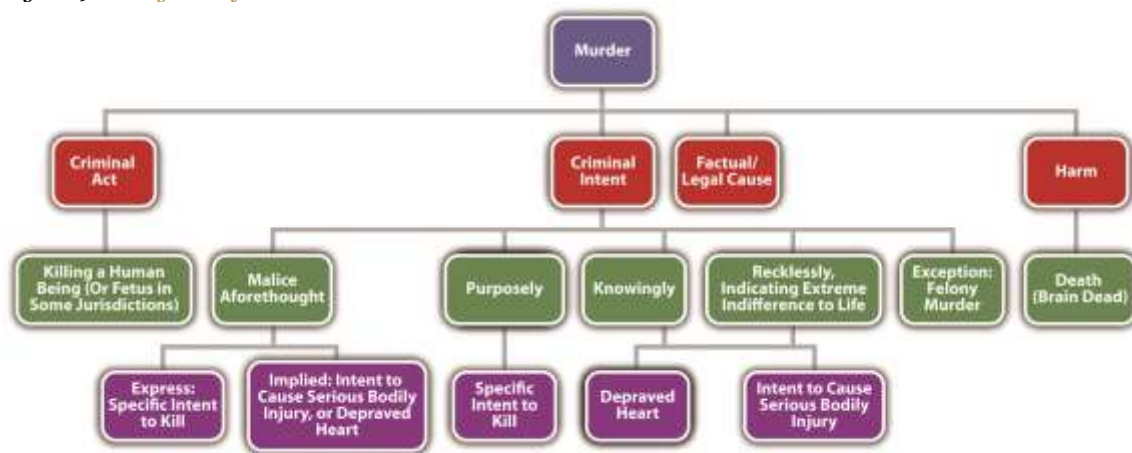
Synopsis of the History of Homicide

Homicide is the killing of one human being by another. Homicide is not always criminal. For example, a lawful execution pursuant to the death penalty is *homicide*, but it is not *criminal* homicide.

Homicide law in the United States has its origins in the English common law. Oxford professor Sir William Blackstone defined homicide as justifiable, excusable, or felonious. Justifiable homicides were not criminal because they did not include the concept of guilt. Excusable homicides were not criminal because they included minimal guilt. Felonious homicides were criminal and were considered the most heinous offenses known to man.

Initially at common law, every felonious or criminal homicide was punished by death. Gradually, as the law evolved, unlawful killings were divided into murder and manslaughter based on the defendant's

Figure 9.2 Diagram of Murder



Justification and Excuse

As Blackstone stated, murder cannot be *justified* or *excused*. Justifiable and excusable homicides are *noncriminal*, and thus justification or excuse can operate as an **affirmative defense** in many jurisdictions. A thorough discussion of defenses based on justification and excuse is in and .

A *justifiable homicide* is a homicide that is warranted under the circumstances. One example of a justifiable homicide is when a law enforcement officer shoots and kills a fleeing felon to prevent imminent great bodily injury or death. This killing is intentional and **purposeful** with **malice aforethought**, but it is not criminal. The justification negates the criminality and the law enforcement officer will not be convicted of murder. A complete discussion of use of deadly force by law enforcement to arrest or apprehend a criminal defendant is in . Other murder defenses based on justification are self-defense, defense of others, and defense of habitation.

An *excusable homicide* is a homicide that society forgives or pardons. One example of an excusable homicide is a homicide committed by a defendant who is found legally insane. This killing could also be intentional and **purposeful** with **malice aforethought**, but it is noncriminal. The excuse negates the criminality and the defendant will not be convicted of murder. A complete discussion of the insanity defense is in .

AIDS and Homicide

The criminal transmission of AIDS is a new and evolving topic with state and federal courts and criminal codes. Many jurisdictions have statutes specifying that death by the *deliberate* transmission of AIDS is **murder** because murder intent is present. ^[8] Death by the *inadvertent* transmission of AIDS is more

- [5] *People v. Carines*, 597 N.W. 2d 130 (1999), accessed February 13, 2011, http://scholar.google.com/scholar_case?case=6441565823584670121&q=deadly+weapon+doctrine&hl=en&as_sdt=2,5.
- [6] *Acers v. United States*, 164 U.S. 388 (1896), accessed February 13, 2010, http://scholar.google.com/scholar_case?case=16538901276155737856&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- [7] Uniform Determination of Death Act, accessed February 14, 2010, <http://www.gencourt.state.nh.us/rsa/html/X/141-D/141-D-mrg.htm>.
- [8] Minn. Stat. Ann. § 609.2241, accessed February 24, 2010, <https://www.revisor.mn.gov/statutes/?id=609.2241>.

9.3 First-Degree Murder

LEARNING OBJECTIVES

1. Ascertain the three types of murder that are typically first degree.
2. Define premeditated murder.
3. Explain the significance of the criminal act element of murder in premeditated murder.
4. Define murder by a specified means.
5. Give examples of specified means for first-degree murder.
6. Analyze first-degree murder grading.
7. Ascertain the circumstances that merit capital punishment.

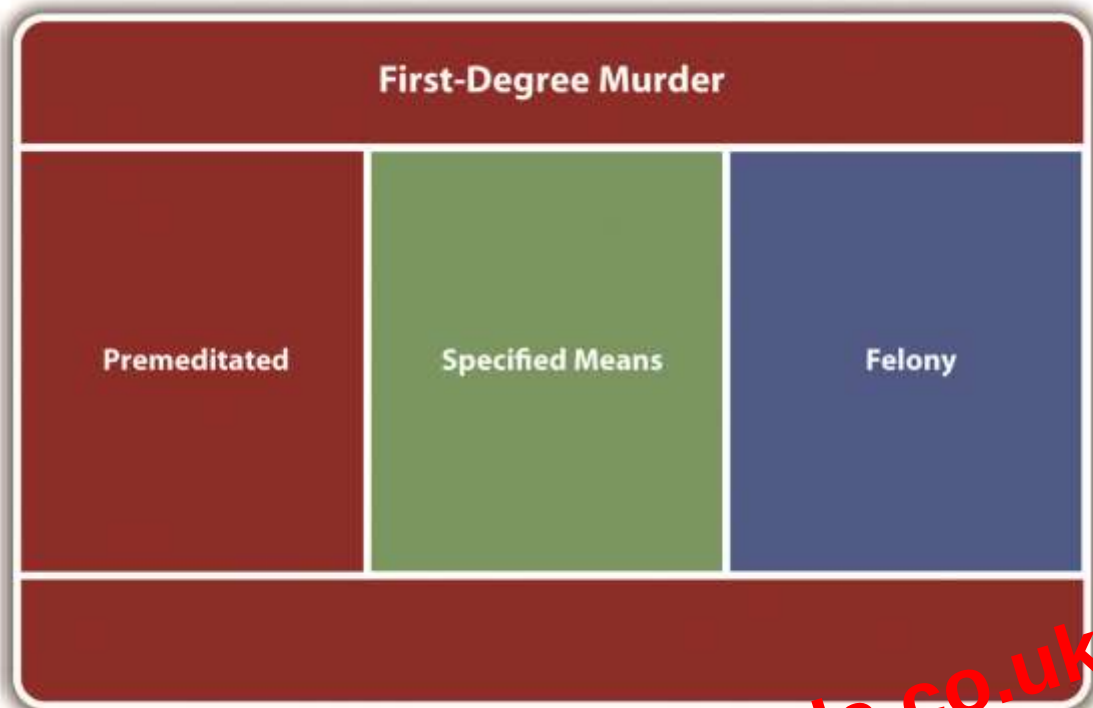
In this section, you analyze the *factors* that classify a murder as first-degree murder. Keep in mind that the criminal act, criminal intent, causation, and harm elements of murder have already been discussed.

Factors Classifying Murder as First Degree

States and the federal government usually include premeditated murder, murder by a specified means, and very serious **felony murders** in their first-degree murder statutes. Felony murder is discussed shortly.

Premeditated Murder

Premeditated murder was originally and historically the predominant form of murder in any first-degree murder statute. A common statutory definition of first-degree premeditated murder is a willful, deliberate, premeditated killing. ^[1]



First-Degree Murder Grading

Most states divide murder into **first** and **second degree**.^[10] Some states add a **third degree** of murder that generally includes less serious sentencing options.^[11] The Model Penal Code classifies *all* murders as felonies of the first degree (Model Penal Code § 210.1(1)).

First-degree murder is the highest classification of murder and results in the most extreme punishment available in a jurisdiction's punishment scheme. If the jurisdiction allows for the death penalty, first-degree murder typically is the only crime against an individual that qualifies the defendant for execution.^[12] If the jurisdiction does not allow for the death penalty, first-degree murder often qualifies the defendant for *life in prison*.^[13]

Capital Punishment

The US Supreme Court has held that criminal homicide is the *only* crime against an individual that can merit the death penalty.^[14] A discussion of crimes against the government (such as treason) that merit the death penalty is in [Chapter 13 "Crimes against the Government"](#).

In states that allow capital punishment, first-degree murder with one or more aggravating factor(s) is generally a capital offense. Examples of aggravating factors are killing more than one person, killing for financial gain, killing with a particularly heinous method, or killing a peace officer.^[15] In general, the trier of fact must ensure that the aggravating factor(s) are not outweighed by mitigating factor(s). Examples of

Concurrence of the Felony and the Death of the Victim

Another important aspect that must be analyzed in any felony murder case is the **concurrence** of the felony and the death of the victim. The felony and the death must be part and parcel of the same continuous transaction. Therefore, there must be a determination of (1) when the felony begins and (2) when the felony ends. If the death occurs *before* or *after* the commission or attempted commission of the felony, the defendant might not be guilty of felony murder.

Example of a Death That Occurs before the Felony Begins

Carlos shoots and kills his drug dealer in a fit of temper because the drugs he bought are placebo. After the killing, it occurs to Carlos that the drug dealer might be carrying significant amounts of cash. Carlos thereafter steals some cash from the drug dealer's pockets and runs off. Although this killing is probably murder, it is *not* **felony murder**. Carlos stole money from his drug dealer, but the theft occurred *after* the murder. Thus the killing did not happen *during* a robbery. If premeditation is proven, this could still be first-degree murder, but it is not first-degree felony murder.

Death That Occurs after the Felony Ends

More commonly, the issue is whether the killing occurs after the felony ends. The general rule is that the felony ends when the defendant has reached a place of temporary safety.^[7] This place does *not* have to be the defendant's residence; it could simply be a hiding place. Pursuant to this rule, a death that occurs during a car chase as the defendants flee the scene of the crime is considered felony murder.^[8]

that the gun is unloaded. If the employee dies, Steven could be convicted of negligent involuntary manslaughter in jurisdictions that recognize this crime. If Steven is in a jurisdiction that only recognizes **reckless** involuntary manslaughter, the prosecution may have to prove a higher degree of awareness, such as Steven's knowledge that the shotgun was *loaded*.

Vehicular Manslaughter

Vehicular manslaughter is typically either the operation of a motor vehicle with **recklessness** or **negligence** resulting in death or the operation of a motor vehicle *under the influence* of alcohol or drugs resulting in death.^[12] Some states have specific vehicular manslaughter statutes.^[13] In states that do not, the defendant could be prosecuted under a jurisdiction's misdemeanor or unlawful act manslaughter statute if the defendant violates a vehicle code section. Vehicular manslaughter can also be prosecuted under a jurisdiction's reckless or negligent involuntary manslaughter statute, depending on the circumstances. If the defendant uses a motor vehicle as a weapon to kill the victim, the intent to kill is present and the appropriate crime would be **murder**.

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Figure 9.8 Diagram of Involuntary Manslaughter

house. He paused to reload and also to retrieve a handgun from the snow in between shots.

Answers to Exercises

From

1. The Minnesota Supreme Court reversed the court of appeal and held that felon in possession of a firearm and possession of a stolen firearm are not felonies *inherently dangerous to life*, so they cannot be predicate felonies for a felony murder conviction. The Court stated the following: “Applying the statute as previously interpreted by us to this record, we conclude that the predicate offenses of felon in possession of a firearm and possession of a stolen firearm are not inherently dangerous. While the *use* of a firearm can pose significant danger to human life, simple possession—standing alone—does not.” [2]
2. Kurt did not commit felony murder in this case because he had reached a place of *temporary safety*, so the felony had ended.
3. The US Supreme Court based its holding on the *Eighth and Fourteenth* amendments. Primarily, the Court determined that the death penalty was cruel and unusual punishment under the circumstances.

Answers to Exercises

From

1. There is no evidence of premeditation, and Kurt did not kill the homeless person using a specified means. This is not a first-degree felony murder (based on the felony of robbery) because the felony had ended when the killing occurred. Thus this is most likely **second-degree** murder.
2. The California Court of Appeals upheld the defendant’s second-degree murder charge and stated that it was up to the trier of fact to determine the probability of death and the subjective mental state of the defendant.
3. The Mississippi Court of Appeals held that putting a gun to someone’s forehead and pulling the trigger indicates *depraved heart intent*, even if the defendant believes the gun to be unloaded.

Answers to Exercises

also be present when there is a discrepancy in size or age between the defendant and the victim or if the sexual encounter takes place in an isolated location. The Model Penal Code considers it a felony of the third degree and gross sexual imposition when a male has sexual intercourse with a female not his wife by compelling “her to submit by any threat that would prevent resistance by a woman of ordinary resolution” (Model Penal Code § 213.1(2)(a)). Note that the Model Penal Code’s position does not require the threat to be a *threat of force*; it can be *any* type of threat that prevents physical resistance.

If the victim does not physically resist the criminal act, the prosecution must prove that the victim affirmatively indicated lack of consent in some other manner. This could be a verbal response, such as saying, “No,” but the verbal response must be unequivocal. In the most extreme case, at least one court has held that a verbal “No” *during the act* of sexual intercourse is sufficient, and the defendant who *continues* with sexual intercourse after being told “No” is committing the criminal act of rape. ^[19]

Figure 10.2 Proving Lack of Consent

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jurisdictions expressly disallow the defense, requiring **strict liability** intent for the lack of consent attendant circumstance. ^[23]

Example of Rape Intent

Review the example with Alex and Brandy in [Section 10 "Example of Rape Act"](#). Change the example so that Alex does not display a knife and simply asks Brandy if she would like to have sex with him. Brandy does not respond. Alex walks over to Brandy and removes her pants. Brandy does not protest or physically resist. Thereafter, Alex asks Brandy if she “likes it rough.” Brandy remains silent. Alex physically and forcibly puts his penis in Brandy’s vagina. In states that allow a **negligent** intent to support the attendant circumstance of rape, Alex may be able to successfully assert **mistake of fact** as a defense. It appears that Alex has with general intent or knowingly committed forcible sexual intercourse, based on his actions. In most jurisdictions, the jury could be instructed on an *inference* of this intent from Alex’s behavior under the circumstances. However, if **negligent** intent is required to support the attendant circumstance of the victim’s lack of consent, the trier of fact may find that Alex’s mistake as to Brandy’s consent was honest and reasonable, based on her lack of response or physical resistance. If Alex is in a jurisdiction that requires **strict liability** intent to support the attendant circumstance element, Alex cannot raise the defense because Alex’s belief as to Brandy’s consent would be irrelevant.

Rape Causation

The defendant’s criminal act must be the **factual** and **legal cause** of the harm, which is defined in [Section 10 "Rape Harm"](#).

Rape Harm

The **harm** element of rape in most jurisdictions is *penetration*, no matter how slight. ^[24] This precludes virginity as a defense. In addition, modern statutes do not require male ejaculation, which precludes lack of semen as a defense. ^[25]

Example of Rape Harm

Review the example with Alex and Brandy in [Section 10 "Example of Rape Act"](#). Assume that Brad walks into the room while Alex and Brandy are engaging in sexual intercourse. Brad tackles Alex and pulls him off Brandy. Alex may be charged with rape, not **attempted** rape, in most jurisdictions. The fact that Alex did not ejaculate does not affect the rape analysis in any way because most jurisdictions do not require ejaculation as a component of the harm element of rape.

men without a sufficient government interest.^[36] In several states that criminalize spousal rape, the criminal act, criminal intent, attendant circumstance, causation, and harm elements are exactly the same as the elements of forcible rape.^[37] Many states also **grade** spousal rape the same as forcible rape—as a serious felony.^[38] Grading of sex offenses is discussed shortly.

Statutory Rape

Statutory rape, also called **unlawful sexual intercourse**, criminalizes sexual intercourse with a victim who is under the age of legal consent. The age of legal consent varies from state to state and is most commonly sixteen, seventeen, or eighteen.^[39]

The **criminal act** element required for statutory rape in many jurisdictions is sexual intercourse, although other types of sexual conduct with a victim below the age of consent are also criminal.^[40] The **harm** element of statutory rape also varies, although many jurisdictions mirror the harm element required for rape.^[41] The **attendant circumstance** element required for statutory rape is an underage victim.^[42] There is no requirement for *force* by the defendant, nor is there an attendant circumstance element of lack of consent because the victim is incapable of legally consenting. In the majority of states, the criminal intent element of statutory rape is **strict liability**.^[43] However, a minority of states require **reckless** or **negligent** criminal intent, allowing for the defense of **mistake of fact** as to the victim's age. If no jurisdiction recognizes mistake of age as a defense, the mistake must be made *reasonably*, and the defendant must take *reasonable* measures to verify the victim's age.^[44] The mistake of age defense can be proven by evidence of a falsified identification, witness testimony that the victim lied about his or her age to the defendant, or even the appearance of the victim.

It is much more common to prosecute males for statutory rape than females. The historical reason for this selective prosecution is the policy of preventing teenage pregnancy.^[45] However, modern statutory rape statutes are gender-neutral.^[46] This ensures that women, especially women who are older than their sexual partner, are equally subject to prosecution.

Example of Statutory Rape

Gary meets Michelle in a nightclub that only allows entrance to patrons eighteen and over. Gary and Michelle end up spending the evening together, and later they go to Gary's apartment where they have consensual sexual intercourse. In reality, Michelle is actually fifteen and was using false identification to enter the nightclub. If Gary and Michelle are in a state that requires **strict liability** for the criminal

rape.^[58] However, incest is generally **graded** lower than forcible rape or sexual assault because force and lack of consent are not required.^[59]

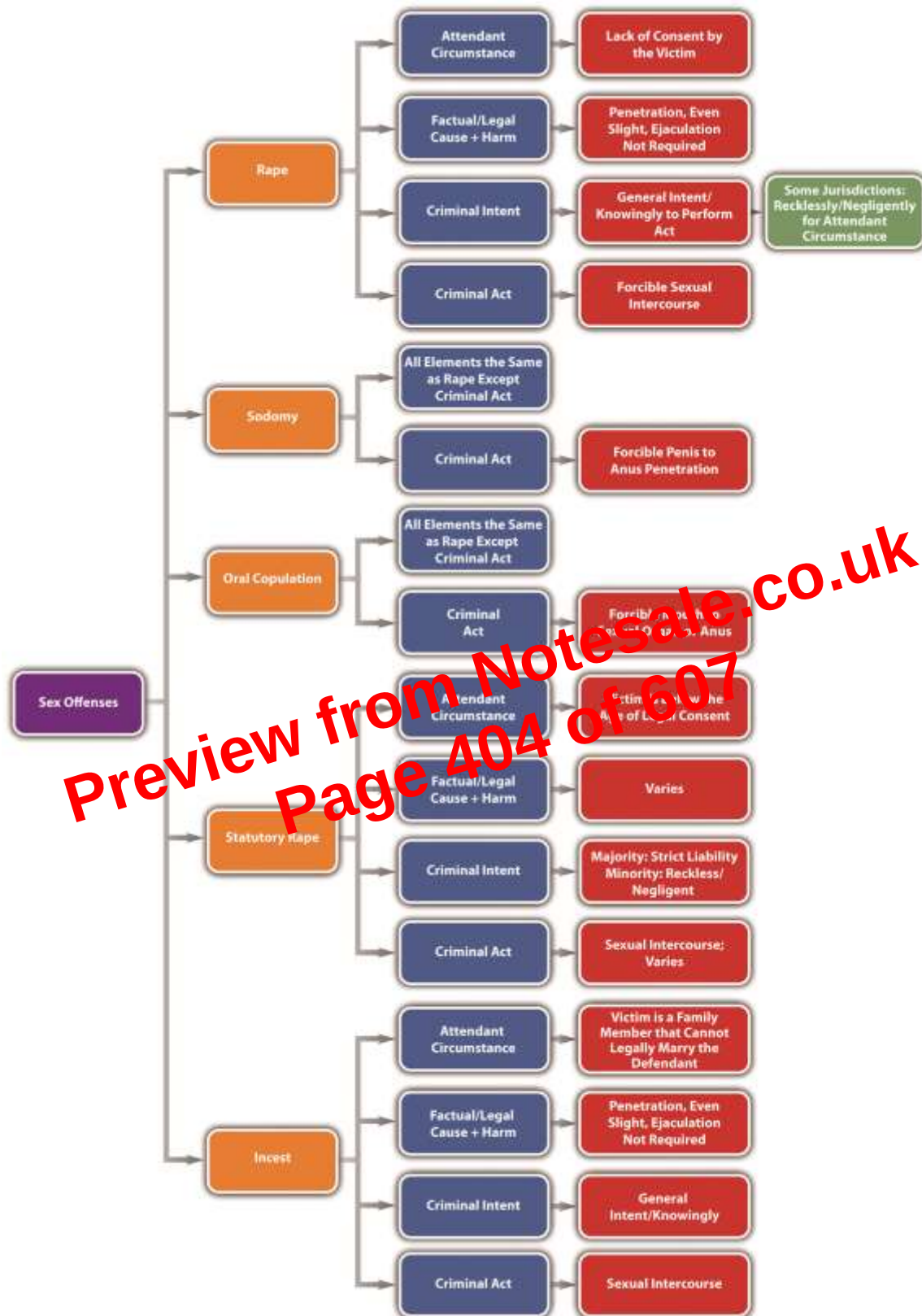
Example of Incest

Hal and Harriet, brother and sister, have consensual sexual intercourse. Both Hal and Harriet are above the age of legal consent. In spite of the fact that there was no force, threat of force, or fraud, and both parties consented to the sexual act, Hal and Harriet could be charged with and convicted of **incest** in many jurisdictions, based on their *family relationship*.

Sex Offenses Grading

Jurisdictions vary when it comes to **grading** sex offenses. In general, forcible sex crimes involving penetration are graded as serious felonies. Factors that could aggravate grading are gang rape,^[60] the infliction of bodily injury, the use of a weapon, a youthful victim, the commission of other crimes in concert with the sexual offense, or a victim who has mental or intellectual disabilities or who has been compromised by intoxicants.^[61] The Model Penal Code grades rape as a felony of the second degree unless the actor inflicts serious bodily injury on the victim or another, or the defendant is a stranger to the victim, in which case the grading is elevated to a felony of the first degree (Model Penal Code § 213.1 (1)). Sexual offenses that do not include penetration are graded lower,^[62] along with offenses that could be consensual.^[63] Sex offense statutes that criminalize sexual conduct with a victim below the age of legal consent often grade the offense more severely when there is a large age difference between the defendant and the victim, when the defendant is an adult, or the victim is of tender years.^[64]

Figure 10.4 Diagram of Sex Offenses



- Acquaintance rape often goes unreported and does not necessarily include use of force by the defendant or resistance by the victim.
- States that criminalize spousal rape generally require the same elements for spousal rape as for rape and grade spousal rape the same as rape.
- Statutory rape is generally sexual intercourse with a victim who is under the age of legal consent. Statutory rape does not have the requirement that the intercourse be forcible and does not require the attendant circumstance of the victim's lack of consent because the victim is incapable of rendering legal consent. In the majority of jurisdictions, the criminal intent element required for statutory rape is strict liability. In a minority of jurisdictions, the criminal intent element required for statutory rape is negligent or reckless intent, providing for a defense of mistake of fact as to the victim's age.
- Sodomy has the same elements as rape except for the criminal act element, which is often defined as forcible penis to anus penetration, rather than penis to vagina penetration. In addition, in some states sodomy is criminal with consent when it occurs in a state prison or a local detention facility or jail. Oral copulation also has the same elements as rape, except for the criminal act element, which is forcible mouth to sexual organ or anus penetration. It is also sexual intercourse between family members who cannot legally marry.
- Generally, rape, sodomy, and oral copulation are graded as serious felonies. Factors that enhance grading of sex offenses are penetration, gang rape, bodily injury, the use of a weapon, a victim who has intellectual or mental disabilities or is youthful or intoxicated, and the commission of other crimes in concert with the sex offense. Sex offenses committed with the victim's consent and without penetration are typically graded lower. If the victim is below the age of consent, a large age difference exists between the defendant and the victim, the defendant is an adult, or the victim is of tender years, grading typically is enhanced.
- Typically, a Megan's law statute provides for sex offender registration and notification to the public that a convicted sex offender lives in their area. A Jessica's law statute often includes a stay-away order mandating that a sex offender cannot live within a certain

Figure 10.8 *Crack the Code*



Assault Grading

Assault **grading** is very similar to battery grading in many jurisdictions. As stated previously, many modern statutes follow the Model Penal Code approach and combine assault and battery into one statute, typically called "assault."^[24] Simple assault is generally a misdemeanor.^[25] Aggravated assault is generally a felony.^[26] Factors that could enhance grading of assault are the use of a deadly weapon and assault against a law enforcement officer, teacher, or helpless individual.^[27]

Table 10.2 Comparing Battery, Attempted Battery, and Threatened Battery Assault

court hearing. For this reason, the restraining order method of preventing a defendant from stalking was cumbersome, ineffective, and frequently resulted in force or violence against the stalking victim.

The modern crime of stalking allows law enforcement to arrest and incapacitate defendants *before* they complete an assault, battery, or other violent crime against a victim. Like all crimes, stalking requires the defendant to commit a voluntary act supported by criminal intent. In many jurisdictions, stalking also has the elements of causation and harm, as is discussed in .

Stalking Act

Various approaches have been made to criminalize stalking, and a plethora of descriptors now identify the stalking criminal act. In the majority of jurisdictions, the **criminal act** element required for stalking includes *any course of conduct* that **credibly** threatens the victim's safety, including following,^[10] harassing,^[11] approaching,^[12] pursuing, or making an express or implied threat to injure the victim, the victim's family member,^[13] or the victim's property.^[14] In general, credible threat means the defendant has the **apparent ability** to effectuate the harm threatened.^[15] The stalking criminal act is unique among criminal acts in that it must occur on *more than one* occasion or repeatedly.^[16] The popularity of social networking sites and the frequency with which defendants use the Internet to stalk their victims inspired many states to specifically criminalize cyberstalking, which is the use of the Internet or e-mail to commit the criminal act of stalking.^[17]

Example of a Case Lacking Stalking Act

Elliot tells Lisa on two separate occasions that he loves her. Lisa intensely dislikes Elliot and wants nothing to do with him. Although Elliot's proclamations of love are unwelcome, Elliot probably has not committed the criminal act element required for stalking. Elliot's behavior does not threaten Lisa's *safety* or the safety of her family members or property. Thus Elliot may not be charged with and convicted of stalking in most jurisdictions.

Example of Stalking Act

Change the example in so that Elliot tells Lisa he loves her on one occasion. Lisa frowns and walks away. Elliot then follows Lisa and tells her that he will "make her pay" for not loving him. Lisa ignores Elliot's statement, climbs into her car, and drives away. Later that evening, Elliot rings Lisa's doorbell. Lisa does not answer the door but yells at Elliot, telling him to leave. Disgruntled and angry, Elliot carves, "you will die for not loving me" into Lisa's front door with his pocketknife.

Figure 10.9 *Diagram of Domestic Violence and Stalking*

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Connecticut uphold the defendant's conviction? The case is available at this link: http://scholar.google.com/scholar_case?case=13933358391504195031&q=kidnapping&hl=en&as_sdt=2,5&as_ylo=2008.

3. Read *Commonwealth v. Rivera*, 828 A.2d 1094 (2003). In *Rivera*, the defendant, who had a court order depriving him of custody, forcibly removed his daughter from her day care and drove around with her in his car, frequently calling and terrorizing the child's mother. The defendant's daughter disappeared, and the defendant was later convicted of felony murder, kidnapping, and other offenses. The underlying felony for the felony murder was **kidnapping**, and the defendant appealed claiming he could not legally kidnap his *own biological child*. Did the Superior Court of Pennsylvania affirm the defendant's felony murder and kidnapping convictions? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=6955582610025556237&q=%22interference+with+the+custody+of+children%22&hl=en&as_sdt=2,5.

[1] 720 ILCS § 5/10-1, <http://law.onecle.com/illinois/ilcs5/10-1.html>.

[2] *People v. Dominguez*, 140 P.3d 865 (2001), accessed February 24, 2011, http://scholar.google.com/scholar_case?case=3515612573668484000&q=People+v.+Dominguez&hl=en&as_sdt=2,5.

[3] N.R.S. § 200.310, accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>.

[4] N.C. Gen. Stat. § 14-39(a), accessed February 24, 2011, <http://law.onecle.com/north-carolina/14-criminal-law/14-39.html>.

[5] N.R.S. § 200.310(2), accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>.

[6] Ariz. Rev. Stat. § 13-1304, accessed February 24, 2011, <http://law.onecle.com/arizona/criminal-code/13-1304.html>.

[7] N.C. Gen. Stat. § 14-39, accessed February 24, 2011, <http://law.onecle.com/north-carolina/14-criminal-law/14-39.html>.

[8] N.R.S. § 200.310, accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>.

[9] N.R.S. § 200.310, accessed February 24, 2011, <http://law.onecle.com/nevada/crimes/200.310.html>.

[10] Ariz. Rev. Stat. § 13-1304(B), accessed February 24, 2011, <http://law.onecle.com/arizona/criminal-code/13-1304.html>.

10.5 End-of-Chapter Material

Summary

States vary as to how they categorize and grade sex offenses. In general, rape is knowing, forcible sexual intercourse without consent or with consent obtained involuntarily. Although the victim had to resist to indicate lack of consent at early common law, in modern times the victim need not resist if it would be futile to do so. Another modernization from common-law rape is the elimination of an exemption for spousal rape and the elimination of the requirement that victim testimony in a rape case be corroborated. Most states have rape shield laws that govern the admissibility of evidence of the victim's past sexual conduct at a trial for rape. Sodomy and oral copulation are sometimes combined and included with rape in one statute called sexual assault. If sodomy and oral copulation are the subject of separate statutes, sodomy is typically knowing forcible penis to anus penetration, and oral copulation is typically knowing forcible mouth to sexual organ or anus penetration. Statutory rape is generally sexual intercourse with an underage victim either recklessly, negligently, or with strict liability depending on the jurisdiction, and incest is generally knowing sexual intercourse between family members who cannot marry. States vary as to how they grade sex offenses, with force and penetration enhancing the grading to a felony in most jurisdictions.

Assault and battery are often included in the same statute (called assault) but are actually separate offenses with distinct elements. Battery is generally a purposeful, knowing, reckless, or negligent (depending on the jurisdiction) unlawful harmful or offensive touching without victim consent. Assault can be attempted battery, in which case all the elements of battery except the physical contact are present, or threatened battery, which is a purposeful act that causes apprehension of harmful or offensive physical contact in the victim. Simple battery and simple assault are typically misdemeanors, while aggravated versions of these offenses are often felonies. Factors that can aggravate the grading of assault and battery are the use of a weapon or serious injury.

Domestic violence statutes criminalize conduct such as assault, battery, sex offenses, or criminal homicide between family members and have special provisions that pertain to interfamily violence. Stalking criminalizes a purposeful course of conduct that poses a credible threat to the victim's safety.

2. The defendant threw a cup of urine in the victim's face. Although the battery statute in Wisconsin requires **bodily harm**, the court held that the stinging sensation in the victim's eyes was sufficient and upheld the defendant's conviction.
3. The Supreme Judicial Court of Massachusetts upheld the defendant's conviction, reasoning that the defendant's **apparent ability** to consummate the shooting is what is essential to the crime of assault with a deadly weapon, not the secret fact that the gun is loaded with blanks rather than bullets.

Answers to Exercises

From [Section 10.3 "Domestic Violence and Stalking"](#)

1. Most domestic violence statutes include **individuals residing together**, so this could be domestic violence battery or assault.
2. The Supreme Court of North Dakota upheld the defendant's conviction, stating that the constitutional right to travel is not absolute and can be restricted to protect a victim from **harm**, as in this case.
3. The Court of Appeals of Georgia reversed the defendant's conviction because aggravated stalking in Georgia requires a **course of conduct** violating a protective order. In this case, the prosecution only proved that the defendant committed *one act* violating the protective order.

Answers to Exercises

From [Section 10.4 "Kidnapping and False Imprisonment"](#)

1. If Coby's state does not require **asportation** for kidnapping when the kidnapping is for ransom, then Coby has probably committed kidnapping. He confined a victim against her will with the purpose of committing another offense (theft) and demanded a ransom, which are all the elements of kidnapping.
2. The Connecticut Supreme Court rejected precedent and *changed the rule* that an act of kidnapping could be incidental to the commission of a separate offense. Thereafter, the court ordered a new trial on the kidnapping charge, although it surmised that a jury could reasonably find the defendant guilty of kidnapping separate from the assault.

employer-employee or attorney-client. Embezzlement does not require a physical taking, so it can pertain to real or personal property.

When the defendant steals by a false representation of fact, and the subject of the theft is a **service**, the theft is generally a **false pretenses** theft.^[4] False pretenses can *also* be used to steal personal or real property and is very similar to larceny by trick in this regard. What differentiates false pretenses from larceny by trick is the **status** of the property *after* it is stolen, which is discussed under the harm element of consolidated theft statutes.

To summarize, whether the defendant steals by a physical taking, a conversion, or a false representation of fact, and whether the defendant steals real or personal property or a service, the crime is theft under modern consolidated theft statutes and is graded primarily on the value of the property or service stolen.

Example of Consolidated Theft Act

Jeremy stops by the local convenience store on his way to work and buys some cigarettes. Before paying for the cigarettes, Jeremy slips a package of chewing gum into his pocket and does not pay for it. Jeremy continues walking to his job at a local gas station. When one of the customers buys gas, Jeremy only rings him up for half of the amount purchased. Once the gas station closes, Jeremy takes the other half out of the cash register and puts it in his pocket with the chewing gum. After work, Jeremy decides to have a drink at a nearby bar. While enjoying his drink, he meets a patron named Chuck, who is a taxi driver. Chuck mentions that his taxi needs a tune-up. Jeremy offers to take Chuck back to the gas station and do the tune-up in exchange for a taxi ride home. Chuck eagerly agrees. The two drive to the gas station, and Jeremy suggests that Chuck take a walk around the block while he performs the tune-up. While Chuck is gone, Jeremy lifts the hood of the taxi and then proceeds to read a magazine. When Chuck returns twenty-five minutes later, Jeremy tells him the tune-up is complete. Chuck thereafter drives Jeremy home for free.

In this scenario, Jeremy has performed three separate acts of theft. When Jeremy slips the package of chewing gum into his pocket without paying for it, he has physically **taken** personal property, which is a **larceny** theft. When Jeremy fails to ring up the entire sale for a customer and pockets the rest from the cash register, he has **converted** the owner of the gas station's cash for his own use, which is an **embezzlement** theft. When Jeremy **falsely represents** to Chuck that he has performed a tune-up of Chuck's taxi and receives a free taxi ride in payment, he has falsely represented a fact in exchange for a

proof or **affirmative defense** in many jurisdictions. Keep in mind that all the rules of consent discussed in and apply. Thus consent obtained *fraudulently*, as in larceny by trick or false pretenses, is not valid and effective and cannot form the basis of a consent defense.

Example of a Consensual Conversion That Is Noncriminal

Review the example given in with Jeremy. Change the example so that the owner of the gas station is Jeremy's best friend Cody. Cody tells Jeremy several times that if he is ever short of cash, he can simply take some cash from the register, as long as it is not more than fifty dollars. Assume that on the date in question, Jeremy did *not* ring up half of a sale but simply took fifty dollars from the register because he was short on cash, and he needed money to order drinks at the bar. In this case, Jeremy may have a valid defense of **victim's consent** to any charge of theft under a consolidated theft statute.

Embezzlement Attendant Circumstance of a Relationship of Trust and Confidence

In many jurisdictions, embezzlement theft under a consolidated theft statute requires the **attendant circumstance** element of a relationship of **trust** and **confidence** between the victim and the defendant. ^[11] This relationship is generally present in an employer-employee relationship, a friendship, or a relationship where the defendant is paid to care for the victim's property. However, if the attendant circumstance element of trust and confidence is lacking, the defendant will *not* be subject to prosecution for embezzlement under a consolidated theft statute in many jurisdictions.

Example of a Case Lacking Embezzlement Attendant Circumstance

Tran sells an automobile to Lee. Tran's automobile has personalized license plates, so he offers to apply for new license plates and thereafter send them to Lee. Lee agrees and pays Tran for half of the automobile, the second payment to be made in a week. Lee is allowed to take possession of the automobile and drives it to her home that is over one hundred miles away. Tran never receives the second payment from Lee. When the new license plates arrive, Tran phones Lee and tells her he is going to keep them until Lee makes her second payment. In some jurisdictions, Tran has *not* embezzled the license plates. Although Tran and Lee have a relationship, it is *not* a relationship based on **trust** or **confidence**. Tran and Lee have what is called a debtor-creditor relationship (Lee is the debtor and Tran is the creditor). Thus if the jurisdiction in which Tran sold the car requires a special confidential relationship for embezzlement, Tran may not be subject to prosecution for this offense.

Table 11.1 Comparing Larceny, Larceny by Trick, False Pretenses, and Embezzlement

Crime	Criminal Act	Type of Property	Criminal Intent	Attendant Circumstance	Harm
Larceny	Taking control plus asportation	Personal	Specific or purposely to deprive victim permanently*	Victim's property (applies to all four theft crimes), lack of victim consent	Property loss
Larceny by trick	Taking by a false representation of fact	Personal	Specific or purposely to deceive*	Victim reliance on false representation	Victim loses possession of property
False pretenses	Taking by a false representation of fact	Personal, real, services	Specific or purposely to deceive*	Victim reliance on false representation	Victim loses ownership of property
Embezzlement	Conversion	Personal, real	Specific or purposely to deprive victim temporarily or permanently*	Relationship of trust and confidence between defendant and victim (some jurisdictions)	Property loss either temporary or permanent
*Some jurisdictions include general intent or knowingly to commit the criminal act.					
Note: Grading under consolidated theft statutes is based primarily on property value; market value is the standard, and property can be aggregated if stolen in a single course of conduct.					

Federal Mail Fraud

The federal government criminalizes the use of the federal postal service as federal mail fraud, a felony.^[20] Like every federal offense, federal mail fraud is criminal in all fifty states. In addition, a defendant can be prosecuted by the federal and state government for *one act of theft* without violating the double jeopardy protection in the Fifth Amendment of the federal Constitution.

The **criminal act** element required for federal mail fraud is perpetrating a “scheme to defraud” using the US mail.^[21] *Scheme* has been given a broad interpretation and includes “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.”^[22] Even one act of mailing is sufficient to subject the defendant to a criminal prosecution for this offense.^[23] In addition, the defendant does not need to actually mail anything himself or herself.^[24] The criminal intent element required for federal mail fraud is **general intent** or **knowingly** or **awareness** that the mail will be used to further the scheme.^[25] The defendant does not have to intend that the US Mail will be used to commit the theft, as long as use of the postal service is reasonably foreseeable in the ordinary course of business.^[26] The defendant’s criminal act, supported by the appropriate intent, must be

Example of Extortion Act

Rodney tells Lindsey that he will report her illegal drug trafficking to local law enforcement if she does not pay him fifteen thousand dollars. Rodney has probably committed the criminal act element required for extortion in most jurisdictions. Note that Rodney's threat to expose Lindsey's illegal activities is actually *desirable* behavior when performed with the intent to eliminate or reduce crime. However, under these circumstances, Rodney's act is most likely *criminal* because it is supported by the intent to steal fifteen thousand dollars from Lindsey.

Extortion Intent

The criminal intent element required for extortion is typically the **specific intent** or **purposely** to commit the criminal act and to unlawfully deprive the victim of property *permanently*.^[3] This intent requirement is similar to the criminal intent element required for larceny and false pretenses theft, as discussed in . Some jurisdictions only require **general intent** or **knowingly** to perform the criminal act.^[4]

Example of a Case Lacking Extortion Intent

Review the example with Rodney and Lindsey in . Change the example and assume that Rodney asks Lindsey to loan him the fifteen thousand dollars so that he can make a balloon payment due on his mortgage. Lindsey refuses. Rodney then threatens to expose Lindsey's drug trafficking if she doesn't loan him the money. In many jurisdictions, Rodney may not have the criminal intent element required for extortion. Although Rodney performed the criminal act of threatening to report Lindsey for a crime, he did so with the intent to *borrow* money from Lindsey. Thus Rodney did not act with the specific intent or purposely to permanently deprive Lindsey of property, which could operate as a **failure of proof** or **affirmative defense** to extortion in many jurisdictions.

Extortion Attendant Circumstance

Extortion is a form of theft, so it has the same **attendant circumstance** required in consolidated theft statutes—the property stolen belongs to *another*. In many jurisdictions, it is an **affirmative defense** to extortion that the property taken by threat to expose a secret or accuse anyone of a criminal offense is taken *honestly*, as compensation for property, or restitution or indemnification for harm done by the secret or crime.^[5] The Model Penal Code provides an affirmative defense to extortion by threat of accusation of a criminal offense, exposure of a secret, or threat to take or withhold action as an official if

Receiving Stolen Property Attendant Circumstances

The property must be *stolen* for this crime, so the prosecution must prove the **attendant circumstances** that the property belongs to another and lack of victim consent.

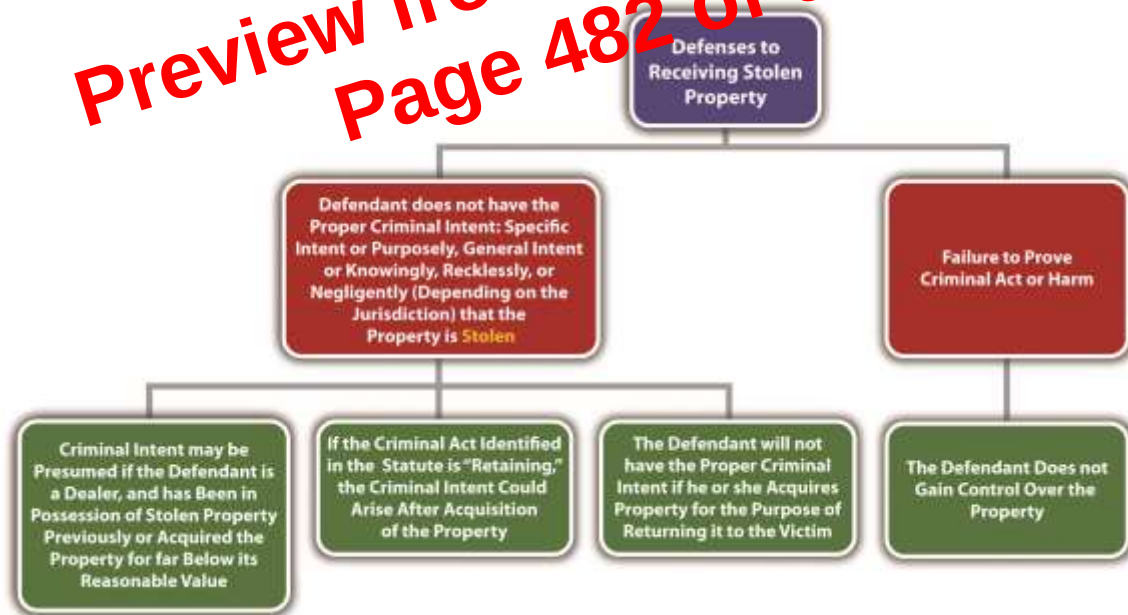
Receiving Stolen Property Causation

The criminal act must be the **factual** and **legal cause** of receiving stolen property harm, which is defined in .

Receiving Stolen Property Harm

The defendant must **buy, receive, retain, sell, or dispose of** stolen property for the completed crime of receiving stolen property in most jurisdictions. ^[35] If the defendant does not actually gain or transfer control of the property, only *attempted* receiving stolen property can be charged.

Figure 11.6 Diagram of Defenses to Receiving Stolen Property



Receiving Stolen Property Grading

Receiving stolen property is **graded** as a felony-misdemeanor ^[36] or as a misdemeanor if the stolen property is of low value and a felony if the stolen property is of high value. ^[37]

- Robbery requires a taking accomplished by force or threat of imminent force. Extortion requires a taking by threat of future harm that is not necessarily force, and larceny generally requires a taking by stealth or a false representation of fact. Robbery also requires the attendant circumstance that the property be taken from the victim's person or presence and is generally graded more severely than larceny or extortion.
- Robbery is typically graded as a serious felony, which is a strike in jurisdictions that have three strikes statutes, and a predicate felony for first-degree felony murder.
- The criminal act element required for receiving stolen property is typically buying-receiving, retaining, and selling-disposing of stolen personal property.
- The defendant must have the intent to commit the criminal act of receiving stolen property, which could be specific intent or purposely, general intent or knowingly, recklessly, or negligently to either buy-receive or sell-dispose of stolen personal property, depending on the jurisdiction. If "retain" is the criminal act element specified in the receiving stolen property statute, a defendant who obtains property without knowledge that it is stolen commits the offense if he or she thereafter keeps property after discovering that it is stolen. The defendant must also have the specific intent or purposeful desire to deprive the victim of the property permanently in some jurisdictions.
- A failure of proof or affirmative defense to receiving stolen property in some jurisdictions is that the defendant received and retained the stolen property with the intent to return it to the true owner.
- The attendant circumstances for receiving stolen property are that the property belongs to another and lack of victim consent. The harm element of receiving stolen property is that the defendant buy-receive, retain, or sell-dispose of stolen personal property.
- Receiving stolen property is graded as a felony-misdemeanor or a misdemeanor if the stolen property is of low value and a felony if the stolen property is of high value.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Define the criminal act element required for burglary.
2. Define the criminal intent element required for burglary.
3. Define the attendant circumstances required for burglary.
4. Analyze burglary grading.
5. Define the elements of criminal trespass, and analyze criminal trespass grading.
6. Define the criminal act element required for arson.
7. Define the criminal intent element required for arson.
8. Define the attendant circumstances required for arson.
9. Define the harm element required for arson.
10. Analyze arson grading.
11. Define the elements of criminal mischief, and analyze criminal mischief grading.

Burglary

Although burglary is often associated with theft, it is actually an enhanced form of trespassing. At early common law, burglary was the invasion of a man's castle at nighttime, with a sinister purpose. Modern jurisdictions have done away with the common-law attendant circumstances and criminalize the unlawful **entry** into a structure or vehicle at any time of day. Burglary has the elements of criminal act, criminal intent, and attendant circumstances, as is explored in .

Burglary Act

The **criminal act** element required for burglary varies, depending on the jurisdiction. Many jurisdictions require breaking and entering into the area described in the burglary statute. ^[1] Some jurisdictions and the Model Penal Code only require entering (Model Penal Code § 221.1). Other jurisdictions include **remaining** in the criminal act element. ^[2]

When criminal breaking is required, generally *any* physical force used to enter the burglarized area is sufficient—even pushing open a closed door. ^[3] **Entry** is generally partial or complete intrusion of either the defendant, the defendant's body part, or a tool or instrument. ^[4] In some jurisdictions, the entry must be *unauthorized*, ^[5] while in others, it could be *lawful*. ^[6] The Model Penal Code makes an exception for “premises...open to the public” or when the defendant is “licensed or privileged to enter” (Model Penal Code § 221.1(1)). **Remaining** means that the defendant lingers in the burglarized area after an initial lawful or unlawful entry. ^[7]

Example of Burglary Act

Jed uses a burglar tool to remove the window screen of a residence. The window is open, so once Jed removes the screen, he places both hands on the sill, and begins to launch himself upward. The occupant of the residence, who was watching Jed from inside, slams the window down on Jed's hands. Jed has probably committed the criminal act element required for burglary in many jurisdictions. When Jed removed the window screen, he committed a **breaking**. When Jed placed his hands on the windowsill, his fingers intruded into the residence, which satisfies the **entry** requirement. Thus Jed may be subject to a prosecution for burglary rather than *attempted* burglary, even though he never actually damaged or broke the barrier of the residence or managed to gain complete access to the interior.

Burglary Intent

Depending on the jurisdiction, the criminal intent element required for burglary is typically the **general intent** or **knowingly** to commit the criminal act, with the **specific intent** or **purpose** to commit a felony,^[8] any crime,^[9] or a felony, grand, or petty theft once inside the burglarized area.^[10] The Model Penal Code describes the criminal intent elements as "purpose to commit a crime therein" (Model Penal Code § 221.1(1)).

Example of a Case Lacking Burglary Intent

Hans drives Christian to break into a house in their neighborhood that is reputed to be "haunted." Christian goes up to the front door of the house, shoves it open, steps inside the front hallway, and then hurriedly dashes back outside. Christian probably does not have the criminal intent element required for burglary in this scenario. Although Christian committed the criminal act of breaking and entering, Christian did not have the intent to commit a crime once inside. Christian's conduct is probably criminal, but it is most likely a **criminal trespass**, *not burglary*. Criminal trespass is discussed in.

Burglary Attendant Circumstances

Depending on the jurisdiction, burglary often includes the **attendant circumstance** that the area entered is a structure, building, or vehicle belonging to another.^[11] However, modern jurisdictions have eliminated the requirement that the property belong to another^[12] and prohibit burglarizing property owned by the *defendant*, such as a landlord burglarizing a tenant's apartment. Some jurisdictions require a structure or building to be occupied,^[13] or require it to be a dwelling,^[14] and require a vehicle to

grade theft primarily on the value of the property stolen. Larceny under a consolidated theft statute in many jurisdictions is the physical taking or gaining possession of a victim's personal property by control and asportation, or a false representation of fact, with the intent to keep the property. Embezzlement under a consolidated theft statute is the conversion of a victim's real or personal property entrusted to the defendant. False pretenses under a consolidated theft statute is the permanent transfer of ownership of real or personal property or services from the victim to the defendant, based on a false representation of fact. The theft of property of low value is typically a misdemeanor (petty theft), while the theft of property of high value (grand theft) is a felony, felony-misdemeanor, or a gross misdemeanor, depending on the circumstances and the jurisdiction. Federal mail fraud, a felony, is the knowing use of the mail to perpetrate a scheme to defraud.

Extortion is the purposeful theft of property by a threat of future harm such as bodily injury or exposure of the victim's crime or secret that subjects the victim to hatred, contempt, or ridicule. Extortion is typically graded as a felony. Robbery is the purposeful theft of property from the victim's person or presence by force or threat of imminent physical harm. Robbery is typically graded as a serious felony. Receiving stolen property is receiving, buying, selling, disposing of, or retaining stolen property with either knowledge or awareness that the property is stolen or knowledge or awareness of a risk that the property is stolen. Receiving stolen property is typically graded as a felony-misdemeanor or a misdemeanor if the property is of low value and a felony if the property is of significant value.

Burglary is either breaking and entering, entering, or remaining on another's property with the intent to commit a felony, any crime, grand theft, or petty theft once inside. In some jurisdictions, the defendant can burglarize his or her own property. Burglary is typically graded as a serious felony. Criminal trespass is a knowing unauthorized entry onto the property of another. Criminal trespass is typically graded as a less serious felony than burglary, or a misdemeanor if the trespass is into a place, rather than an occupied building or structure. Arson is knowingly burning or damaging by fire property described in the arson statute. Arson is typically graded as a serious felony. Criminal mischief is damaging, destroying, or interfering with property with specific intent or purposely, general intent or knowingly, recklessly, or negligently, depending on the jurisdiction and the degree of the offense. Criminal mischief is typically graded as a less serious felony than arson, a gross misdemeanor, or a misdemeanor.

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Read the statute, and then describe the elements of each of the following crimes. Check your answers using the answer key at the end of the chapter.

1. **Offenses against computer users:** [Fla. Stat. Ann. § 815.06](#). The statute is available at this link: <http://law.onecle.com/florida/crimes/815.06.html>. Identify the criminal **act** (seven possible), criminal **intent**, **attendant circumstance**, and **harm**. How is this crime **graded**?
2. **Identity theft:** [18 Pa. C.S. § 4120](#). The statute is available at this link: <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.041.020.000.html>. Identify the criminal **act** (two possible), **criminal intent**, **attendant circumstance**, and **harm**. How is this crime **graded**?
3. **Unlawful duplication of computer-related material in the first degree:** [N.Y. Penal Law § 156.30](#). The statute is available at this link: http://law.onecle.com/new-york/penal/PEN0156.30_156.30.html. Identify the criminal **act** (three possible), **criminal intent**, **attendant circumstance**, and **harm**. How is this crime **graded**?

Cases of Interest

- *People v. Beaver*, 186 Cal. App. 4th 1177 (2010), illustrates the complexity of prosecuting theft under a consolidated theft statute: http://scholar.google.com/scholar_case?case=12194560873043980150&q=false+pretenses+theft+of+a+service&hl=en&as_sdt=2,5&as_ylo=1999.
- *State v. Castillo*, Docket No. 29, 641 (NM: 2011), discusses the difference between a debit card and credit card for theft: http://scholar.google.com/scholar_case?case=8674118418557512209&q=State+v+Castillo+NM&hl=en&as_sdt=2,5&as_ylo=2010.
- *People v. Nowack*, 614 N.W.2d 78 (2000), discusses the criminal intent element required for arson: http://scholar.google.com/scholar_case?case=3668258956679541189&q=arson+%22specific+intent+crime%22&hl=en&as_sdt=2,5&as_ylo=2000.

Articles of Interest

- Bernie Madoff case: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1661462

- Largest hedge fund insider trading case in US history: http://www.huffingtonpost.com/2011/03/22/raj-rajaratnam-jury-hears_n_839281.html
- Celebrity burglaries: <http://www.nigerianbestforum.com/generaltopics/?p=50094>
- Wildland arson: <http://www.springerlink.com/content/h4w5015373m2v200>

Websites of Interest

- Information on arson: <http://www.ncjrs.gov/App/Topics/Topic.aspx?topicid=66>
- Cybercrime: <http://www.justice.gov/criminal/cybercrime/reporting.htm>
- US DOJ identity theft information: <http://www.justice.gov/criminal/fraud/websites/idtheft.html>

Statistics of Interest

- Burglary: <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=321>
- Identity theft: <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=42>

Answers to Exercises

From

1. Linda has committed **larceny** because she **took** personal property belonging to another without consent and with what appears to be the intent to keep it permanently. Shoplifting is typically larceny. A bra is not a high-value item (even in an expensive department store), so Linda's larceny is probably petty, second-, or third-degree theft under a consolidated theft statute.
2. Ellen has committed **larceny** because she **took** personal property belonging to another without consent and with what appears to be the intent to keep it permanently. When Ellen put her hand over the Rolex watch, she gained **control** of it. When she slid it across the counter, this was sufficient **asportation** of the property because asportation for larceny can generally be any distance—no matter how slight. The Rolex is valued at ten thousand dollars, so Ellen's larceny is probably grand or first-degree theft under a consolidated theft statute.
3. The Minnesota Supreme Court reversed, holding that the lease deposits were held in trust and belonged to the *defendant*, not the lessees. The court also held that the prosecution failed to prove a relationship of **trust** and **confidence** between the

is constitutional to regulate *obscenity*, *true threats*, and *fighting words*. Nonetheless, any statute criminalizing speech or expression is subject to strict scrutiny, must be narrowly drafted, and supported by a compelling government interest. Thus two common grounds for challenging disorderly conduct statutes are **void for vagueness** and **overbreadth**.^[6]

Example of a Disorderly Conduct Statute That Is Unconstitutional

A state legislature enacts a disorderly conduct statute that prohibits “making rude and annoying comments to another.” This statute is most likely unconstitutional under the First and Fourteenth Amendments. The words *rude* and *annoying* are ambiguous, which could lead to uneven application by law enforcement and a failure to provide adequate notice to the public of what is criminal. Therefore, the statute can be stricken as **void for vagueness**. In addition, rude and annoying comments are not necessarily fighting words, true threats, or obscenity, so they could be protected under the First Amendment. This means that the statute could also be stricken as **overbroad** because it includes protected and unprotected conduct within its parameters. For a fuller and more detailed description of void for vagueness and overbreadth constitutional challenges, please refer to:

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Figure 12.1 Potential Constitutional Challenges to Disorderly Conduct Statutes



constitutional challenges as vagrancy and loitering statutes because they target the impoverished, addicts, and the unemployed.

Seattle was the first city in the United States to enact a sit-lie ordinance in 1993 that prohibited sitting or lying on a public sidewalk between the hours of 7 a.m. and 9 p.m. in Seattle's downtown area. The ordinance was attacked and ultimately upheld by the US Court of Appeals for the Ninth Circuit in 1996.^[17]

Los Angeles thereafter enacted a more comprehensive ordinance that banned sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles city limits. This ordinance was stricken by the same court as unconstitutional **cruel and unusual**

punishment pursuant to the Eighth Amendment.^[18]

The court held that the homeless in Los Angeles far outnumbered the amount of space available in homeless shelters, and therefore the ordinance punished defendants for conduct that was *involuntary*. Portland followed Los Angeles with a sidewalk-obstruction ordinance, requiring individuals to keep their personal belongings within two feet of their bodies. This ordinance was stricken as **void for vagueness** in 2009.^[19]

The most recent enactment of a sit-lie ordinance took place in San Francisco in 2010. The San Francisco ordinance is modeled after the Seattle ordinance and prohibits sitting or lying on a public sidewalk in the city limits between 7 a.m. and 9 p.m., with exceptions for medical emergencies, protests, or those who have disabilities.^[20]

The first offense is an infraction, and the second offense is a misdemeanor.^[21] If the San Francisco ordinance successfully reduces the presence of transients and is upheld as constitutional, other cities that desire the same results could soon follow suit.

Figure 12.3 Potential Constitutional Challenges to Loitering, Panhandling, and Sit-Lie Laws

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A city enacts an ordinance that prohibits standing or remaining in a crosswalk for an extended period with a sign. What are three potential constitutional challenges to this ordinance? Can you identify a government interest supporting it?
2. Read *State v. Russell*, 890 A.2d 453 (2006). Why did the Supreme Court of Rhode Island reinstate a complaint against the defendant for disorderly conduct in this case? The case is available at this link: http://scholar.google.com/scholar_case?case=15220603438033851670&q=State+v+Russell&hl=en&as_sdt=2,5.
3. Read *People v. Hoffstead*, 905 N.Y.S.2d 736 (2010). Why did the New York Supreme Court overturn the defendant's conviction for loitering in this case? The case is available at this link: http://scholar.google.com/scholar_case?case=1614717218995923333&q=People+v.+Hoffstead&hl=en&as_sdt=2,5.

[1] 18 Pa. C. S. § 5503, accessed April 2, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.055-003/0001.htm>.

[2] Haw. Rev. Stat. § 711-1101(2), accessed April 2, 2011, http://www.capitol.hawaii.gov/hrscurrent/vol14_Ch0701-0853/HRS0711/HRS_0711-1101.htm.

[3] *Wolfe v. State*, 24 P.3d 1252 (2001), accessed April 2, 2011, http://scholar.google.com/scholar_case?case=8611678948602739716&q=disorderly+conduct+%22hazardous+condition%22&hl=en&as_sdt=2,5&as_ylo=2000.

[4] Ala. Code § 13A-11-7, accessed April 3, 2011, <http://law.onecle.com/alabama/criminal-code/13A-11-7.html>.

[5] Tex. Penal Code § 42.01, accessed April 2, 2011, <http://law.onecle.com/texas/penal/42.01.00.html>.

[6] *Colten v. Kentucky*, 407 U.S. 104 (1972), accessed April 3, 2011, http://scholar.google.com/scholar_case?case=7926620308068158831&q=Colten+v.+Kentucky&hl=en&as_sdt=2,5.

[7] N.C. Gen. Stat. § 14-132, <http://law.onecle.com/north-carolina/14-criminal-law/14-132.html>.

2. Identify potential constitutional challenges to unlawful assembly and failure to disperse statutes.
3. Analyze unlawful assembly and failure to disperse grading.
4. Define the elements of riot, and analyze riot grading and the potential for constitutional challenges to riot statutes.
5. Define criminal gang and criminal gang member.
6. Compare gang participation and gang-enhancement statutes.
7. Analyze two civil responses to the criminal gang problem.
8. Identify potential constitutional challenges to gang activity statutes.

Group conduct, if criminal, can enhance the potential for violence and injury and is punishable as the crimes of unlawful assembly, riot, or criminal gangs. However, the right to *peacefully assemble* is guaranteed in the First Amendment, so statutes codifying these offenses can be subject to constitutional attack similar to disorderly conduct, vagrancy, and loitering statutes. In addition, the problem of criminal gangs has proven to be so stubborn that it has produced some novel criminal *and civil* responses. The following sections discuss group activity offenses as well as their potential constitutional defenses.

Unlawful Assembly and Failure to Disperse

Unlawful assembly can be the predicate offense to riot, which is discussed shortly. The elements required for unlawful assembly are the assembling ^[1] or meeting ^[2] (**criminal act**) of a group, with the **specific intent** or **purposely** to commit a breach of the peace, some other unlawful act, ^[3] or riot. ^[4] Some jurisdictions and the Model Penal Code punish the failure to disperse (**criminal act**) when a peace officer or public servant orders a group participating in disorderly conduct likely to cause substantial harm, serious annoyance, or alarm to do so ^[5] (Model Penal Code § 250.1(2)). The criminal intent element for failure to disperse is **general intent** or **knowingly** ^[6] (Model Penal Code § 250.1(2)).

Jurisdictions vary as to the **attendant circumstance** for unlawful assembly and failure to disperse, which is the size of the group. Some common group minimums are **two**, ^[7] **three**, ^[8] or **five**. ^[9] The Model Penal Code requires three or more persons (Model Penal Code § 250.1(2)).

Example of Unlawful Assembly and Failure to Disperse

Six neighbors are sitting on their porches, peacefully chatting. One of the neighbors, Buck, notices a pro-choice group with signs in the park across the street. Annoyed, Buck tells the group, “Let’s go show those



(1) A person or organization establishing, by clear and convincing evidence, coercion, intimidation, threats, or other harm to that person or organization in violation of this chapter has a **civil cause of action** for treble damages, **an injunction**, or any other appropriate relief in law or equity. Upon prevailing, the plaintiff may recover attorney's fees in the trial and appellate courts and the costs of investigation and litigation that are reasonably incurred.

(2)(a) For purposes of this subsection, the term "state" includes any of the state's agencies, instrumentalities, subdivisions, or municipalities, and includes, but is not limited to, state attorneys and the Office of Statewide Prosecution of the Department of Legal Affairs.

(4) In addition to any remedies provided for by ss. 60.05 and 823.05, the state has a **civil cause of action** against any person or organization if it proves by clear and convincing evidence that it has been injured by reason of a violation of this chapter by the person or organization. The state has a civil cause of action for treble damages, injunctive relief, or any other relief in law or equity which the court deems appropriate. If the state prevails, it may also recover attorney's fees in the trial and appellate courts and the costs of investigation and litigation that are reasonably incurred.

Civil gang injunctions (CGIs) are precisely drafted orders prohibiting gang members from associating with other gang members or entering certain areas known for gang activity.^[35] A state agency or an individual resident can typically make a motion requesting a CGI.^[36] The basis for a CGI motion is the tort of public nuisance, which requires proof that the gang is disturbing the enjoyment of life and property for those living in the community.^[37] Common provisions of CGIs are a prohibition on associating with known gang members, wearing gang colors, flashing gang hand signs, or loitering in areas known for gang activity.^[38] Violation of a CGI could constitute the crime of **contempt**, resulting in fines or incarceration.^[39]

the attendant circumstance, which is the group minimum, identifying two, three, five, or some similar number, depending on the statute.

- Unlawful assembly and failure to disperse statutes can be constitutionally challenged under the First Amendment, as void for vagueness, or overbroad.
- Unlawful assembly and failure to disperse are typically graded as misdemeanors.
- Riot is group commission of an unlawful violent act or a lawful act in a violent manner (criminal act) with either the specific intent or purposely to commit a felony or misdemeanor or prevent official action, or the general intent or knowingly that someone in the group possesses a firearm, or with strict liability intent. Some jurisdictions require the criminal act and intent to be the factual and legal cause of harm, which is public terror, alarm, or a risk thereof. The attendant circumstance, which is the group minimum, could be two, five, six, or some similar number, depending on the statute. Riot is often graded as a misdemeanor, or a felony if a firearm is used or there is property damage or physical injury to someone other than a defendant. Because riot statutes criminalize conduct involving force or violence, riot statutes are not as prone to constitutional challenges as disorderly conduct, vagrancy, loitering, and unlawful assembly statutes.
- Criminal gang could be defined as a group of a statutorily specified number that engages in a pattern of criminal activity and has in common hand signs, tattoos, and style of dress. Criminal gang member could be defined as someone who is identified as a gang member, admits to gang membership, associates with gang members, adopts the hand signs, tattoos, and style of dress of gang members, and commits crimes at the behest of the gang.
- Gang participation statutes criminalize actively participating in a criminal gang and promoting, furthering, or assisting (criminal act) the commission of a felony on behalf of a criminal gang with the general intent or knowingly that the gang participates in a pattern of criminal activity. Gang participation is typically graded as a felony. Gang enhancement statutes enhance a sentence for a misdemeanor or felony committed with

Federal and State Drug Schedules

Federal criminal statutes targeting illegal drugs are part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, commonly known as the Controlled Substances Act.^[1] The states follow one of the three versions of the Uniform Controlled Substances Act,^[2] which was drafted by a commission striving for uniformity in state and federal laws. For the purpose of drug crimes, the states and the federal government categorize illegal drugs in drug schedules.^[3] The schedules generally focus on the harmful or addictive qualities of the drug, with Schedule I drugs being the most harmful or addictive; the remaining schedules reflect less harmful or addictive drugs, including drugs that are legal with a prescription.^[4]

Example of a Drug Schedule

The North Carolina drug schedule is located in [N.C. Gen. Stat. § 90-89-90-94](#).^[5] Review the schedule and note that heroin, a highly addictive drug that can cause death if a user ingests too much, is listed in Schedule I, while marijuana, a less addictive drug that is generally not as harmful as heroin, is listed in Schedule VI.

Federal and State Drug Crimes

The federal government and all fifty states criminalize the manufacture and cultivation, possession, sale, and use of drugs categorized in a jurisdiction's drug schedule, with exceptions for validly prescribed drugs and drugs involved in scientific or medical research. As discussed in [Chapter 4 "The Elements of a Crime"](#), the government cannot criminalize the *status* of being a drug addict.^[6] However, there is no constitutional impediment to punishing **criminal acts** involving controlled substances, even though it may be more difficult for an addict to control drug-related criminal behavior.

In most jurisdictions, the manufacture of scheduled drugs is a felony,^[7] with a more severe penalty for the accompanying use of a firearm or the furtherance of a clandestine laboratory operation.^[8] Cultivation of marijuana, which must be done with **general intent** or **knowingly**, can be a misdemeanor or a felony, depending on the quantity cultivated.^[9]

Possession of scheduled drugs is typically **graded** based on the quantity possessed, the drug's classification in the schedule, and whether or not the possession is for the purpose of distribution, with the penalties ranging from a misdemeanor for simple possession to a serious felony for possession with intent to sell.^[10] As is discussed more fully in [Chapter 4 "The Elements of a Crime"](#), possession can be *actual*, meaning the drug is located on or very near the defendant's person, or *constructive*, meaning

Modernization of Drug Crimes Statutes

Two new trends in state drug crimes statutes are the emphasis on *rehabilitation* for nonviolent drug offenders and the legalization of **marijuana** for **medical** use.

Modern statutes allow nonviolent drug offenders to go through a specialized drug court that typically sentences the offenders to probation and rehabilitation, rather than incarceration.^[20] Common offenses for drug courts are simple possession and use of drugs listed in a jurisdiction's drug schedule.^[21] Typically, the drug court offender must participate in a rehabilitation program that includes counseling and detoxification within a specified time period.^[22] During the rehabilitation, the offender is frequently drug tested to ensure compliance. If the drug offender tests positive, reoffends, or does not complete the program within the specified time limits, the offender will be found guilty of the original nonviolent drug offense and sentenced accordingly.^[23]

Legalization of marijuana for medical use is another modern statutory trend among the states. Currently, sixteen states and the District of Columbia legalize medical marijuana.^[24] The criteria under these statutes vary, but in general a qualified individual can gain a prescription for marijuana from a caregiver, usually a physician, and thereafter obtain, possess, and use a specified quantity of marijuana.^[25] In some states, limited cultivation is also permissible.^[26]

The legalization of marijuana for medical use presents an interesting constitutional dilemma because federal law lists marijuana as a Schedule 1 drug and does not permit its possession, use, or sale for medicinal purposes.^[27] Technically, the legalization of marijuana for medical use violates the **Supremacy Clause** in the federal Constitution, which [Chapter 2 "The Legal System in the United States"](#) and [Chapter 3 "Constitutional Protections"](#) discuss in detail. However, the US Supreme Court has not invalidated any state's medical marijuana statutory scheme on this basis, although the Court has upheld federal Congress's authority to prohibit the possession and use of small quantities of marijuana under the Federal Controlled Substances Act^[28] and has rejected a medical necessity exception for the possession and use of marijuana.^[29]

Example of the Modernization of Drug Crimes Statutes

Remy lives in a state that legalizes marijuana for medical use and also has a drug court program. Remy obtains a prescription from an authorized caregiver and then buys the maximum amount of marijuana permitted under her state's medical marijuana statute at a medical marijuana distribution center. As

- [9] Ohio Rev. Code Ann. § 2925.04, accessed April 17, 2011, <http://codes.ohio.gov/orc/2925.04>.
- [10] Ohio Rev. Code Ann. § 2925.11, accessed April 17, 2011, <http://codes.ohio.gov/orc/2925>.
- [11] Connecticut Jury Instructions No. 2.11-1, <http://www.jud.ct.gov/ji/criminal/part2/2.11-1.htm> (accessed February 13, 2010).
- [12] Connecticut Jury Instructions No. 2.11-1, <http://www.jud.ct.gov/ji/criminal/part2/2.11-1.htm> (accessed February 13, 2010).
- [13] *People v. Parra*, 70 Cal. App. 4th 222 (1999), accessed April 17, 2011, http://scholar.google.com/scholar_case?case=5809016451778310933&q=People+v.+Parra+70+Cal.+App.+4th+222&hl=en&as_sdt=2,5.
- [14] Cal. Health and Safety Code § 11357(b), accessed April 18, 2011, <http://www.canorml.org/laws/hsc11357.html#b>.
- [15] N.C. Gen. Stat. § 90-95, accessed April 17, 2011, http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_90/Article_5.html.
- [16] Ala. Code § 13A-12-231, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-231.html>.
- [17] Ala. Code § 13A-12-215, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-215.html>.
- [18] Ala. Code § 13A-12-250, accessed April 17, 2011, <http://law.onecle.com/alabama/criminal-code/13A-12-250.html>.
- [19] Cal. Health and Safety Code § 11550, accessed April 17, 2011, <http://law.onecle.com/california/health/11550.html>.
- [20] Ariz. Rev. Stat. § 13-3422, accessed April 17, 2011, <http://law.onecle.com/arizona/criminal-code/13-3422.html>.
- [21] Ariz. Rev. Stat. § 13-3422, accessed April 17, 2011, <http://law.onecle.com/arizona/criminal-code/13-3422.html>.
- [22] Tex. Penal Code § 469.001, accessed April 17, 2011, <http://codes.lp.findlaw.com/txstatutes/HS/6/B/469/469.001>.
- [23] Ariz. Rev. Stat. § 13-3422, accessed April 17, 2011, <http://law.onecle.com/arizona/criminal-code/13-3422.html>.

[41] N.M. Stat. § 30-9-4.1, accessed April 21, 2011, <http://law.justia.com/codes/new-mexico/2009/chapter-30/article-9/section-30-9-4-1>.

[42] N.Y. Penal Law § 230.33, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.33_230.33.html.

[43] N.Y. Penal Law § 230.32, accessed April 21, 2011, http://law.onecle.com/new-york/penal/PEN0230.32_230.32.html.

[44] Cal. Penal Code § 266 i, accessed April 21, 2011, <http://law.onecle.com/california/penal/266i.html>.

[45] 720 ILCS § 5/11-16, accessed April 21, 2011, <http://law.onecle.com/illinois/720ilcs5/11-16.html>.

[46] Danny Hakim, William K. Rashbaum, "Spitzer Is Linked to Prostitution Ring," *New York Times* website, accessed September 4, 2011, <http://www.nytimes.com/2008/03/10/nyregion/10cnd-spitzer.html>.

[47] 18 Pa. C.S. § 5513, accessed April 21, 2011, <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.055.013.000.html>.

[48] Cal. Penal Code § 647(f), accessed April 21, 2011, <http://law.onecle.com/california/penal/647.html>.

[49] Or. Rev. Stat. § 813.010, et seq., accessed April 21, 2011, <http://law.onecle.com/oregon/813-driving-under-the-influence-of/index.html>.

[50] Cal. Penal Code § 1202.1, accessed April 22, 2011, <http://law.onecle.com/california/penal/1202.1.html>.

[51] Cal. Penal Code § 647(b), accessed April 22, 2011, <http://law.onecle.com/california/penal/647.html>.

Chapter 13

Crimes against the Government

Bribery, of course, connotes a voluntary offer to obtain gain, where extortion connotes some form of coercion.

U.S. v. Adcock, cited in *Section 13.3.2 "Bribery Elements"*



- [6] 51 Pa. Cons. Stat. Ann. § 6018, accessed April 30, 2011, <http://law.onecle.com/pennsylvania/military-affairs/00.060.018.000.html>.
- [7] 18 U.S.C. § 2385, accessed April 30, 2011, http://www.law.cornell.edu/uscode/718/usc_sec_18_00002385----000-.html.
- [8] 18 U.S.C. § 2385, accessed April 30, 2011, http://www.law.cornell.edu/uscode/718/usc_sec_18_00002385----000-.html.
- [9] *Yates v. U.S.*, 354 U.S. 298, 318 (1957), accessed April 30, 2011, http://scholar.google.com/scholar_case?case=14369441513839511604&q=Yates+v.+U.S.&hl=en&as_sdt=2,5.
- [10] 18 U.S.C. § 2385, accessed April 30, 2011, http://www.law.cornell.edu/uscode/718/usc_sec_18_00002385----000-.html.
- [11] RCW § 9.05.060, accessed May 1, 2011, <http://apps.leg.wa.gov/rcw/default.aspx?cite=9.05.060>.
- [12] 18 U.S.C. § 793, accessed May 1, 2011, http://www.law.cornell.edu/uscode/718/usc_sec_18_00000793----000-.html.
- [13] 18 U.S.C. § 794(b), accessed May 1, 2011, http://www.law.cornell.edu/uscode/718/usc_sec_18_00000794----000-.html.
- [14] 18 U.S.C. § 792 et seq., accessed May 1, 2011, http://www.law.cornell.edu/uscode/718/usc_sup_01_18_10_1_20_37.html.

13.2 Crimes Involving Terrorism

LEARNING OBJECTIVES

1. Identify three federal statutory schemes targeting terroristic conduct.
2. Ascertain the function of the Department of Homeland Security.
3. Define international and domestic terrorism.
4. Identify crimes involving terrorism.
5. Identify potential constitutional challenges to the USA PATRIOT Act.

In recent years, crimes involving terrorism have escalated both in the United States and abroad. The federal government's response has been to enact comprehensive criminal statutes with severe penalties targeting terroristic conduct. In this section, federal statutes criminalizing acts of terrorism are reviewed, along with potential constitutional challenges.

support to terrorists? What were the constitutional challenges to this federal statute?

The case is available at this

link:http://scholar.google.com/scholar_case?case=6926778734800618484&q=convicted+%222339%22&hl=en&as_sdt=2,5&as_ylo=2000.

3. Read *Humanitarian Law Project v. U.S. Department of Justice*, 352 F.3d 382 (2003). In this case, the same federal statute was analyzed (18 U.S.C. § 2339) as in [*Humanitarian Law Project v. Reno*](#), in Exercise 2. Did the US Court of Appeals for the Ninth Circuit uphold the statute in the face of a Fifth Amendment challenge that the statute deprived the defendants of due process of law? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=2048259608876560530&q=convicted+%222339%22&hl=en&as_sdt=2,5&as_ylo=2000.

Next

[1] USA PATRIOT Act, Tit. VIII § 804, accessed May 4,

2011, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf.

[2] USA PATRIOT Act, Tit. VIII § 805, accessed May 4, 2011, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf.

[3] USA PATRIOT Act, Tit. VIII § 806, accessed May 4, 2011, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf.

[4] USA PATRIOT Act, Tit. II, § 203 et seq., http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf.

[5] Department of Homeland Security website, accessed May 4, 2011, <http://www.dhs.gov/index.shtm>.

[6] 18 U.S.C. § 2331(1), accessed May 3, 2011, http://www.law.cornell.edu/uscode/718/usc_sec_18_00002331----000-.html.

[7] 8 U.S.C. § 1101(a) (22), accessed May 3, 2011, http://www.law.cornell.edu/uscode/html/uscode08/usc_sec_08_00001101----000-.html.

[8] 18 U.S.C. § 2332, accessed May 3, 2011, http://www.law.cornell.edu/uscode/718/usc_sec_18_00002332----000-.html.

Another Example of Bribery

Review the example with Isabel in [Section 13 "Example of Bribery"](#). Add to this example and assume that the judge graciously accepts Isabel's gift and thereafter rules in her favor, *acquitting* her of perjury. In this example, *both* the judge and Isabel have likely committed bribery because most states criminalize the conferring, offering, **and accepting** and **receiving** a bribe as the criminal act elements. Thus both Isabel and the judge may be subject to prosecution for and conviction of this offense, and the judge's acquittal of Isabel will ease the prosecutor's burden in proving the **specific intent** or **purposely** or **general intent** or **knowingly** to enter into an agreement corruptly influencing the decision making in this case.

Example of a Case Lacking an Element of Bribery

Isabel notices a gentleman struggling to pay his bill at a local coffee shop. Isabel steps up and charitably offers to pay the gentleman's bill. Later in the day, while watching her son's professional baseball game, Isabel notices that the umpire looks familiar. After pondering it for a few minutes, she realizes that he is the same gentleman who could not pay his bill at the coffee shop. Isabel and the umpire probably have *not* committed bribery in this case. Although Isabel gave the umpire money, and he was the decision maker in her son's baseball game, Isabel did not give the money *for* the umpire to accept it, with the **specific intent** or **purposely** or **general intent** or **knowingly** to enter into an agreement *influencing* the umpire's decisions. Thus the criminal intent element for bribery appears to be lacking, and neither Isabel nor the umpire are subject to prosecution for and conviction of this offense.

Bribery When No Authority to Act Is Present

In many states and under the Model Penal Code, it is *no defense* to bribery that the individual bribed does *not* have the **authority** to act or make the decision that is the subject of the bribe (Model Penal Code § 240.1). ^[30]

Example of Bribery When No Authority to Act Is Present

Review the example with Isabel and the judge in [Section 13 "Another Example of Bribery"](#). Change this example and assume that the "judge" in question is an imposter who is merely masquerading as a judge to live out a lifelong fantasy. Isabel and the "judge" may still be prosecuted for and convicted of bribery in many jurisdictions and under the Model Penal Code because **lack of authority** is typically *not a defense* to bribery under modern statutes criminalizing this offense.

Figure 13.8 *Diagram of Defenses to Bribery*

charges against him. Did the Supreme Court of New York uphold the defendant's conviction? Why or why not? The case is available at this

link: http://scholar.google.com/scholar_case?case=3089258849772766127&q=%22witness+tampering%22&hl=en&as_sdt=4,33&as_ylo=2003.

LAW AND ETHICS

Should Former President Clinton Have Been Criminally Prosecuted for Perjury and Obstruction of Justice?

On May 6, 1994, Paula Jones filed a civil lawsuit for sexual harassment against then-president Bill Clinton.

The US Supreme Court ruled that the president was not immune to this lawsuit, allowing it to

continue.^[52] An investigation pursuant to the Jones lawsuit revealed that the president was currently

having an affair with a White House intern, Monica Lewinsky.^[53] During a Jones lawsuit deposition, the

president stated under oath that he did not have sexual relations with Ms. Lewinsky pursuant to the

definition of sexual relations given by the questioning attorneys.^[54] He also stated that he could not recall

ever being alone with Lewinsky at the White House.^[55] After the deposition, he was involved in an effort

to get Ms. Lewinsky a federal job outside Washington, D.C.^[56] Although the Jones lawsuit was dismissed,

the president was evasive when asked questions regarding the Lewinsky affair during a grand jury

investigation instigated by prosecutor and former Solicitor General Kenneth Starr. The evening of the

grand jury investigation, the president appeared on national TV and admitted, "Indeed, I did have a

relationship with Ms. Lewinsky that was not appropriate. In fact, it was wrong. It constituted a critical

lapse in judgment and a personal failure on my part for which I am solely and completely

responsible."^[57] The House of Representatives later **impeached** Clinton for perjury and obstruction of

justice, based on the statements he made at the grand jury investigation and his conduct during the Jones

deposition. After a trial in the Senate, he was **acquitted** of both counts and thereafter served out his term

as president.^[58] He was never *criminally* prosecuted for perjury or obstruction of justice outside the

impeachment procedure, although he was later **disbarred** for his behavior.^[59]

1. Is it **ethical** to allow the president to avoid a criminal prosecution for perjury and obstruction of justice **while he is in office**? Why or why not?

Check your answer using the answer key at the end of the chapter.

[1] "Perjury—Perjury at Common Law," Jrank.org website, accessed May 5,

2011, <http://law.jrank.org/pages/1632/Perjury-Perjury-at-common-law.html>.

general intent or knowingly that the statement is false, in a judicial or official proceeding or in a certified writing. The biggest issues encountered in a perjury prosecution are proving the validity of the oath, the defendant's criminal intent, the materiality of the false statement, and any requirement of corroborative evidence. One defense to perjury is retraction of the false material statement during the same judicial or official proceeding before it becomes manifest that the falsity will be exposed. Many jurisdictions also criminalize perjury committed by inconsistent statements made under oath or affirmation in an official or judicial proceeding and subornation of perjury, which is procuring another to commit perjury with specific intent or purposely. Perjury and subornation of perjury are typically graded as felonies. Bribery is conferring, offering, agreeing to confer, or soliciting, accepting, or agreeing to accept a benefit upon a public official, employee, legislator, participant in a judicial proceeding, or sports official with the specific intent or purposely, or the general intent or knowingly to influence the bribed individual's decision making. The most difficult bribery element to prove is the criminal intent element. Bribery is typically graded as a felony. Obstruction of justice crimes interfere with the orderly administration of justice. Examples of obstruction of justice offenses are giving false identification to a law enforcement officer, impersonating a law enforcement officer, refusing to aid a law enforcement officer when requested, giving false evidence, hiding or controlling oneself and refusing to give evidence, tampering with evidence, and tampering with a witness or juror, with specific intent or purposely, or general intent or knowingly. Obstruction of justice is graded as a misdemeanor or felony, depending on the offense.

YOU BE THE USA

You are an assistant US attorney starting your first day on the job. You have been presented with four case files and told to review them and recommend criminal prosecutions based on the facts. Read each one and then decide which **crime should be prosecuted**. Check your answers using the answer key at the end of the chapter.

1. The defendant, an army intelligence analyst stationed near Baghdad, Iraq, downloaded thousands of classified Iraq and Afghanistan documents and confidential cables and released them to an ex-computer hacker who thereafter exposed them to the public. **Which crime** should be prosecuted: **treason** or **obstruction of justice**? Read about this case at this link: <http://coto2.wordpress.com/2011/03/02/bradley-manning-charged-with-22-crimes-including-capital-offense-aiding-the-enemy>.

defense could be gleaned from the defendants' conduct in deliberately damaging the missiles.

3. The District of Columbia Court of Appeals upheld the defendant's disbarment based on convictions for crimes of moral turpitude, and stated that other than *reason*, no act was more base, vile, or depraved than an intentional act to breach the confidentiality of national defense secrets that have come into the hands of an individual.

Answers to Exercises

From [Section 13.2 "Crimes Involving Terrorism"](#)

1. Whether or not this is an act of terrorism requires more information. Although the killing takes place in front of the Pakistani Embassy within the territory of the United States, this evidence is not enough to prove that Joshua intended his conduct to influence a civilian population or government by intimidation or to affect the government's conduct by assassination. The location of the shooting could be a pure coincidence, and Joshua could have a nonterroristic motive for the killing, such as a *personal* hatred or **malice** toward Khalid.
2. The US Court of Appeals for the Ninth Circuit upheld the statute, which was in place before September 11, 2001, and under AEDPA prohibited domestic material support to terrorists and terroristic organizations. The court held that the statute was not an unconstitutional prohibition on the right of free association or expression under the First Amendment, nor did it violate federal due process under the Fifth Amendment by granting the secretary of state unfettered and unreviewable authority to designate organizations as terroristic. However, the court affirmed the US District Court's decision that portions of the statute defining "personnel" and "training" were **unconstitutionally vague**.
3. The US Court of Appeals for the Ninth Circuit upheld the statute against a Fifth Amendment due process challenge by construing the statute to require proof that the defendant act with the general intent or knowledge of the terrorist organization's designation or of the unlawful activities that caused it to be so designated.

Answers to Exercises

concerns are *outweighed* by the important interests at stake, and most countries would protect their leaders from this type of legal action while in office.

Answers to You Be the USA

1. This conduct aids the enemy, rather than impeding the administration of justice by interfering with law enforcement procedure, criminal prosecution, or conviction, so the proper crime to prosecute is **treason**.
2. Copying a top-secret design and providing it to another nation is spying, rather than destroying, damaging, or producing defective property to impede national defense, so the proper crime to prosecute is **conspiracy to commit espionage**.
3. This payment is made for the purpose of influencing a public official's decision, rather than harboring a terrorist abroad, so the proper crime to prosecute is **bribery**.
4. The defendant was not under oath when she made the false statement. She was giving false evidence and impeding a law enforcement investigation, so the proper crime to prosecute is **obstruction of justice**.

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Chapter 14

Appendix A: Case Listings

Chapter 1 "Introduction to Criminal Law"

- *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)
- *Gonzales v. Oregon*, 546 U.S. 243 (2006)
- *Payton v. New York*, 445 U.S. 573 (1980)
- *Johnson v. Pearce*, 148 N.C.App. 199 (2001)
- *State v. Gillison*, 766 N.W. 2d 649 (2009)
- *Campbell v. State*, 5 S.W.3d 693 (1999)
- *Keeler v. Superior Court*, 470 P.2d 617 (1970)
- *Texas v. Johnson*, 491 U.S. 397 (1989)
- *Marbury v. Madison*, 5 U.S. (1Cranch) 137 (1803)
- *Shaw v. Murphy*, 532 U.S. 223 (2001)

