CALIFORNIA CRIMINAL LAW 2026



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California Criminal Law 2026

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About the Book

Dr. Mark C. Fields

Dr. Mark C. Fields is a retired California Highway Patrol Lieutenant and current college professor with over 45 years' experience in law enforcement. Assignments included Investigations, Drug Task Force supervisor, Internal Affairs, Risk Management, POST Academy Instructor, and Police Explorer Advisor. Dr. Fields severed in the Federal Bureau of Investigation's Police Executive Fellowship program assigned to the Criminal Investigations Division in Washington, DC, where his work focused on Organized Retail Theft.

He holds a Doctorate in Educational Leadership (Ed.D) from Cal-State Long Beach, a master's degree in Public Administration from Cal-State Northridge, and an associate's degree in Administration of Justice from Merritt College. He is a graduate of P.O.S.T. Command College Class 46 where his research focused on early warning and intervention systems for law enforcement operations.

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Dedication

This work is dedicated to my friend and mentor, Professor Emeritus Raymond "Ray" Lewis who has served the law enforcement profession for over 55 years in roles including Chief of Police, tenured professor, and now with the mounted patrol of the sheriff's posse. Thank you, Ray, for all you have done for our students.

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Preface

Welcome to California Criminal Law. This engaging textbook will enhance your ability to be successful in both your academic pursuits and a career in criminal justice.

Content

This textbook focuses on California criminal law and procedures. After completing a course in Criminal Law, you will be familiar with the nature and sources of law, the court system, the adversarial process, the most prominent crimes, and accompanying criminal defenses.

Approach

This course introduces you to crimes and defenses with the goal of applying what is learned to fact pattern scenarios and determining the appropriate criminal charges in those scenarios. Some of the scenarios come from actual criminal cases, and some are purely fictional. The authors have embedded the California Jury Instructions (CALCRIM) and applicable case law to many of the crimes covered in this text.

Features

This textbook is designed to supplement classroom instruction. For faculty in the California Community College system, this textbook aligns with Course Identification (C-ID) Administration of Justice (AJ) 120, Concepts of Criminal Law. The authors have provided a course shell in Canvas Commons complete with supplemental readings, interactive video lessons, exams, and other learning activities.

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1: INTRODUCTION TO CRIMINAL LAW

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1.1: Introduction and Chapter Learning Objectives

Chapter Learning Objectives

LO 1: Describe the historical origin and development of criminal law

LO 2: Define what constitutes a crime

LO 3: Compare and contrast criminal law and criminal procedure

LO 4: Differentiate between criminal law and civil law

LO 5: Identify the sources of law

LO 6: Analyze the impact of precedent and Stare Decisis on the law

LO 7: Explain how laws are classified

LO 8: Analyze the effects of specific and general deterrence, incapacitation, rehabilitation, retribution, and restitution.

Introduction

This textbook introduces you to our legal system in the United States, the basic elements of a crime, the specific elements of commonly encountered crimes, and most criminal defenses. Criminal law always involves the government and government action, so you will also review the pertinent sections of the United States Constitution and its principles as they apply to criminal law. By the end of the course you will be comfortable with the legal framework that governs the careers of criminal justice professionals.

The basic purpose of criminal law is to establish limits on certain behavior or activities that are considered harmful to society. The law is not about arbitrarily preventing them from enjoying life, laws are based on community standards and generally accepted norms. Laws are the "tools" we use to build and maintain an orderly society.

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1.2: The History of Criminal Law

Criminal law and the criminal justice system have evolved over a period of thousands of years. Over 3,500 years ago King Hammurabi of Babylon compiled a series of commands called the **Code of Hammurabi**, regarding the day-to-day life of his people (britannica.com). These commands, which dealt with topics from divorce to contracts to murder, were literally written in stone (diorite stela) binding future Babylonian kings to Hammurabi's new code of law. Organized religion has played a significant role in guiding community behavior. From the Torah all the way to the Talmud, Halachah Code guided the dos and don'ts of everyday life Judaism. Biblical laws included the 10 Commandments handed to Moses on Mount Saini and the revelation of the Qu'ran to Muhammad that included the five pillars of Islam.

Tribalism established a commitment to one's own tribe, land and friends while the introduction of feudalism developed a society that lacked the initial resource comfort provided by tribal communities. The era of Enlightenment uncovered a different method of thinking that sought to understand why people exhibited criminal behavior. The establishment of penal codes and a juvenile justice system during the 19th century changed the face of crime and the criminal justice system.

A shift from tribalism—loyalty to a tribe or friends—to **feudalism**—a societal structure focused on owning land in exchange for labor came next. In England during the 2nd century BC, the first jail appeared resulting from an increased use of trial and grand jury systems. Royalty established jails to house individuals retained for criminal violations. Early jailing systems allowed commoners to observe and taunt offenders. In addition, necessities, such as food or clothing, required payment from the offender; if they could not afford these items, they went without them.

The decline of feudalism led to a revision of the justice system during the 16th and 17th centuries. Criminal justice authorities moved to punish the accused by locking up offenders and forcing them into labor. Despite the difficult conditions, jailers and authorities sought to incorporate rehabilitative methods by delivering the skills necessary to obtain work through forced labor. This would hopefully change an accused person's situation.

England's increase in merchant activity led to the resolving of disputes using a criminal charge process. Gallery slavery involved the gathering of vagrants and thieves from the streets and the forcing of individuals into lifetime servitude.

The United States owes much of its early legal processes to England. The Enlightenment—a major intellectual movement—spurred change in how people examined human behavior. During the late 18th century, what we consider classic criminological theory fully developed. In the United States, colonists used religion as a foundation for understanding crime. In addition, slavery contributed significantly to the evolution of criminal law.

Corporal punishments were prominent, although people began implementing punishments that "fit the crime." Democracy and capitalism increased and the economic statuses and demographics of everyday citizens began to change, as America became its own country. In addition, the church and religion began to have less informal control over how citizens conducted their lives. Consequently, the introduction of a new criminal system was required.

Police forces for the new republic were not created during the Constitutional Convention in Pennsylvania in 1787. Colonists treated crime as sin, but this changed when the new republic came about.

From the mid-19th century to the late 19th century in the United States, the justice system evolved using established legal codes and practices. Jim Crow laws established a method to reconcile slavery of the past. The country began to rely significantly on criminal justice procedures. Today, more than six million people have received rehabilitative measures, including incarceration, for crimes, including petty theft, drug abuse and murder. As described in this section, the criminal justice system is constantly evolving. These topics are covered in depth in other courses in the Administration of Justice degree.

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1.3: Definition of a Crime

Let's begin at the beginning by defining a **crime**. As defined by California Penal Code (PC) Section 15 (2024) a crime is defined as a "*public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:*

1. *Death;*
2. *Imprisonment;*
3. *Fine;*
4. *Removal from office; or,*
5. *Disqualification to hold and enjoy any office of honor, trust, or profit in this State.*

You will learn about criminal acts and omissions in Chapter 4 "*The Elements of a Crime*". For now, it is important to understand that a criminal act or omission to act, and criminal intent are elements or parts of every crime. Illegality is also an element of every crime. Generally, the *government* must enact a *criminal law* specifying a crime and its elements before it can punish an individual for criminal behavior. Criminal laws are the primary focus of this book. As you slowly start to build your knowledge and understanding of criminal law, you will notice some unique characteristics of the legal system.

Laws differ significantly from state to state. Throughout the United States, each state and the federal government criminalize different behaviors. Although this plethora of laws makes American legal studies more complicated for teachers and students, the size, cultural makeup, and geographic variety of our country demand this type of legal system.

Laws in a democratic society, unlike laws of nature, are created by *people* and are founded in religious, cultural, and historical value systems. People from varying backgrounds live in different regions of this country. Thus you will see that different people enact distinct laws that best suit their needs. This book focuses on California law however we often refer to the Model Penal Code which informs law in all states. However, the bulk of any criminal law overview is an examination of different crimes and their elements. This current textbook was revised in summer 2025 and includes laws that were enacted before then. Always check the most current version of your state's laws because it may vary from the law presented in this book.

Laws are not *static*. As society changes, so do the laws that govern behavior. Evolving value systems naturally lead to new laws and regulations supporting modern beliefs. For example, prior to 2016 recreational use of marijuana was illegal in California and still is in many other states. Although a certain stability is essential to the enforcement of rules, occasionally the rules must change. Try to maintain an open mind when reviewing the different and often contradictory laws set forth in this book. Law is not exact, like science or math. Also try to become comfortable with the gray area, rather than viewing situations as black or white. Criminal Law and Criminal Procedure

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

Linda needs a new cell phone but cannot afford one. She convinces her friend Carla to go to the Apple store with her to "just take a look." Unbeknownst to Carla, Linda has the intent to steal a phone. Moments after they enter the store, Linda places a new iPhone worth $1,200 in her purse. Clara watches, horrified, but does not say anything, even though a security guard is standing nearby. Linda leaves the store without paying for the phone. This example illustrates two issues of criminal law: (1) Which crime did Linda commit when she stole the phone? (2) Did Clara commit a crime when she failed to alert the security guard to Linda's shoplifting? You learn the answer to these issues later in Chapter 10 "*Crimes against Property*," Chapter 4 "*The Elements of a Crime*," and Chapter 8 "*Parties to Crime*".

Example of Criminal Procedure Issues

Using the previous example, Linda walks out of the store with the stolen goods. Jamal, a police officer, just happens to be parked out front and is notified by store security that Linda has just stolen an iPhone from the store. Jamal arrests her (laws of arrest are covered in Chapter 3) and transports her to the police station. Jamal begins questioning Linda about the crime and she immediately requests an attorney. Jamal ignores this request and continues to question Linda. Whether Jamal properly arrested and interrogated Linda are **criminal procedure** issues discussed in Chapter 3, *Laws of Arrest and Constitutional Protections*.

The Difference Between Civil and Criminal Law

Law can be classified in a variety of ways. One of the most general classifications divides law into civil and criminal. A basic definition of **civil law** is "the body of law having to do with the private rights of individuals" (dictionary.com, 2024). As this definition indicates, civil law is between individuals, not *the government*. Criminal law involves regulations enacted and enforced by government action, while civil law provides a remedy for individuals who need to enforce private rights against other individuals. Some examples of civil law are family law, wills and trusts, and contract law. If individuals need to resolve a *civil dispute*, this is called **civil litigation**, or a civil lawsuit. When the type of civil litigation involves an injury, the injury action is called a **tort**.

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1.4: Characteristics of Civil Litigation

It is important to distinguish between civil litigations and criminal prosecution. Civil and criminal cases share the same courts, but they have very different goals, purposes, and results. Sometimes, one set of facts gives way to a civil lawsuit *and* a criminal prosecution. This does not violate double jeopardy and is actually quite common.

Parties in Civil Litigation

In civil litigation, an injured party sues to receive a court-ordered remedy, such as money, property, or some sort of performance. Anyone who is injured—an individual, corporation, or other business entity—can sue civilly. In a civil litigation matter, the injured party that is suing is called the **plaintiff**. A plaintiff must hire and pay for an attorney or represent himself or herself. Hiring an attorney is one of the many costs of litigation and should be carefully contemplated before jumping into a lawsuit.

The alleged wrongdoer and the person or entity being sued are called the **defendant**. While the term *plaintiff* is always associated with civil litigation, the wrongdoer is called a defendant in *both* civil litigation and a criminal prosecution, so this can be confusing. The defendant can be any person or thing that has caused harm, including an individual, corporation, or other business entity. A defendant in a civil litigation matter must hire and pay for an attorney *even if that defendant did nothing wrong*. The right to a free attorney does not apply in civil litigation, so a defendant who cannot afford an attorney must represent himself or herself.

Goal of Civil Litigation

The *goal* of civil litigation is to *compensate the plaintiff* for any injuries and to put the plaintiff back in the position that person held before the injury occurred. This goal produces interesting results. It occasionally creates liability or an obligation to pay when there is no fault on behalf of the defendant. The goal is to make the plaintiff whole, not to punish, so *fault* is not really an issue. If the defendant has the resources to pay, sometimes the law requires the defendant to pay so that society does not bear the cost of the plaintiff's injury.

A defendant may be liable without fault in two situations. First, the law that the defendant violated may not require fault. Usually, this is referred to as **strict liability**. Strict liability torts do not require fault because they do not include an intent component. Strict liability and other intent issues are discussed in detail in Chapter 4 "*The Elements of a Crime*". Another situation where the defendant may be liable without fault is if the defendant did not actually commit any act but is associated with the acting defendant through a *special relationship*. The policy of holding a separate entity or individual liable for the defendant's action is called **vicarious liability**. An example of vicarious liability is employer-employee liability, also referred to as *respondent superior*. If an employee injures a plaintiff while on the job, the *employer* may be liable for the plaintiff's injuries, whether or not the employer is at fault. Clearly, between the employer and the employee, the employer generally has the better ability to pay.

> **Example of Vicarious Liability**
>
> One famous, or infamous, example of vicarious liability is the case involving Rodney King in Los Angeles that occurred in 1991. Mr. King was stopped for speeding by the California Highway Patrol who was backed up by the Los Angeles Police Department. Mr. King did not immediately respond to commands from the police and was subsequently beaten by four officers and a sergeant from the LAPD. The beating was videotaped by a bystander and later shown on TV. Mr. King suffered severe injuries and sued the police for excessive force, a violation of his civil rights. As the employer of the involved police officer, the City of Los Angeles was found to be liable for excessive force and Mr. King was awarded substantial civil damages.

Harm Requirement

The goal of civil litigation is to compensate the plaintiff for injuries, so the plaintiff must be a bona fide victim that can prove harm. If there is no evidence of harm, the plaintiff has no basis for the civil litigation matter. An example would be when a defendant rear-ends a plaintiff in an automobile accident without causing damage to the vehicle (property damage) or physical injury. Even if the defendant is at fault for the automobile accident, the plaintiff cannot sue because the plaintiff does not need compensation

for any injuries or losses.

Damages

Often the plaintiff sues the defendant for money rather than a different, performance-oriented remedy. In a civil litigation matter, any money the court awards to the plaintiff is called **damages**. Several kinds of damages may be appropriate. The plaintiff can sue for **compensatory damages**, which compensate for injuries, **costs**, which repay the lawsuit expenses, and in some cases, **punitive damages**. Punitive damages, also referred to as **exemplary damages**, are *not* designed to compensate the plaintiff but instead focus on *punishing* the defendant for causing the injury (BMW of North America, Inc., 1996).

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1.5: Characteristics of a Criminal Prosecution

A criminal prosecution takes place after a defendant violates a federal, state, or local criminal statute, or in some jurisdictions, after a defendant commits a common-law crime. Statutes and common-law crimes are discussed in Section 1.6 “Sources of Law”.

Parties in a Criminal Prosecution

The government institutes the criminal prosecution, rather than an individual plaintiff. If the defendant commits a federal crime, *the United States of America* pursues the criminal prosecution. If the defendant commits a state crime, the state government, often called the *People of the State* pursues the criminal prosecution. As in a civil lawsuit, the alleged wrongdoer is called the defendant and can be an individual, corporation, or other business entity.

The *attorney* who represents the government controls the criminal prosecution. In a federal criminal prosecution, this is the **United States Attorney** (United States Department of Justice, 2010). In a state criminal prosecution, this is generally a *state prosecutor, district attorney, or city attorney* (Galaxy.com, 2010). A state prosecutor works is typically an elected official. In California, the **Attorney General** is the State Prosecutor.

Applicability of the Constitution in a Criminal Prosecution

The defendant in a criminal prosecution can be represented by a private attorney or a *free* attorney paid for by the state or federal government if he or she is *unable to afford attorney's fees* and *facing incarceration* (Alabama v. Shelton, 2001). Attorneys provided by the government are called **public defenders** (18 U.S.C., 2010). This is a significant difference from a civil litigation matter, where both the plaintiff and the defendant must hire and pay for their own private attorneys. The court appoints a free attorney to represent the defendant in a criminal 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. Thus 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.

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1.6: Two Different Trials—Two Different Results



Football star and actor O. J. Simpson was prosecuted criminally for the June 12, 1994 murder (California PC 187) and later sued civilly for the murder and wrongful death of victims Ron Goldman and his ex-wife, Nicole Brown Simpson. In the criminal prosecution, which came first, the US Constitution provided O. J. Simpson with the right to a fair trial (due process) and the right to remain silent (privilege against self-incrimination). The burden of proof in the criminal trial was *beyond a reasonable doubt*, and O. J. Simpson did *not* have to testify. The prosecution failed to prove the criminal case beyond a reasonable doubt and O. J. Simpson was acquitted, or found *not guilty*, of the crime of murder (Linder, D., 2010).

In the subsequent civil lawsuit, the burden of proof was *preponderance of evidence*, which means in light of the evidence and the law, do you believe that each element of the claim is more likely true than not? O. J. Simpson was required to testify in the civil case. As a result O. J. Simpson was found *liable* in the civil lawsuit. The jury awarded $8.5 million in compensatory damages to Fred Goldman (Ron Goldman's father) and his ex-wife Sharon Rufo. A few days later, the jury awarded punitive damages of $25 million to be shared between Nicole Brown Simpson's children and Fred Goldman (Jones, T. L., 2010).

Image from Sam Mircovich/Reuters

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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1.7: Classification of Crimes

Crimes can be classified in many ways. Crimes also can be grouped by subject matter. For example, a crime like assault, battery, or rape tends to injure another person's body, so it can be classified as a "crime against the person." If a crime tends to injure a person by depriving him or her of property or by damaging property, it can be classified as a "crime against property." These classifications are basically for convenience and are not imperative to the study of criminal law.

More important and substantive is the classification of crimes according to the severity of punishment. This is called **grading**. Crimes are generally graded into four categories: **felonies**, **misdemeanors**, **wobblers**, and **infractions**. Often the criminal intent element affects a crime's grading. **Malum in se** crimes, murder, for example, are evil in their nature and are generally graded higher than **malum prohibitum** crimes, which are regulatory, like a failure to pay income taxes.

Felonies

Felonies are the *most serious* crimes. They are either supported by a heinous intent, like the intent to kill, or accompanied by an extremely serious result, such as loss of life, grievous injury, or destruction of property. Felonies are serious, so they are graded the highest, and all sentencing options are available. Depending on the jurisdiction and the crime, the sentence could be execution, **prison** time, a fine, or alternative sentencing such as probation, rehabilitation, and home confinement. Potential consequences of a felony conviction also include the inability to vote, own a weapon, or even participate in certain careers.

Misdemeanors

Misdemeanors are *less serious* than felonies, either because the intent requirement is of a lower level or because the result is less extreme. Misdemeanors are usually punishable by **jail** time of one year or less per misdemeanor, a fine, or alternative sentencing like probation, rehabilitation, or community service. Note that incarceration for a misdemeanor is in jail rather than prison. The difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement also differs between jail and prison. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

Wobblers

Wobblers are crimes that the government can prosecute and punish as *either* a felony or a misdemeanor, depending on the particular circumstances accompanying the offense. The discretion whether to prosecute the crime as a felony or misdemeanor usually belongs to the *judge*, but in some instances the *prosecutor* can make the decision.

Infractions

Infractions are the least serious crimes and include minor offenses such as jaywalking and motor vehicle offenses that result in a simple traffic ticket. Infractions are generally punishable by a fine or alternative sentencing such as traffic school.

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1.8: Punishment

Punishment has five recognized purposes: ***deterrence***, ***incapacitation***, ***rehabilitation***, ***retribution***, and ***restitution***.

Specific and General Deterrence

Deterrence prevents future crime by frightening the *defendant* or the *public*. The two types of deterrence are **specific** and **general deterrence**. Specific deterrence applies to an *individual defendant*. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment. General deterrence applies to the *public* at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. When the public learns, for example, that an individual defendant was severely punished by a sentence of life in prison or the death penalty, this knowledge can inspire a deep fear of criminal prosecution.

Incapacitation

Incapacitation prevents future crime by removing the defendant from society. Examples of incapacitation are incarceration, house arrest, or execution pursuant to the death penalty.

Rehabilitation

Rehabilitation prevents future crime by altering a defendant's behavior. Examples of rehabilitation include educational and vocational programs, treatment center placement, and counseling. The court can combine rehabilitation with incarceration or with probation or parole. In some states, for example, nonviolent drug offenders must participate in rehabilitation in combination with probation, rather than submitting to incarceration (Ariz. Rev. Stat., 2010). This lightens the load of jails and prisons while lowering **recidivism**, which means reoffending.

Retribution

Retribution prevents future crime by removing the desire for *personal* avengement (in the form of assault, battery, and criminal homicide, for example) against the defendant. When victims or society discover that the defendant has been adequately punished for a crime, they achieve a certain satisfaction that our criminal procedure is working effectively, which enhances faith in law enforcement and our government.

Restitution

Restitution prevents future crime by punishing the defendant *financially*. Restitution is when the court orders the criminal defendant to pay the victim for any harm and resembles a civil litigation damages award. Restitution can be for physical injuries, loss of property or money, and rarely, emotional distress. It can also be a *fine* that covers some of the costs of the criminal prosecution and punishment.

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1.9: Sources of Law

Law comes from three places, which are referred to as the sources of law.

Constitutional Law

The first source of law is **constitutional law**. Two constitutions are applicable in every state: the federal or United S Constitution, which is in force throughout the United States of America, and the state's constitution. The US Constitution created our legal system, as is discussed in Chapter 2 "The Legal System in the United States". States' constitutions typically focus on issues of local concern. The purpose of federal and state constitutions is to *regulate government action*. Private individuals are protected by the Constitution, but they do not have to follow it themselves.

> **Example of Constitutional Law Applied to Government and Private Action**
>
> Members from the Westboro Baptist Church stand on a public sidewalk near the funeral of a veteran with signs critical of homosexuals. Although many individuals may be offended by the signs, the government *cannot* arrest or criminally prosecute the group for their actions because the First Amendment of the US Constitution guarantees the right to freedom of speech and assembly (this is discussed further in later chapters). On the other hand, if this same group walks into a restaurant and criticizes the owner for their hiring of homosexuals, the owner could eject them immediately. The restaurant is a *private business*, not the government, and they do not have to allow this behavior on their property. (Note: There is a distinction between hate speech, which is legal, and hate crimes, which are illegal. This is discussed in later chapters).

Superiority of the Constitution

Of the three sources of law, **constitutional law** is considered the *highest* and should not be supplanted by either of the other two sources of law. Pursuant to principles of federal supremacy, the *federal* or US Constitution is the most preeminent source of law, and state constitutions cannot supersede it. Federal constitutional protections and federal supremacy are discussed in Chapter 2 "The Legal System in the United States" and Chapter 3 "Constitutional Protections".

Statutory Law

The second source of law is **statutory law**. While the Constitution applies to government action, statutes apply to and regulate *individual* or *private* action. A **statute** is a written (and published) law that can be enacted in one of two ways. Most statutes are written and voted into law by the *legislative* branch of government. This is simply a group of individuals elected for this purpose. The US legislative branch is called Congress, and Congress votes federal statutes into law. Every state has a legislative branch as well, called a state legislature, and a state legislature votes state statutes into law.

California codifies its criminal laws in different one of 27 different codes (https://leginfo.legislature.ca). This text covers primarily the Penal Code (general crimes), Vehicle Code (traffic laws), Health and Safety Code (drug laws), Business and Professions Code (sales of tobacco and alcohol to minors) and the Welfare and Institution Codes (child welfare laws).

State citizens can also vote state statutes into law. Although a state legislature adopts *most* state statutes, citizens voting on a ballot can enact some very important statutes. For example Penal Code 187, Murder includes the killing of a fetus however in 2023 a majority of California's citizens voted to allow the killing of a fetus while a full-term child is in the birth canal (California Proposition 1, 2023). California's three-strikes law was voted into law by both the state legislature and California's citizens and actually appears in the California Penal Code in two separate places (Brown, B., and Jolivette, G., 2010).

Statutory Law's Inferiority

Statutory law is inferior to **constitutional law**, which means that a statute cannot conflict with or attempt to supersede constitutional rights. If a conflict exists between constitutional and statutory law, the courts must resolve the conflict. Courts can invalidate unconstitutional statutes pursuant to their power of **judicial review**, which is discussed in an upcoming section.

Administrative Laws and Ordinances

Other written and published laws that apply to individuals are **administrative laws** and **ordinances**. Administrative laws and ordinances should not supersede or conflict with statutory law.

Administrative laws are enacted by administrative agencies, which are governmental agencies designed to regulate in specific areas. Administrative agencies can be federal or state and contain not only a legislative branch but also an executive (enforcement) branch and judicial (court) branch. The Food and Drug Administration (FDA) is an example of a federal administrative agency. The FDA regulates any food products or drugs produced and marketed in the United States.

There has been some controversy surrounding the power of administrative agencies to enact law without legislative or voter input. In June 2024 the United States Supreme Court curtailed this power in the cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*. As of the date of this chapter update (July 2024) the effects of this ruling have yet to be seen.

Ordinances are similar to statutes, except that *cities, counties, and other governmental bodies* vote them into law, rather than a state's legislature or a state's citizens. Ordinances usually relate to health, safety, or welfare, or quality of life and violations of them are typically classified as infractions or misdemeanors. A written law enacted by a college's Board of Trustees prohibiting vaping on campus is an example of an ordinance.

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Model Penal Code

State criminal laws differ significantly, so in the early 1960s a group of legal scholars, lawyers, and judges who were members of the American Law Institute drafted a set of suggested criminal statutes called the **Model Penal Code**. The intent of the Model Penal Code was to provide a standardized set of criminal statutes that all states could adopt, thus simplifying the diversity effect of the United States' legal system. While the Model Penal Code has not been universally adopted, a majority of the states have incorporated portions of it into their penal codes, and the Model Penal Code survives as a guideline and focal point for discussion when state legislatures modify their criminal statutes.

Case Law

The third source of law is **case law**. When judges rule on the facts of a particular case, they create case law. *Federal* case law comes from federal courts, and *state* case law comes from state courts. Case law has its origins in English common law.

English Common Law

In Old England, before the settlement of the United States, **case law** was the most prevalent source of law. This was in contrast to countries that followed the Roman Law system, which primarily relied on written codes of conduct enacted by legislature. Case law in England was mired in tradition and local customs. Societal principles of law and equity were the guidelines when courts issued their rulings. In an effort to be consistent, English judges made it a policy to follow previous judicial decisions, thereby creating a uniform system of laws throughout the country for the first time. Case law was named **common law** because it was common to the entire nation (Duhaime, L., 2010).

The English system of jurisprudence made its way to the United States with the original colonists. Initially, the thirteen colonies unanimously adopted common law as the law of the land. All crimes were common-law crimes, and cases determined criminal elements, defenses, and punishment schemes. Gradually, after the Revolutionary War, hostility toward England and modern reform

led to the erosion of common-law crimes and a movement toward codification. States began replacing common-law crimes with statutes enacted by state legislatures. Oxford professor Sir William Blackstone's *Commentaries on the Law of England,* which interpreted and summarized English common law, became an essential reference as the nation began the process of converting common-law principles into written statutes, ordinances, and penal codes (Duhaime, L., 2010).

Limitations on Common-Law Crimes

In modern society judges *cannot* create crimes (United States v. Hudson & Goodwin, 2010). This violates notions of fairness. Making up a new crime and punishing the defendant for it does not provide consistency or predictability to our legal system. It also violates the principle of legality, a core concept of American criminal justice embodied in this phrase: "Nullum crimen sine lege, nulla poena sine crimen" (No crime without law, no punishment without crime).

In states that do not allow common-law crimes, including California, **statutes** must define criminal conduct. If no statute exists to criminalize the defendant's behavior, the defendant ***cannot be criminally prosecuted***, even if the behavior is abhorrent (CA PC 15).

Common law still plays an important role in criminal lawmaking, even though crimes are now contained in statutes. Classification of crimes as felonies and misdemeanors are a reflection of English common law. Legislatures often create statutes out of former common-law crimes. Judges look to the common law when defining statutory terms, establishing criminal procedure, and creating defenses to crimes. The United States is considered a common-law country. Every state except Louisiana, which is based on the French Civil Code, adopts the common law as the law of the state *except* where a statute provides otherwise (Legal Definition, 2010).

> **Example of a Court's Refusal to Create a Common-Law Crime**
>
> *Keeler v. Superior Court*, 470 P.2d 617 (1970). In *Keeler*, the defendant attacked his pregnant ex-wife, and her baby was thereafter stillborn. The California Supreme Court disallowed a murder charge against Keeler under California Penal Code § 187 because the statute criminalized only the malicious killing of a "human being." The court reached its decision after examining the common-law definition of human being and determining that the definition did not include a fetus. The court reasoned that it *could not create a new crime* without violating the due process clause, separation of powers, and California Penal Code § 6, which prohibits the creation of common- law crimes. After the *Keeler* decision, the California Legislature changed Penal Code § 187 to include killing a viable fetus, excepting when done by **a physician who has taken an oath to do no harm** (some people see contradiction in that).

Powerful Nature of Case Law

Generally, if there is a statute on an issue, the statute is *superior* to case law, just as the Constitution is superior to statutory law. However, judges *interpret* constitutional and statutory law, making case law a *powerful* source of law. A judge can interpret a constitution in a way that adds or creates exceptions to its protections. A judge can also interpret a statute in a way that makes it unconstitutional and unenforceable. This is called the power of **judicial review** (Marbury v. Madison, 2010).

> **Example of Judicial Review**
>
> An example of judicial review is set forth in *Texas v. Johnson*, 491 U.S. 397 (1989). In *Johnson*, the US Supreme Court ruled that burning a flag is protected self-expression (speech) under the First Amendment to the US Constitution. Thus the Court reversed the defendant's conviction under a Texas statute that criminalized the desecration of a venerated object. Note how *Johnson* not only *invalidates* a state statute as being inferior to the US Constitution but also *changes* the US Constitution by adding flag burning to the First Amendment's protection of speech.

Stare Decisis and Precedent

Cases are diverse, and case law is not really law until the judge rules on the case, so there must be a way to ensure case law's

predictability. It would not be fair to punish someone for conduct that is not yet illegal. Thus judges adhere to a policy called stare decisis. Stare decisis is derived from English common law and compels judges to follow rulings in previous cases. A previous case is called precedent. Once judges have issued a ruling on a particular case, the public can be assured that the resulting precedent will continue to be followed by other judges. Stare decisis is not absolute; judges can deviate from it to update the law to conform to society's modern expectations.

Rules of Stare Decisis and Use of Precedent

Case precedent is generally an appeal rather than a trial. There is often more than one level of appeal, so some appeals come from higher courts than others. This book discusses the court system, including the appellate courts, in Chapter 2 "The Legal System in the United States".

Many complex rules govern the use of precedent. Lawyers primarily use precedent in their arguments, rather than statutes or the Constitution, because it is so specific. With proper research, lawyers can usually find precedent that matches or comes very close to matching the facts of any particular case. In the most general sense, judges tend to follow precedent that is newer, from a high court, and from the same court system, either federal or state.

> **Example of Stare Decisis and Use of Precedent**
>
> Geoffrey is a defense attorney for Conrad, who is on trial for first-degree murder. The murder prosecution is taking place in New Mexico. Geoffrey finds case precedent from a New York Court of Appeals, dated 1999, indicating that Conrad should have been prosecuted for voluntary manslaughter, not first-degree murder. Brandon, the prosecuting attorney, finds case precedent from the New Mexico Supreme Court, dated 2008, indicating that a first-degree murder prosecution is appropriate. The trial court will probably follow the precedent submitted by Brandon because it is newer, from a higher court, and from the same court system as the trial.

Case Citation

Cases must be published to become case law. A published case is also called a judicial opinion. This book exposes you to many judicial opinions that you have the option of reading on the Internet. It is essential to understand the meaning of the case citation.

The case citation is the series of numbers and letters after the title of the case and it denotes the case's published location. For example, let's look at the case citation for Keeler v. Superior Court, 470 P.2d 617 (1970).

The number 470 is the volume number of the book that published the *Keeler* case. The name of that book is "P.2d" (this is an abbreviation for *Pacific Reports, 2d Series*). The number 617 is the page number of the *Keeler* case. The date (1970) is the date the California Supreme Court ruled on the case.

Case Briefing

It is useful to condense judicial opinions into **case brief format**. 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.

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 court is examining, which is usually the grounds for appeal. The case brief should phrase the issue as a question. Cases usually have more than one issue. The case brief can state all the issues or only the issue that is most important. The substantive holding comes after the issue, is *actually the case law*, and answers the issue question. If more than one issue is presented in the case brief, a substantive holding should address each issue.

A **procedural holding** should follow the substantive holding. The procedural holding discusses what the court did procedurally with the case. This could include reversing the lower court's ruling, affirming the lower court's ruling, or *adjusting a sentence* issued by the lower court. This book discusses court procedure in detail in Chapter 2 "The Legal System in the United States". Last, but still vital to the case brief, is the **rationale**. The rationale discusses the *reasoning* of the judges when ruling on the case. Rationales can s*et policy*, which is not technically case law but can still be used as precedent in certain instances.

One judge writes the judicial opinion. Judges vote how to rule, and not all cases are supported by a unanimous ruling. Occasionally, other judges will want to add to the judicial opinion. If a judge agrees with the judicial opinion, the judge could write a **concurring opinion**, which explains why the judge agrees. If a judge disagrees with the judicial opinion, the judge could write a **dissenting opinion** explaining why the judge disagrees. The dissenting opinion will not change the judicial opinion, but it may also be used as precedent in a future case if there are grounds for changing the law.

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1.10: End-of-Chapter 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 but is inferior to constitutional law. Case law is law made by judges when they rule on the facts of a case. Although case law is technically inferior to statutory law, judges must interpret statutes and the Constitution, so case law can be the most powerful source of law. When a case invalidates a statute as unconstitutional, this action is called judicial review. Case law stays consistent because judges follow previous court decisions, called precedent. This policy, called stare decisis, lends predictability to case law but is not absolute, and courts can deviate from it to update the law.

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2: THE LEGAL SYSTEM IN THE UNITED STATES

2.1: Federalism

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2.1: Federalism

The United States' system of government is called **federalism**. Federalism, as set forth in the US Constitution, divides governmental power between the *federal government* and each of the *states*. This prevents a concentrated source of governmental power in one individual or small group of individuals. Because of federalism, the United States has one federal legal system, and each state has its own state legal system. Thus in the United States, a plethora of legal systems all operate harmoniously at the same time.

The Scope of Federal Law

The government's power to regulate comes from the US Constitution. The *federal* government derives its authority to create law from Article I, § 8, which discusses federal Congress's *exclusive* or **delegated powers**. These include the power to regulate currency and coin, establish a post office, promote science and art by regulating the rights to discoveries and writings, declare war and raise armies, conduct foreign affairs, regulate interstate and foreign commerce, and make laws necessary and proper to execute other 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 (McCulloch v. Maryland, 2010). 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. For example, the 2024 author of the version to this text worked for the Federal Bureau of Investigation in the Organized Retail Crime Unit where we investigated ORC that crossed 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.

The Scope of State Law

The US Constitution designates the states as the *primary regulatory authority*. This is clarified in the Tenth Amendment, which reads, "*The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or the people.*" State laws are also supposed to regulate in two areas. First, state laws regulate issues of a *local* character or concern. A state may regulate, for example, its water ownership and use because water can be scarce and is not generally provided to other states. Second, state laws regulate issues or things that remain within a state's border. A state generally regulates, for example, the operation of a small business whose products are only sold locally and not shipped out of the state.

Federal laws are *the same* in every state, but state laws *differ* from state to state. Something that is legal in one state may be illegal in another state. This inconsistency makes our system of federalism complicated for students (and lawyers). However, with a country as large and varied as the United States, it is sensible to allow each state to choose for itself which laws will be most suitable.

State Criminal Laws

The power to enact criminal laws belongs almost *exclusively* to the states. This is because of the Tenth Amendment, which vests in states a **police power** to provide for the health, safety, and welfare of state citizens. Approximately 90 percent of all criminal laws are state, rather than federal. Often, federal crimes are also state crimes and can be prosecuted and punished by both the state and federal government without violating the principle of double jeopardy.

> **Example of the Diversity of State Laws**
>
> In Nevada, prostitution is legal under certain circumstances (N.R.S., 2010). An individual who engages in prostitution inside a licensed "house of prostitution" in Nevada is not exposed to criminal liability. However, if the *same individual* engages in prostitution in a California, he or she would be subject to a criminal prosecution under Penal Code Section 647 [b]. Prostitution will be discussed in detail in Chapter 12 "Crimes against the Public".

Federal Supremacy

Our legal system is divided up to conform to the principle of federalism, so a potential exists for conflict between federal law and state law. A federal law may make something *illegal*; a state law may insist that it is *legal*. Whenever a conflict occurs between federal and state law, courts must follow the federal law. This is called **federal supremacy**. As the Supremacy Clause of Article VI of the federal Constitution states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

> **Example of Federal Supremacy**
>
> In California and some other states, an individual may possess and use marijuana for recreational (Proposition 16, 2016). Federal law prohibits possession and use of marijuana under *any circumstances* (21 U.S.C., 2010). Technically, this could be a conflict that violates **federal supremacy**. Until the courts address the federal supremacy issue, however, state marijuana statutes can continue to stay in effect.

Key Takeaways From this Section

- Federalism is a system of government in which power is divided between one national, federal government and several independent state governments.
- Congress gets its regulatory authority from Article I § 8 of the federal Constitution. This includes several delegated powers, the commerce clause, and the necessary and proper clause.
- The commerce clause gives Congress the power to regulate commerce that crosses state lines.
- The necessary and proper clause gives Congress the power to regulate if necessary to carry out all other powers listed in the Constitution.
- The Constitution specifically authorizes Congress to punish piracies and felonies on the high seas, counterfeiting, and treason. Case precedent has also expanded the federal government's power to enact criminal laws based on the commerce clause and the necessary and proper clause.
- The federal government is intended to be limited, with the bulk of regulatory authority residing in the states. The federal government is restricted to regulating in the areas designated in Article I § 8 of the federal Constitution. The states can regulate for the health, safety, and welfare of citizens pursuant to their police power, which is set forth in the Tenth Amendment of the federal Constitution.
- Federal criminal laws criminalize conduct that occurs on federal property or involves federal employees, currency, coin, treason, national security, rights secured by the Constitution, or commerce that crosses state lines. State criminal laws make up 90 percent of all criminal laws, are designed to protect state citizens' health, safety, and welfare, and often criminalize the same conduct as federal criminal laws.

- Federal supremacy, which is set forth in the Supremacy Clause of the federal Constitution, requires courts to follow federal laws if there is a conflict between a federal and state law.

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2.2: The Branches of Government

In this section you will:

1. Identify the three branches of government.

2. Ascertain the head of the federal and state legislative branches of government.

3. Compare the Senate and the House of Representatives.

4. Ascertain the head of the federal and state executive branches of government.

5. Ascertain the head of the federal and state judicial branches of government.

The federal Constitution was written to ensure that government power is distributed and never concentrated in one or more areas. This philosophy is served by **federalism**, where the federal government shares power with the states. It is also further served by dividing the government into three branches, all responsible for different government duties and all *checking and balancing* each other. The three branches of government are detailed in Articles I–III of the federal Constitution and are the **legislative branch**, the **executive branch**, and the **judicial branch**. While the federal Constitution identifies only the federal branches of government, the principle of checks and balances applies to the states as well. Most states identify the three state branches of government in their state constitution.

Each branch of government has a distinct authority. When one branch encroaches on the duties of another, this is called a violation of **separation of powers**. The *courts* decide whether a government branch has overstepped its boundaries because courts interpret the Constitution, which describes each branch's sphere of influence. Thus the judicial branch, which consists of all the courts, retains the balance of power.

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.

> **Examples of Legislative Branch Checks and Balances**
>
> The legislative branch can check and balance both the *executive* branch and the *judicial* branch. Congress can impeach the president of the United States, which is the first step toward removal from office. Congress can also enact statutes that supersede judicial opinions, as discussed in Chapter 1 "Introduction to Criminal Law". Similarly, state legislature can also impeach a governor or enact a state statute that supersedes a state case law.

The Executive Branch

The **executive branch** is responsible for enforcing the statutes enacted by the legislative branch. In the federal government, the executive branch is headed by the president of the United States. States' executive branches are headed by the governor of the state.

Examples of Executive Branch Checks and Balances

The executive branch can check and balance both the *legislative* branch and the *judicial* branch. The president of the United States can veto statutes proposed by Congress. The president also has the authority to nominate federal justices and judges, who thereafter serve for life. State executive branches have similar check and balancing authority; a governor can generally veto statutes proposed by state legislature and can appoint some state justices and judges.

The Judicial Branch

The **judicial branch** is responsible for interpreting all laws, including statutes, codes, ordinances, and the federal and state constitutions. This power is all encompassing and is the basis for **judicial review**, referenced in Chapter 1 "Introduction to Criminal Law". It allows the judicial branch to invalidate any unconstitutional law in the statutory source of law and also to change the federal and state constitutions by interpretation. For example, when a court creates an exception to an amendment to the constitution, it has made an informal change without the necessity of a national or state consensus. The federal judicial branch is headed by the US Supreme Court. Each state's judicial branch is headed by the highest-level state appellate court. Members of the judicial branch include all judges and justices of every federal and state court in the court system, which is discussed shortly.

Examples of Judicial Branch Checks and Balances

The judicial branch can check and balance both the *legislative* branch and the *executive* branch. The US Supreme Court can invalidate statutes enacted by Congress if they conflict with the Constitution. The US Supreme Court can also prevent the president from taking action if that action violates separation of powers. The state courts can likewise nullify unconstitutional statutes passed by the state legislature and void other executive branch actions that are unconstitutional.

Diagram of Judicial Branch Checks and Balances

Government Branch	Duty or Authority	Check and Balance	Government Branch Checking and Balancing
Legislative	Create statutes	President can veto	Executive
Executive	Enforce statutes	Congress can override presidential veto by 2/3 majority	Legislative
Judicial	Interpret statutes and Constitution	President nominates federal judges and justices	Executive
Executive	Enforce statutes	Senate can confirm or reject presidential nomination of federal judges and justices	Legislative
Executive	Enforce statutes	Congress can impeach the president	Legislative

Legislative	Create statutes	Courts can invalidate unconstitutional statutes	Judicial
Executive	Enforce statutes	Courts can invalidate unconstitutional executive action	Judicial
Judicial	Interpret statutes and Constitution	Statutes can supersede case law	Legislative

Key Takeaways From this Section

- The three branches of government are the legislative branch, the executive branch, and the judicial branch.
- The head of the federal legislative branch of government is Congress. The head of the state legislative branch of government is the state legislature.
- The Senate represents every state equally because each state has two senators. The House of Representatives represents each citizen equally because states are assigned representatives based on their population.
- The head of the federal executive branch of government is the president. The head of each state executive branch of government is the governor.
- The head of the federal judicial branch of government is the US Supreme Court. The head of each state judicial branch of government is the highest-level state appellate court.

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2.3: The Court System

In this section you will

- Compare federal and state courts.
- Define jurisdiction.
- Compare original and appellate jurisdiction.
- Identify the federal courts and determine each court's jurisdiction.
- 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 "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** (28 U.S.C. § 1332, 2010). 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 (28 U.S.C. § 1441, 2010). All state *criminal prosecutions* take place in state courts.

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2.3.1: 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 the opposite (the winner loses, the loser wins).
- It can also **remand**, which means send the case back to the trial court, with instructions. After remand, the trial court can take action that the appellate court cannot, such as adjust a sentence or order a new trial.

Some courts have only original jurisdiction, but most courts have a little of original and appellate jurisdiction. The US Supreme Court, for example, is primarily an appellate court with appellate jurisdiction. However, it also has original jurisdiction in some cases, as stated in the Constitution, Article III, § 2, clause 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction."

> **Example of Original and Appellate Jurisdiction**
>
> Paulina is prosecuted for the attempted murder of Ariana. Paulina is represented by public defender Pedro. At Paulina's trial, in spite of Pedro's objections, the judge rules that Paulina's polygraph examination results are admissible, but prohibits the admission of certain witness testimony. Paulina is found guilty and appeals, based on the judge's evidentiary rulings. While Pedro is writing the appellate brief, he discovers case precedent barring the admission of polygraph examination results. Pedro *can include* the case precedent in his appellate brief but *not the prohibited witness testimony*. The appellate court has the jurisdiction to hold that the objection was improperly overruled by the trial court, but is limited to reviewing the trial record for error. The appellate court *lacks* the jurisdiction to admit new evidence not included in the trial record.

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2.3.2: The Federal Courts

For the purpose of this book, the focus is the federal trial court and the intermediate and highest-level appellate courts because these courts are most frequently encountered in a criminal prosecution. Other federal specialty courts do exist but are not discussed, such as bankruptcy court, tax court, and the court of military appeals.

The federal trial court is called the **United States District Court**. Large states like California have more than one district court, while smaller states may have only one. District courts hear all the federal trials, including civil and criminal trials. As stated previously, a dispute that involves only state law, or a state criminal trial, cannot proceed in district court. The exception to this rule is the diversity of citizenship exception for civil lawsuits.

After a trial in district court, the loser gets one **appeal of right**. This means that the intermediate appellate federal court *must* hear an appeal of the district court trial if there are sufficient grounds. The intermediate appellate court in the federal system is the **United States Court of Appeals**. There is less federal law than state law, so only thirteen US Courts of Appeals exist for all fifty states. The US Courts of Appeals are spread out over thirteen judicial circuits and are also referred to as Circuit Courts.

Circuit Courts have appellate jurisdiction and can review the district court criminal and civil trials for error. The Circuit Court reviews only trials that are federal in nature, with the exception of civil lawsuits brought to the district court under diversity of citizenship. As noted in Chapter 1 "Introduction to Criminal Law", the federal Constitution governs criminal trials, so *only a guilty defendant* can appeal. In general, with exceptions, appeal of a not-guilty verdict (also called an **acquittal**) violates a defendant's double jeopardy protection.

After a Circuit Court appeal, the loser has one more opportunity to appeal to the highest-level federal appellate court, which is the **United States Supreme Court**. The US Supreme Court is the highest court in the country and is located in Washington, DC, the nation's capital. The US Supreme Court has eight associate justices and one chief justice: all serve a lifetime appointment.

The US Supreme Court is a discretionary court, meaning it does not have to hear appeals. Unlike the Circuit Courts, the US Supreme Court can pick and choose which appeals it wants to review. The method of applying for review with the US Supreme Court is called filing a petition for a **writ of certiorari**.

Any case from a Circuit Court, or a case *with a federal matter at issue* from a state's highest-level appellate court, can petition for a writ of certiorari. If the writ is granted, the US Supreme Court reviews the appeal. If the writ is denied, which it is the majority of the time, the ruling of the Circuit Court or state high court is the final ruling. For this reason, the US Supreme Court reverses many cases that are accepted for review. If the US Supreme Court wants to "affirm" the intermediate appellate court ruling, all it has to do is deny the petition and let the lower court ruling stand.

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2.3.3: The State Courts

For the purpose of this textbook we focus on the California State Courts. Slight variations in this system may occur from state to state.

Small Claims Court

California offers their citizens a "people's court," typically called small claims court. **Small claims court** is a civil court designed to provide state citizens with a low-cost option to resolve disputes where the amount in controversy is minimal. Generally, you can only sue for up to $12,500 in California small claims court. A traditional small claims court only has the jurisdiction to award money damages. This means that it cannot adjudicate criminal matters or family court matters such as granting a petition for divorce.

Small claims court has special rules that make it amenable to the average individual. Attorneys cannot represent clients in small claims court, although they certainly can represent themselves just like any other individual. Small claims court proceedings are generally informal, and usually no court reporter types what is said. Therefore, no court record exits for appeal. Small claims court *appeals* are the exception to the general rule and are usually new trials where evidence is accepted. In California, only a defendant can file an appeal of a small claims judgment.

Trial Courts

California trial courts are called **Superior Court**. Each county in California has a Superior Court. State trial courts are generally all-purpose and hear civil litigation matters, state criminal trials, and nonlitigation cases including family law, wills and probate, foreclosures, and juvenile adjudications.

California also has specialty courts to hear special matters. One example is **Adult Drug Court**. These are evidence based court programs that provide an alternative to traditional criminal justice case adjudication for high risk/high need individuals struggling with substance use disorders. These collaborative justice court models take a team based, less adversarial approach to case processing and combine close judicial oversight and monitoring with intensive supervision and substance abuse treatment services in lieu of incarceration.

The goals of these programs are to:

- reduce recidivism and substance abuse in substance abusing offenders
- increase the offender's likelihood of successful rehabilitation by addressing substance abuse or other underlying issues that may have contributed to their criminal justice involvement.

State Court of Appeals

The intermediate appellate court is called the **state court of appeals**. The state courts of appeal provide appeals of right, meaning they *must* hear an appeal coming from the state's trial court if adequate grounds are present. Appeals can be of any case adjudicated in the state trial court. In state criminal prosecutions, as stated earlier in the discussion of federal appeals, only a guilty defendant can appeal without violating the protection against double jeopardy. At the appellate level, the state court of appeal simply reviews the trial court record for error and does not have the **jurisdiction** to hear new trials or accept evidence.

California Supreme Court

The highest appellate court for the state court system in California is the California Supreme Court. The CA Supreme Court is a discretionary court that gets to select the appeals it hears, very similar to the US Supreme Court. The state supreme court generally grants a petition for writ of certiorari, or a **petition for review**, if it decides to hear a civil or criminal case coming out of the state court of appeal. If review is denied, the state court of appeal ruling is the final ruling on the case. If review is granted and the state supreme court rules on the case, the loser has one more chance to appeal, *if there is a federal matter*, to the US Supreme Court.

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2.3.4: Key Takeaways From This Section

- Federal courts are exclusive and hear only federal matters or cases involving diversity of citizenship.
- State courts are nonexclusive and can hear state and federal matters.
- All federal criminal prosecutions take place in federal court, and all state criminal prosecutions take place in state court.
- Jurisdiction is either the court's power to hear a matter or a geographic area over which a court has authority.
- Original jurisdiction is a court's power to hear a trial and accept evidence. Appellate jurisdiction is a court's power to hear an appeal and review the trial for error.
- Three federal courts adjudicate criminal matters: the trial court, which is called the United States District Court; the intermediate court of appeal, which is called the United States Court of Appeals or Circuit Court; and the high court of appeal, which is called the United States Supreme Court. The district court has original jurisdiction; the Circuit Court and US Supreme Court have primarily appellate jurisdiction.
- State courts are usually limited to four, and only three adjudicate criminal matters. Small claims court is a "people's court" and hears only civil matters with a low threshold of damages. The state trial court, often called superior, circuit, or county court, is the trial court for the state system. Some states have an intermediate court of appeal, which is generally called the state court of appeals. Some states have a high court of appeal, which is generally called the state supreme court. The trial court has original jurisdiction; the state court of appeal and state supreme court primarily have appellate jurisdiction.

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2.4: The Burden of Proof

In this section you will

1. Define the burden of proof.
2. Distinguish between the burden of production and the burden of persuasion.
3. Compare the civil and criminal burden of proof.
4. Compare inference and presumption.
5. Compare circumstantial and direct evidence.

Definition of the Burden of Proof

The key to the success of a civil or criminal trial is meeting the **burden of proof**. A *failure* to meet the burden of proof is also a common ground for appeal. In this section, you learn the burden of proof for the plaintiff, prosecution, and defendant. You also are introduced to different classifications of evidence and evidentiary rules that can change the outcome of the trial.

The burden of proof is a party's responsibility to prove a disputed charge, allegation, or defense (Yourdictionary.com, 2010). The burden of proof has two components: the **burden of production** and the **burden of persuasion**. The burden of production is the obligation to *present* evidence to the judge or jury. The burden of persuasion is the duty to *convince* the judge or jury to a certain standard, such as **beyond a reasonable doubt**, which is defined shortly. This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented. "Meeting the burden of proof" means that a party has introduced enough compelling evidence to reach the standard defined in the burden of persuasion.

The plaintiff or prosecutor generally has the burden of proving the case, including every element of it. The defendant often has the burden of proving any defense. The trier of fact determines whether a party met the burden of proof at trial. The trier of fact would be a judge in a nonjury or **bench trial**. In a *criminal* case, the trier of fact is almost always a jury because of the right to a jury trial in the Sixth Amendment. Jurors are not legal experts, so the judge explains the burden of proof in jury instructions, which are a common source of appeal.

Burden of Proof in a Civil Case

Burdens of proof vary, depending on the type of case being tried. The plaintiff's burden of proof in a civil case is called **preponderance of evidence**. Preponderance of evidence requires the plaintiff to introduce slightly more or slightly better evidence than the defense. This can be as low as 51 percent plaintiff to 49 percent defendant. When preponderance of evidence is the burden of proof, the judge or jury must be convinced that it is "*more likely than not*" that the defendant is liable for the plaintiff's injuries.

Preponderance of evidence is a fairly low standard, but the plaintiff must still produce more and better evidence than the defense. If the plaintiff offers evidence of questionable quality, the judge or jury can find that the burden of proof is not met and the plaintiff loses the case. The defendant's burden of proof when proving a defense in a civil case is also preponderance of evidence. For example, in the O. J. Simpson civil case discussed in Chapter 1 Simpson failed to meet the burden of proving the defense of *alibi*. The defendant does not always have to prove a defense in a civil case. If the plaintiff does not meet the burden of proof, the defendant is victorious without having to present *any evidence at all*.

Burden of Proof in a Criminal Prosecution

The prosecution's burden of proof in a criminal case is the most challenging burden of proof in law; it is **beyond a reasonable doubt**. Judges have struggled with a definition for this burden of proof.

As Chief Justice Shaw stated nearly a century ago,

"[w]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds

of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge (Commonwealth v. Webster, 2010).

In general, the prosecution's evidence must overcome the defendant's **presumption of innocence**, which the Constitution guarantees as due process of law (In re Winship, 2010). This fulfills the policy of criminal prosecutions, which is to punish the guilty, not the innocent. If even a slight chance exists that the defendant is innocent, the case most likely lacks convincing and credible evidence, and the trier of fact should acquit the defendant.

States vary as to their requirements for the defendant's burden of proof when asserting a defense in a criminal prosecution (Findlaw.com, 2010). Different defenses also have different burdens of proof, as is discussed in detail in Chapter 5 "Criminal Defenses. Some states require the defendant to meet the burden of production, but require the prosecution to thereafter meet the burden of persuasion, *disproving* the defense to a preponderance of evidence or, in some states, beyond a reasonable doubt. Other states require the defendant to meet the burden of production *and* the burden of persuasion. In these states, the defendant's standard is typically preponderance of evidence, *not* beyond a reasonable doubt. The defendant does not always have to prove a defense in a criminal prosecution. If the prosecution does not meet the burden of proof, the defendant is acquitted without having to present any evidence at all.

> **Example of a Failure to Meet the Burden of Proof**
>
> Ahnn is on trial for first-degree murder. The only key piece of evidence in Ahnn's trial is the murder weapon, which was discovered in Ann's dresser drawer during a law enforcement search. Before Ahnn's trial, the defense makes a motion to suppress the murder weapon evidence because the search warrant in Ahnn's case was signed by a judge who was inebriated and mentally incompetent. The defense is successful with this motion, and the judge rules that the murder weapon is *inadmissible* at trial. The prosecution decides to proceed anyway. If there is no other convincing and credible evidence of Ahnn's guilt, Ahnn does not need to put on a defense in this case. The prosecution will fail to meet the burden of proof and Ahnn will be acquitted.

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.

A **presumption** is a conclusion that the judge or jury *must* make under the circumstances. As stated previously, all criminal defendants are presumed innocent. Thus the judge or jury *must* begin any criminal trial concluding that the defendant is not guilty.

Presumptions can be **rebuttable** or **irrebuttable**. A party can disprove a *rebuttable* presumption. The prosecution can rebut the presumption of innocence with evidence proving beyond a reasonable doubt that the defendant is guilty. An irrebuttable presumption is irrefutable and *cannot* be disproved. In some jurisdictions, it is an irrebuttable presumption that children under the age of seven are incapable of forming criminal intent. Thus in these jurisdictions children under the age of seven cannot be criminally prosecuted (although they may be subject to a juvenile adjudication proceeding).

Circumstantial and Direct Evidence

Two primary classifications are used for evidence: **circumstantial evidence** or **direct evidence**.

Circumstantial evidence indirectly proves a fact. Fingerprint evidence is usually circumstantial. A defendant's fingerprint at the scene of the crime *directly* proves that the defendant placed a finger at that location. It *indirectly* proves that because the defendant was present at the scene and placed a finger there, the defendant committed the crime. Common examples of circumstantial evidence are fingerprint evidence, DNA evidence, and blood evidence. Criminal cases relying on circumstantial evidence are more difficult for the prosecution because circumstantial evidence leaves room for doubt in a judge's or juror's mind.

However, circumstantial evidence such as DNA evidence can be very reliable and compelling, so the prosecution can and often does meet the burden of proof using *only* circumstantial evidence.

Direct evidence directly proves a fact. For example, eyewitness testimony is often direct evidence. An eyewitness testifying that he or she saw the defendant commit the crime *directly* proves that the defendant committed the crime. Common examples of direct evidence are eyewitness testimony, a defendant's confession, or a video or photograph of the defendant committing the crime. Criminal cases relying on direct evidence are easier to prove because there is less potential for reasonable doubt. However, direct evidence can be unreliable and is not necessarily preferable to circumstantial evidence. If an eyewitness is **impeached**, which means he or she loses credibility, the witness's testimony lacks the evidentiary value of reliable circumstantial evidence such as DNA evidence.

Table 2.2 Comparison of Circumstantial and Direct Evidence in a Burglary Case

Evidence	**Circumstantial**	**Direct**
Fiber from the defendant's coat found in a residence that has been burglarized	Yes	No—directly proves **presence at the scene**, not that the defendant committed burglary
GPS evidence indicating the defendant drove to the burglarized residence	Yes	No—same explanation as fiber evidence
Testimony from an eyewitness that she saw the defendant go into the backyard of the burglarized residence	Yes	No—could prove trespassing because it directly proves **presence at the scene**, but it does not directly prove burglary
Surveillance camera footage of the defendant purchasing burglar tools	Yes	No—does not directly prove they were used on the residence
Cell phone photograph of the defendant burglarizing the residence	No	Yes—directly proves that the defendant committed the crime
Witness testimony that the defendant confessed to burglarizing the residence	No	Yes—directly proves that the defendant committed the crime
Pawn shop receipt found in the defendant's pocket for items stolen from the residence	Yes	No—directly proves that the items were pawned, not stolen

Key Takeaways From this Section

- The burden of proof is a party's obligation to prove a charge, allegation, or defense.
- The burden of production is the duty to present evidence to the trier of fact. The burden of persuasion is the duty to convince the trier of fact to a certain standard, such as preponderance of evidence or beyond a reasonable doubt.
- The civil burden of proof is preponderance of evidence, for both the plaintiff and the defendant. The criminal burden of proof for the prosecution is beyond a reasonable doubt.
- The criminal burden of proof for the defense is generally preponderance of evidence. States vary on whether they require

the criminal defendant to meet both the burden of production and persuasion or just the burden of production. Different defenses also require different burdens of proof.

- In states that require the defendant to meet only the burden of production, the prosecution must disprove the defense to a preponderance of evidence or beyond a reasonable doubt, depending on the state and on the defense.
- An inference is a conclusion the trier of fact may make, if it chooses to. A presumption is a conclusion the trier of fact must make. A rebuttable presumption can be disproved; an irrebuttable presumption cannot.
- Circumstantial evidence indirectly proves a fact. A fingerprint at the scene of the crime, for example, indirectly proves that because the defendant was present at the scene, the defendant committed the crime. Direct evidence directly proves a fact. If the defendant confesses to a crime, for example, this is direct evidence that the defendant committed the crime.

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2.5: End-of-Chapter Summary

The United States' system of government is called federalism and consists of one federal government regulating issues of a national concern and separate state governments regulating local issues. The bulk of criminal lawmaking resides with the states because of the police power granted to the states in the Tenth Amendment. Ninety percent of all criminal laws are state laws. Many federal crimes are also state crimes, and a defendant can be prosecuted federally and by a state without triggering double jeopardy protection. If a federal statute exists on an issue, a state statute cannot conflict with it because of the Constitution's Supremacy Clause.

The Constitution sets forth three branches of government. The legislative branch consists of Congress and has the authority to create laws. The executive branch is headed by the president of the United States and has the authority to enforce the laws created by the legislative branch. The judicial branch is headed by the US Supreme Court and has the authority to interpret laws and the Constitution. Each branch checks and balances each other, and the judicial branch ensures that no branch oversteps its authority and violates separation of powers. State governments mimic the federal branches of government at the state level and set forth authorities in each state's constitution.

The federal court system exclusively adjudicates federal matters and consists primarily of the US District Court, the US Court of Appeals or Circuit Court, and the US Supreme Court. Each state has its own court system consisting primarily of a trial court, intermediate court of appeal, and possibly a high court of appeal. Trial courts have original jurisdiction and can accept evidence. Appellate courts have appellate jurisdiction and are limited to reviewing the trial courts' decisions for error.

Each party in a civil or criminal trial must meet a burden of proof, which consists of a burden of producing evidence and a burden of persuading the trier of fact. The burden of proof for a civil plaintiff or defendant is preponderance of evidence, which means that the trier of fact must be convinced it is more likely than not that a party should prevail. The burden of proof for the prosecution in a criminal case is beyond a reasonable doubt, which is a stricter standard than preponderance of evidence and consists of enough compelling evidence to rebut the defendant's presumption of innocence. The burden of proof for a criminal defense varies but is often preponderance of evidence. Inferences, which are conclusions the trier of fact may make, and presumptions, which are conclusions the trier of fact must make, can help meet the burden of proof. The evidence presented to meet the burden of proof can be circumstantial, which indirectly proves a fact, or direct, which directly proves a fact. Circumstantial evidence leaves room for reasonable doubt, but it can be reliable and the basis of a successful criminal prosecution.

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3: CONSTITUTIONAL PROTECTIONS & LAWS OF ARREST

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment to the United States Constitution - a foundation to our criminal justice system

3.1: Introduction and Chapter Learning Objectives

3.2: The United States Constitution

3.3: The Legislative Branch's Prohibited Powers

3.4: The First Amendment

3.5: The Right to Privacy

3.6: Second Amendment - The Right to Bear Arms

3.7: Fifth Amendment - Self Incrimination and Double Jeopardy

3.8: Sixth Amendment – The Right to Counsel

3.9: Eighth Amendment - Excessive Punishment

3.10: Key Takeaways

3.11: Summary

3.12: References

3.13: The Due Process and Equal Protection Clauses

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3.1: Introduction and Chapter Learning Objectives

"*Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority*."

—Duncan v. Louisiana, cited in Section 3.2 "The Due Process and Equal Protection Clauses"

This chapter focuses on the United States Constitution as it applies to those suspected of, accused of, or arrested for criminal activity. You will learn about limitations placed on agents of the government, including police officers, as they apply to investigating criminal activity, search and seizure, questioning of those suspected of crime as well as detaining and arresting those suspects.

After completing this chapter and associated coursework the student will be able to:

LO 1: Compare and contrast reasonable suspicion and probable cause

LO 2: Apply the provisions of the United States Constitution to situations involving free speech, assembly, detention, arrest, search, and seizure.

LO 3: Compare and contrast arrest by a peace officer and a private person

LO 4: Explain how diplomatic immunity impacts criminal liability

LO 5: Analyze vicarious and civil liability as they apply to actions by government officials

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3.2: The United States Constitution

"I know my rights!"

In this author's four decades in law enforcement, if someone uttered that phrase it was very likely they *did not* in fact "know their rights." A 2023 Annenberg Public Policy Center survey found that ***only one in 20 adults* in the U.S. could name all five freedoms protected by the First Amendment** and one in six cannot name any of the branches of government (Annenberg, 2023).

We have extensive protections against governmental abuse of power that are set forth in the United States (U.S) Constitution. As stated earlier in this book, the U.S. Constitution is applicable in all criminal cases because the government is prosecuting. State constitutions typically mirror the U.S. Constitution because it sets the *minimum* standard of protection that is guaranteed to all citizens. States can and often do provide *more* constitutional protections to criminal defendants than the federal Constitution, as long as those state protections do not violate the provisions of federal supremacy. In this chapter, the U.S. Constitution is analyzed with reference to the California State Constitution when relevant. I encourage you to take AJ 170 (El Camino College) *Connotational Law for Criminal Justice* for a deeper understanding and analysis of our Constitution.

Constitutional Protections

Generally, two types of constitutional protections exist. First, those suspected or accused of criminal activity can challenge the constitutionality of a criminal statute or ordinance (from this point forward, the term *statute* includes ordinances unless otherwise noted). Recall from Chapter 1 "Introduction to Criminal Law" that these codified laws cannot conflict with or attempt to supersede the Constitution. An attack on the constitutionality of a statute can be a claim that the statute is **unconstitutional on its face**, is **unconstitutional as applied**, or *both*. A statute is unconstitutional on its face when its wording is unconstitutional. A statute is unconstitutional as applied when its enforcement is unconstitutional. The difference between the two is significant. If a statute is unconstitutional on its face, it is invalid under *any circumstances*. If the statute is unconstitutional as applied, it is only unconstitutional under certain circumstances.

A second type of constitutional protection is *procedural*. The defendant can protest an unconstitutional procedure that occurs during prosecution. Procedure during prosecution includes, but is not limited to, arrest, interrogation, search, filing of charges, trial, and appeal. The defendant can make a motion to dismiss the charges, suppress evidence, or declare a mistrial. The defendant can also appeal and seek to reverse a conviction, among other remedies.

This book focuses on criminal law rather than criminal procedure, so the bulk of this chapter is devoted to unconstitutional criminal statutes, rather than unconstitutional procedures. The exception is the right to a jury trial, which is discussed shortly. A more in-depth discussion of procedural processes takes place in our AJ 130 Procedure (AKA C-ID 122 Criminal Court Process).

> **Example of Constitutional Protections**
>
> Bill is on trial for obstructing a public sidewalk. Bill was arrested for standing in front of a restaurant's entrance with a sign stating "will eat any and all leftovers." The city ordinance Bill violated makes it a misdemeanor to "stand or sit on a public sidewalk with a sign." To save money, the judge presiding over Bill's trial declares that Bill will have a bench trial, rather than a jury trial. In this example, Bill can constitutionally attack the city *ordinance* for violating his freedom of speech because it prohibits holding a sign. The city ordinance appears unconstitutional *on its face* and *as applied* to Bill. Bill can also constitutionally attack *his bench trial* because he has the right to a jury trial. He could do this by making a motion to declare a mistrial, by petitioning an appellate court to halt the trial, or by appeal after a judgment of conviction.

Judicial Review

As stated previously in this book, courts review statutes to ensure that they conform to the Constitution pursuant to their power of **judicial review**. Courts generally use different standards of review when constitutional protections are at stake. Typically, a court balances the *government's* interest in regulating certain conduct against an *individual's* interest in a constitutionally

protected right. This balancing of interests varies depending on the right at stake. If a constitutional right is fundamental, the court uses **strict scrutiny** to analyze the statute at issue. A statute that violates or inhibits fundamental constitutional protections is presumptively invalid and can be upheld only if it uses the least restrictive means possible. The government also must prove the statute is supported by a compelling government interest. When the challenge is based on discrimination under the equal protection clause, the court may use a lower standard, called the **rational basis test**. The rational basis test allows a statute to discriminate if the statute is rationally related to a legitimate government interest. Most constitutional rights are considered fundamental and trigger the strict scrutiny of the courts.

Example of Strict Scrutiny

Review the example regarding Bill, who was arrested essentially for standing and holding a sign. The US Supreme Court has held that freedom of speech is a *fundamental right*. Thus a court reviewing the ordinance in Bill's case will hold the ordinance presumptively invalid, unless the government can demonstrate a compelling interest in enacting it, and that it used the least restrictive means possible. The ordinance is broadly written to include all signs, and preventing individuals from holding signs does not serve a compelling government interest, so this difficult standard will probably result in the court holding the ordinance *unconstitutional*.

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3.3: The Legislative Branch's Prohibited Powers

The Legislative Branch's Prohibited Powers

The legislative branch cannot punish defendants without a trial or enact retroactive criminal statutes pursuant to the Constitution's prohibition against **bill of attainder** and **ex post facto laws**. Article 1, § 9, clause 3 states, in pertinent part, "No Bill of Attainder or ex post facto Law shall be passed." The prohibition on bill of attainder and ex post facto laws is extended to the states in Article 1, § 10, clause 1: "No State shall...pass any Bill of Attainder, ex post facto Law." Many state constitutions also prohibit ex post facto legislative action, mirroring the federal Constitution (Indiana Constitution, 2010).

Bill of Attainder

Bill of attainder is when the legislative branch of government punishes the defendant without a trial. The drafters of the Constitution wanted to ensure that criminal defendants have a full and fair adjudication of their rights before the government imposes punishment. Bill of attainder is usually accomplished by a statute that targets an individual or group of individuals for some type of government sanction. Bill of attainder protection enforces *separation of powers* by eliminating the ability of the legislature to impose criminal punishment without a trial conducted by the judicial branch (U.S. v. Brown, 2010).

Example of Bill of Attainder

Brianne is a member of the Communist party. Brianne applies for a job as a teacher at her local elementary school and is refused, based on this statute: "Members of any subversive group, including the Communist party, cannot hold public office nor teach for a public institution." Brianne could attack this statute as a bill of attainder. Its provisions, targeting members of the Communist party or any other subversive group, *punish* by eliminating career opportunities. The members targeted are punished without a trial or any adjudication of their rights. Thus this statute allows the legislature to impose a sanction without a trial in violation of the Constitution's prohibited powers.

Ex Post Facto Law

An ex post facto law punishes an individual *retroactively*, and severely encroaches on notions of fairness. There are three types of ex post facto laws. First, a law is ex post facto if it punishes behavior that occurred before the law was in effect. Second, ex post facto laws may increase the punishment for the offense after the crime occurred. Third, a law can be ex post facto if it increases the possibility of conviction after the crime occurred.

Example of an Ex Post Facto Law Punishing Behavior Retroactively

A state murder statute defines murder as the killing of a human being, *born alive*. The state legislature amends this statute to include the killing of a fetus, with the exception of abortion. The amendment extends the application of the statute to all criminal fetus killings that occurred *before* the statute was changed. This language punishes defendants for behavior that was legal when committed. If the state attempts to include this language, a court can strike the statute for violating the prohibition against ex post facto laws.

Example of an Ex Post Facto Law Increasing Punishment Retroactively

In the preceding example about amending the murder statute, the state also amends the statute to increase the penalty for murder to the *death penalty*. Before the amendment, the penalty for murder was *life in prison* without the possibility of parole. The state cannot give the death penalty to defendants who committed murder before the statute was amended. This is considered ex post facto because it increases the punishment for the offense after the crime is committed.

Example of an Ex Post Facto Law Increasing the Possibility of Conviction Retroactively

In the preceding example, the state amends the murder statute to remove the **statute of limitations**, which is the time limit on prosecution. Before the amendment, the statute of limitations was fifty years. The state cannot prosecute defendants who committed murder *more than fifty years ago*, pursuant to the amendment. This is considered ex post facto because it increases the chance of conviction after the crime is committed.

Changes That Benefit a Defendant Retroactively

Changes that *benefit* a criminal defendant are not considered ex post facto and may be applied retroactively. In the preceding example, if the state amended the murder statute to *shorten* the statute of limitations, this change actually benefits defendants by making it more difficult to convict them. Thus this amendment would be constitutional.

Ex Post Facto Applies Only to Criminal Laws

Ex post facto protection applies only to *criminal* laws. Laws that raise fees or taxes after payment are civil rather than criminal in nature. Thus these retroactive increases do not exceed governmental authority and are constitutional.

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3.4: The First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (First Amendment to the U.S. Constitution)"

The following sections discuss the provisions of the First Amendment. As stated at the start of this chapter, only *one in 20 adults* in the United States could name all five freedoms protected by the First Amendment. The five freedoms it protects are speech, religion, press, assembly, and the right to petition the government as explained in the following sections. Knowledge of each of these are crucial for Administration of Justice students.

Freedom of Speech

The **First Amendment** states, in relevant part, "Congress shall make no law...abridging the freedom of speech." Although this language specifically targets *federal Congress*, the First Amendment has been held applicable to the states by virtue of selective incorporation (Gitlow v. New York, 2010). Most state constitutions including California (Article I, section 9) have a similar provision.

Freedom of speech has been the focus of countless judicial opinions. To summarize US Supreme Court precedent, the word ***speech*** has been interpreted to cover **virtually any *form* of expression, including verbal and written words, pictures, photographs, videos, and songs**. First Amendment speech also includes expressive *conduct* such as dressing a certain way (Tinker v. Des Moines Independent Community School District, 2011), flag burning (Texas v. Johnson, 2010), and cross burning (R.A.V. v. St. Paul, 2010).

Exceptions to the First Amendment's Protection of Free Speech

In general, courts have examined the history of the Constitution and the policy supporting freedom of speech when creating exceptions to its coverage. Modern decisions afford freedom of speech the strictest level of scrutiny; only a compelling government interest can justify an exception, which must use the least restrictive means possible (Sable Communis. of California, Inc. v. FCC, 2010). For the purpose of brevity, this book reviews the constitutional exceptions to free speech in statutes criminalizing *fighting words, incitement to riot, hate crimes, and obscenity*.

Fighting Words

Although the First Amendment protects *peaceful* speech and assembly, if speech creates a **clear and present danger** to the public, it can be regulated (Schenck v. U.S., 2010). This includes fighting words, "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (Chaplinsky v. New Hampshire, 2010).

Any criminal statute prohibiting fighting words must be narrowly tailored and focus on *imminent* rather than *future* harm. Modern US Supreme Court decisions indicate a tendency to favor freedom of speech over the government's interest in regulating fighting words, and many fighting words statutes have been deemed unconstitutional under the First Amendment or void for vagueness and overbreadth under the Fifth Amendment and Fourteenth Amendment due process clause (Lewis v. City of New Orleans, 2010).

> **Example of an Unconstitutional Fighting Words Statute**
>
> Georgia enacted the following criminal statute: "Any person who shall, without provocation, use to or of another, and in his presence...opprobrious words or abusive language, tending to cause a breach of the peace...shall be guilty of a misdemeanor" (Ga. Code § 26-6303). The US Supreme Court determined that this statute was overbroad, void for vagueness, and unconstitutional under the First Amendment (Gooding v. Wilson, 2010).

The Court held that the dictionary definitions of “opprobrious” and “abusive” give them greater reach than fighting words. Thus, the statute is overbroad and does not restrict its prohibition to *imminent* harm. Opprobrious and abusive have various meanings, so the statute is also subject to uneven enforcement and is void for vagueness. As the Court stated, this language “licenses the jury to create its own standard in each case” (Gooding v. Wilson, 1972; Herndon v. Lowry, 2010).

Incitement to Riot and Free Speech

Incitement to riot can also be regulated under the clear and present danger exception (California Penal Code Section 404.6 PC). Similar to fighting words, an incitement to riot statute must prohibit *imminent* lawless action (Brandenburg v. Ohio, 2010). Statutes that prohibit simple advocacy with no imminent threat or harm cannot withstand the First Amendment’s heightened scrutiny.

Example of an Unconstitutional Incitement to Riot Statute

Ohio enacted a statute that criminalized “advocat[ing]…the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and “voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism” (Ohio Rev. Code Ann. § 2923.13). A Ku Klux Klan leader was convicted under the statute after the media broadcast films of him leading a KKK meeting. The US Supreme Court held, “Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments” (Brandenburg v. Ohio, 2010).

Hate Crimes and Free Speech

Many states and the federal government have enacted hate crimes statutes. When hate crimes statutes criminalize speech, including expressive conduct, a First Amendment analysis is appropriate. When hate crimes statutes enhance a penalty for criminal conduct that is *not expressive*, the First Amendment is not applicable (Wisconsin v. Mitchell, 2010).

Hate crimes statutes punish conduct that is targeted at specific classifications of people. These classifications are listed in the statute and can include race, ethnicity, gender, sexual orientation, or religion. Hate crimes statutes that criminalize speech can be constitutional under the clear and present danger exception if they are tailored to apply only to speech or expressive conduct that is supported by the *intent to intimidate* (Virginia v. Black, 2010). This can include speech and expressive conduct such as threats of imminent bodily injury, death, or cross burning. **Hate crimes statutes** must be narrowly drafted, and cannot be void for vagueness or overbroad.

Hate crimes statutes that criminalize the *content* of speech, like a prejudicial *opinion* about a certain race, ethnicity, gender, sexual orientation, or religion are unconstitutional under the First Amendment (R.A.V. v. St. Paul, 2010). Statutes of this nature have been held to have a “chilling effect” on free expression by deterring individuals from expressing unpopular views, which is the essence of free speech protection. Although this type of speech can stir up anger, resentment, and possibly trigger a violent situation, the First Amendment protects content-based speech from governmental regulation without strict scrutiny exposing a compelling government interest.

Example of an Unconstitutional Statute Prohibiting Cross Burning

St. Paul, Minnesota, enacted the Bias-Motivated Crime Ordinance, which prohibited the display of a symbol that a person knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” (Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the US Supreme Court held that this ordinance was unconstitutional on its face because regulation was based on the *content* of speech, with no additional requirement for *imminent lawless action*. The Court held that the ordinance did not proscribe the use of fighting words (the display of a symbol) toward specific groups of individuals, which would be an equal protection clause challenge.

Instead, the Court determined that the statute prohibited the use of specific *types of fighting words*, for example, words that promote racial hatred, and this is impermissible as viewpoint-based censorship. As the Court stated, "[c]ontent-based regulations are presumptively invalid" (R.A.V. v. St. Paul, 2010).

Example of a Constitutional Statute Prohibiting Cross Burning

Virginia enacted a statute that makes it criminal "for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place" (Va. Code Ann.

§ 18.2-423). The US Supreme Court held this statute constitutional under the First Amendment because it did not single out cross burning *indicating racial hatred*, as the Minnesota cross-burning ordinance did. The Court stated, "Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.' *Id.*, at 391." It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality" (Virginia v. Black, 2010).

Obscenity Speech

Another exception to free speech is *obscenity*. Obscenity is usually conveyed by speech, such as words, pictures, photographs, songs, videos, and live performances. However, obscenity is not *protected* speech under the First Amendment (Roth v. United States, 2010).

In ***Miller v. California***, 413 U.S. 15 (1973), the US Supreme Court devised a three-part test to ascertain if speech is obscene and subject to government regulation. Generally, speech is obscene if

1. the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex;
2. it depicts sexual conduct specifically defined by the applicable state law in a patently offensive way; and
3. it lacks serious literary, artistic, political, or scientific value (Miller v. California, 2010).

Example of Speech That Is Not Obscene

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), the US Supreme Court viewed the film *Carnal Knowledge* to determine whether the defendant could be constitutionally convicted under an obscenity statute for showing it at a local theater. The Court concluded that most of the film's sexual content was suggestive rather than explicit, and the only direct portrayal of nudity was a woman's bare midriff. Thus although a jury convicted the defendant after viewing the film, the Court reversed the conviction, stating that the film does not constitute the hard-core pornography that the three-part test for obscenity isolates from the First Amendment's protection. The Court stated, "Appellant's showing of the film 'Carnal Knowledge' is simply not the 'public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable in *Miller*, Id., at 35" (Jenkins v. Georgia, 2010).

Free Speech Access to Government Property: Public Forums and Nonpublic Forums

Members of the public do not have an unrestricted right to use government property for speech simply because the government owns it. Recognizing this, the Supreme Court has adopted a forum-based approach to evaluate First Amendment restrictions on the use of government property. Under this approach, the court classifies a location as being either a public forum or a nonpublic forum, and then tests the restriction using the legal standards established for forums of that type.

Public forums occupy a special status in First Amendment law; the government may restrict speech in these forums only for the most important reasons, and in limited instances. There are two ways to earn designation as a public forum. The first way is through history and tradition. Locations that traditionally have been available for public assembly and free exchange of ideas are called traditional public forums. Streets, sidewalks, and parks are some examples. The second way to earn public-forum status is

through the government's deliberate decision to set a particular facility aside for speech uses by members of the public. Locations that become available for public assembly and free exchange of ideas through government designation are called public forums by designation. Municipal auditoriums and public meeting venues (e.g. City Council chambers) are some examples.

Traditional and designated public forums are subject to the same legal standards. All other government locations are classified as nonpublic forums. Nonpublic forums represent the property the government uses to conduct its official business, such as post offices, police stations, courthouses, municipal airport terminals, military installations, government office buildings, and college campuses.

The government has broad control over speech in nonpublic forums because it has reserved these facilities for its own use. Restrictions on speech in nonpublic forums are valid so long as the "restriction ... is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views." (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1984). California Penal Code 602- Trespassing (discussed in a later chapter) allows government officials to restrict access to non-public forums.

Freedom of Religion

The first 16 words of the First Amendment to the U.S. Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," protect the right of every person to practice religion in accordance with conscience and guard against creation of a sectarian state. However, the precise meaning of these words has produced more uncertainty than perhaps any other provision of the Constitution. The clause is often misinterpreted to mean that the Constitution requires the separation of church and state however this is not the case. The First Amendment protects the right to worship according to individual choice. Some religious practices such as polygamy (marriage to more than one person) have been found to *not* be constitutionally protected (Reynolds v. United States (1879)). Other practices including animal sacrifice have also been restricted.

Freedom of the Press

For the purposes of this textbook we will focus on the media's access to disasters, civil disturbances, crime scenes, or other police activity. **CA Penal Code section 409.5** allows police personnel to limit access to areas where there is a declared emergency. Examples are traffic collision scenes, wildfires, declared unlawful assemblies (riots), and crime scenes. **California Penal Code 409.5(d)** states "*Nothing shall prevent a duly authorized representative of any news service, newspaper, or radio or television station or network from entering the areas closed pursuant to this section*." The exception is press are not allowed to enter active crime scenes which can interfere with investigations.

You should normally give the media representative a warning of the dangers associated with entering the closed area. For example, "*This traffic collision involved a truck carrying methyl-ethel-die-for-sure which is an inhalation hazard. If you enter the closed area you do so at your own risk. We cannot guarantee a rescue or emergency medical treatment once you have entered the restricted area. Please leave me the name of your next of kin in case notification is necessary.*" As long as they understand the risks, they are allowed access to the scene. One exception allows for federal authorities to deny access to scenes involving national security. One example from my experience was a military convoy that was involved in a traffic collision. The Army had incident command and restricted the press.

A good practice at crime scenes is to set up a staging area for the media and enlist the services of a Police Public Information Officer.

Freedom of Assembly

The right to peaceful assembly is protected by both the US Constitution and the California Constitution. The key word in this protection is peaceful. This includes meetings, rallies, labor actions (union strikes) and protests. The government, in certain circumstances, can restrict time and location. For example if you want to hold a protest rally on the grounds of the California State Capitol in Sacramento you are required to obtain a permit from the California Highway Patrol (the CHP provides security to State property and State employees). Restrictions can be placed on.

The Right to Petition the Government

One of the freedoms in the First Amendment is the right of the people to petition the government for change.

As explained by The Freedom Forum (www.freedomforum.org)

The right to petition protects our right to ask the government to fix a wrong or change a policy. We can petition the federal, state and local governments. Petitions directed to the judicial, executive and legislative branches are all protected.

Petitioning can mobilize popular support to change existing laws in a peaceful manner.

Petition is a powerful tool that has supported social change from the birth of our nation to ending slavery, women's suffrage and the civil rights movement.

The right to petition does not guarantee a petition will be answered. It does protect the right to complain to the government without fear of punishment.

Historically, a petition was a written request stating a grievance and requesting relief from a ruling authority such as a king. Today signing a petition is one way to exercise this right. But it is not the only way. Petition includes a range of expressive activities designed to influence public officials.

More ways to petition are to:

- File a lawsuit.
- Testify before the government at any level, from your local school board to the U.S. Congress.
- Submit a complaint to a government agency **including complaints about the actions of peace officers.**
- Contact a government official.
- Circulate a ballot initiative or referendum for others to sign.

Each law enforcement agency in California is required by Penal Code section 832.5 to establish a procedure to investigate complaints. You can obtain a written description of the procedures from the law enforcement agency. You can be decertified as a police officer if you impede the citizen complaint process. This includes using treats to intimidate someone from filing the complaint.

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3.5: The Right to Privacy

The federal Constitution does not explicitly protect privacy. However, several of the amendments in the Bill of Rights ensure and protect individual decision making and autonomy from governmental intrusion. Thus modern interpretations of the Constitution by the US Supreme Court have created a **right to privacy** (Griswold v. Connecticut, 2010). This right is considered fundamental and subject to strict scrutiny; only a compelling government interest can justify a statute encroaching on its protections. Many states including California have an explicit right to privacy in their state constitutions.

The Constitutional Amendments Protecting Privacy

US Supreme Court precedent has held that the right to privacy comes from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. The First Amendment protects the right to speak freely, assemble peacefully, and worship according to individual choice. The Third Amendment prohibits the government from forcing individuals to quarter, house, or feed soldiers. The Fourth Amendment prevents the government from unreasonably searching or seizing an individual or an individual's property. The Fifth and Fourteenth Amendments provide due process of law before the government can deprive an individual of life, liberty, or property. The Ninth Amendment states that rights not explicitly set forth in the Constitution may still exist. Taken together, these amendments indicate that the Constitution was written to erect a barrier between individuals and an *overly intrusive* and *regulatory* government. In modern society, this right to privacy guarantees the right to use *birth control*, the right to an *abortion*, and the right to *participate in consensual sexual relations*.

> **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.

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3.6: Second Amendment - The Right to Bear Arms

Although the federal Constitution specifically references a right to bear arms in the **Second Amendment**, the US Supreme Court has not interpreted this amendment in a significant fashion until recently. The Second Amendment provides "[a] well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." Many state constitutions have a similar provision (Volokh, E., 2010). In 2008, the US Supreme Court explored the Second Amendment and its effect on weapons possession in a case attacking Washington, DC, firearms legislation (District of Columbia v. Heller, 2010).

In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court affirmed the Court of Appeals for the D.C. Circuit in striking provisions of the Firearms Control Regulations Act of 1975. The Court struck the portions of this act that banned the possession of handguns and mandated that all legal firearms must be kept unloaded and disassembled while in the home. Although the District Court held that the Second Amendment applies only to the militia, the US Supreme Court emphasized that the Second Amendment is exercised individually and belongs to all Americans. The Court also expanded previous interpretations of the Second Amendment to cover an individual's right to possess a usable handgun in the home for self-defense. The *Heller* case is unprecedented and is the first to address individual handgun possession under the Second Amendment. However, the *Heller* ruling is narrow and specifically excludes firearms restrictions on *felons*, the *mentally ill*, firearm possession in or near *schools* or government buildings, and the *commercial sale* of firearms. The *Heller* decision also fails to extend the Second Amendment's protections to the *states* because Washington, DC, is a federal enclave.

In *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), the US Supreme Court revisited the gun possession issue by reviewing and rejecting as unconstitutional a handgun ban in the city of Chicago, Illinois. In *McDonald*, the Court took the extra step of extending the *Heller* ruling to the states, holding that the Second Amendment applies to the states via its **selective incorporation** into the due process clause. However, *McDonald* did not expand the ruling in *Heller* in other ways and reemphasized the Heller exceptions of firearms restrictions on felons, the mentally ill, firearm possession in or near schools or government buildings, and the commercial sale of firearms.

> **Example of an Appropriate Restriction on Firearms**
>
> Dirk is a public middle-school janitor. Occasionally, with the permission of the principal, Dirk stays overnight in an outbuilding on campus when he works a particularly late shift. Dirk wants to keep a handgun in the outbuilding, for protection. If Dirk's state has a statute prohibiting the possession of a handgun within one mile of any public school, Dirk *cannot* keep a handgun in the outbuilding for self-defense. Modern US Supreme Court precedent holds that the Second Amendment protects an individual's right to possess a handgun in the home for self-defense. However, this precedent specifically *exempts* firearm possession near schools. Unless newer precedent expands the ruling to include firearm possession near schools, the statute in Dirk's state is constitutional.

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3.7: Fifth Amendment - Self Incrimination and Double Jeopardy

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to ***be twice put in jeopardy*** *of life or limb; nor shall be* ***compelled in any criminal case to be a witness against himself****, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation*

The Fifth Amendment contains five rights or protections:

- the right to a jury trial when you're charged with a crime,
- protection against double jeopardy,
- protection against self-incrimination,
- the right to a fair trial, and protection against the taking of property by the government without compensation.

"I plead the Fifth!"

For this chapter we will focus on self-incrimination. As a general rule, someone who testifies in court must answer all questions truthfully. However, the Fifth Amendment gives criminal defendants the option to say nothing, if the answer could subject them to criminal penalties. Anyone who has seen a police TV show or movie has likely heard someone say "I plead the Fifth" referring to the right to remain silent which is not actually stated in the Constitution. That interpretation is actually the result Supreme Court case law ruling in Miranda v. Arizona. In a 5-4 Supreme Court decision Miranda v. Arizona (1966) ruled that an arrested individual is entitled to rights against self-incrimination and to an attorney under the 5th and 6th Amendments of the United States Constitution. Miranda v. Arizona (1966) culminated in the famed "Miranda rights" requirement during arrests. Example of Miranda statement read by police:

1. *You have the right to remain silent.*
2. *Anything you say can and will be used against you in a court of law.*
3. *You have the right to talk to a lawyer for advice before we ask you any questions.*
4. *You have the right to have a lawyer with you during questioning.*
5. *If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.*
6. *If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.*

The Miranda rights apply to specific situations. It applies both to questioning while in police custody and testifying in court. The key provisions are "custody" and "questioning."

Some examples from the California Commission on Peace Officer Standards (POST) Police Academy Learning Domain 15.

An officer arrests a suspect for burglary. After the officer read the arrestee his Miranda rights, the arrestee waives his rights and agrees to answer questions. During questioning the arrestee confesses to the crime. If challenged in court the confession will not be suppressed because the officer obtained a knowing, voluntary waiver of the arrestee's 5th Amendment Right against self-incrimination before obtaining the confession.

An officer arrests a subject for burglary. The officer reads the arrestee his Miranda Rights before questioning. After hearing his rights, the arrestee invokes his 5th Amendment Right against self-incrimination by stating that he wants his attorney present before answering any questions. The officer continues to question the arrestee and eventually obtains a confession. The confession will be suppressed in court as a violation of the arrestees 5th Amendment Rights.

An officer arrests a subject for burglary. Before reading the arrestee his Miranda Rights, the officer questions him about the crime and the arrestee confesses. The confession will be suppressed in court because the officer cannot show that the arrestee knowingly, voluntarily and intelligently waived his rights.

Miranda does NOT apply to persons not arrested and in police custody. Examples include questioning during traffic stops, questioning of witnesses, questioning over the phone, or even questioning of suspects who have not yet been arrested. You may

have seen true crime TV shows where a suspect is asked to voluntarily come to the police station for questioning. The suspect is free to leave and as such is not in custody.

Miranda also does not apply to general questioning not related to the criminal activity including asked for name, address, or date of birth.

There are several other provisions related to the Fifth Amendment rights not covered in this class. For a deeper discussion I recommend taking a Constitutional Law class (AJ 170 at El Camino College).

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3.8: Sixth Amendment – The Right to Counsel

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Sixth Amendment to the U.S. Constitution guarantees people accused of a crime the right to:

- a speedy trial
- confront witnesses against them and obtain witnesses in their favor
- the assistance of counsel, during court proceedings

For the purposes of this lesson we will focus on the right to counsel. The Sixth Amendment entitles a person to counsel (i.e., an attorney) once **adversarial judicial proceedings** have commenced. Adversarial judicial proceedings are considered to have commenced when the person is either indicted by a grand jury, or makes his or her first court appearance, known as arraignment.

> **Example from POST LD 15**
>
> Following a grand jury indictment, officers went to Smith's house to serve an arrest warrant and "discuss his involvement in methamphetamine distribution." After being advised of his Miranda rights, including being advised of his right to counsel, Smith waived his rights. Smith made a series of incriminating statements before and after he was arrested. The officers did not violate Smith's 6th amendment rights because, even though he was represented by counsel, he voluntarily waived his 6th amendment rights.

The Miranda Warning includes the advisement of the right to counsel.

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3.9: Eighth Amendment - Excessive Punishment

The prohibition against cruel and unusual punishment comes from the Eighth Amendment, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Although the ban on cruel and unusual punishment relates directly to *sentencing*, which is a criminal *procedure* issue, criminal statutes mandating various penalties can be held unconstitutional under the Eighth Amendment just like statutes offending the due process clause, so a brief discussion is relevant to this chapter. Another facet of excessive punishment is a criminal sentencing enhancement that is based on facts not found beyond a reasonable doubt by a jury. This has been held to violate the **Sixth Amendment**, which states, "In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury of the State and district wherein the crime shall have been committed."

In this section, three issues are analyzed and discussed: the infliction of *cruel punishment*, a criminal sentence that is *too severe*, and a criminal sentence that is invalid under the right to a *jury trial*.

Infliction of Cruel Punishment

In general, the government must refrain from inflicting cruel or barbaric punishments on criminal defendants in violation of the Eighth Amendment. In particular, cases asserting that a criminal punishment is inhumane often focus on **capital punishment**, which is the death penalty.

Synopsis of the History of Capital Punishment

The death penalty has been used as a criminal punishment since the eighteenth century BC. American death penalty law is influenced by the British because the colonists brought English common-law principles, including capital punishment, with them to the New World. The first execution in America took place in 1608, for spying

(Death Penalty Information Center, 2010). Methods of execution and capital crimes varied from colony to colony. In the late 1700s, a movement to abolish the death penalty began, and in 1846 Michigan was the first state to eliminate the death penalty for all crimes except treason (Death Penalty Information Center, 2010). Throughout the nineteenth and twentieth centuries, the United States fluctuated in its attitude toward capital punishment. Executions were at an all-time high in the 1930s (Death Penalty Information Center, 2010). However, in 1972, in the landmark decision of *Furman v. Georgia*, 408 U.S. 238 (1972), the US Supreme Court held that Georgia's death penalty statute, which gave the jury complete discretion to sentence a criminal defendant to death, was *arbitrary* and therefore authorized *cruel and unusual* punishment in violation of the Eighth Amendment. This decision invalidated death penalty statutes in forty states. Later, in 1976, the US Supreme Court case of *Gregg v. Georgia*, 428 U.S. 153 (1976), affirmed the procedure of a bifurcated trial, separating the guilt phase from the penalty phase for death penalty cases. *Gregg* also affirmed the death penalty's constitutionality under the Eighth Amendment. Currently, thirty-four states and the federal government authorize the death penalty, while sixteen states and the District of Columbia do not (Death Penalty Information Center, 2010).

Inhumane Capital Punishment

A claim that capital punishment is *inhumane* and therefore unconstitutional under the Eighth Amendment focuses on the *method* of execution. Throughout the history of the death penalty, many methods of execution have been employed, including shooting, hanging, electrocution, the gas chamber, and lethal injection. At the time of this writing, the law is in a state of flux as to which methods of execution are constitutional because many state and federal decisions have stricken virtually every method available. The current focus of the courts is *lethal injection* because it is one of the few methods that has not been condemned as unconstitutional. Most states that authorize the death penalty use lethal injection as the primary method of execution. In a recent statement on this issue, the US Supreme Court in *Baze v. Rees*, 128 S. Ct. 1520 (2008), held that Kentucky's four-drug lethal injection procedure was *not* cruel and unusual punishment under the Eighth Amendment. In other states, including Missouri and Tennessee, federal courts using different facts have ruled the multidrug procedure *unconstitutional* (Death Penalty Information Center, 2010). It is impossible to predict the future of death penalty methodology under the Eighth Amendment because each case will be decided based on the circumstances presented. However, it is clear that the law in this area is ripe for a definitive statement of constitutionality under the Eighth Amendment's cruel and unusual punishment clause.

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. 2641 (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”.

Examples of Capital Punishment That Are Disproportionate to the Criminal Defendant

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 a *juvenile* when the crime was committed (Roper v. Simmons, 2010), who is *mentally ill* (Ford v. Wainwright, 2010), or has an *intellectual disability* (Atkins v. Virginia, 2010) 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 (Ford v. Wainwright, 2010). 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 (Atkins v. Virginia, 2010). However, this standard is broad, so states vary in their legislative definitions of this classification (Death Penalty Information Center, 2010).

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 (Cal. Penal Code § 667, 2010). Generally, three-strikes statutes punish habitual offenders more harshly when they commit a second or third felony after an initial serious or violent felony (Cal. Penal Code § 667, 2010). 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 offender. Twenty-four states followed, indicating public support for the incapacitation of career criminals (Three Strikes and You're Out, 2010).

Three-strikes statutes vary, but those most likely to be attacked as disproportionate count *any* felony as a strike after an initial *serious* or *violent* felony. Counting any felony might levy a sentence of *life in prison* against a criminal defendant who commits a *nonviolent* felony. However, the US Supreme Court has upheld lengthy prison sentences under three-strikes statutes for relatively minor second or third offenses, holding that they are not cruel and unusual punishment under the Eighth Amendment (Ewing v. California, 2010).

Sentencing that Violates the Right to a Jury Trial

Modern US Supreme Court precedent has expanded the jury's role in sentencing pursuant to the Sixth Amendment. Although a detailed discussion of sentencing procedure is beyond the scope of this book, a brief overview of 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, which upheld the sentencing procedure. The Court held that *other than evidence of a prior conviction*, a judge cannot enhance a defendant's sentence beyond the statutory maximum unless there has been a factual determination by a jury beyond a reasonable doubt of the facts supporting the sentencing enhancement. The Court based its holding on the Sixth Amendment right to a jury trial as incorporated and applied to the states through the Fourteenth Amendment due process clause.

Post-*Apprendi*, this holding was extended to federal sentencing guidelines in *U.S. v. Booker*, 543 U.S. 220 (2005). In *Booker*, a federal judge enhanced a sentence following mandatory US Sentencing Guidelines, which permitted judges to find the sentencing enhancement facts using the preponderance of evidence standard. The US Supreme Court ruled that the enhancement was invalid under the Sixth Amendment right to a jury trial and held that the US Sentencing Guidelines would be *advisory* only, never mandatory. *Booker* was based on *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated a similar Washington State sentencing procedure.

Pursuant to *Apprendi*, *Booker*, and *Blakely*, a criminal defendant's sentence is unconstitutional under the Sixth Amendment right to a jury trial if it is *enhanced* beyond the statutory maximum by facts that were *not* determined by a jury beyond a reasonable doubt. This premise applies in *federal* and *state* courts and also to *guilty pleas* rather than jury verdicts (Blakely v. Washington, 2010).

Example of an Unconstitutional Sentence Enhancement

Ross is tried and convicted by a jury of simple kidnapping. The maximum sentence for simple kidnapping is five years. At Ross's sentencing hearing, the judge hears testimony from Ross's kidnapping victim about the physical and mental torture Ross inflicted during the kidnapping. The victim did not testify at trial. The judge finds that the victim's testimony is credible and rules that Ross used cruelty during the kidnapping by a **preponderance of evidence**. The judge thereafter enhances Ross's sentence to eight years, based on a statutory sentencing enhancement of three years for "deliberate cruelty inflicted during the commission of a crime." The three-year sentencing enhancement is most likely unconstitutional. Under the Sixth Amendment right to a jury trial, the jury must find deliberate cruelty **beyond a reasonable doubt**. A court can strike the enhancement of three years on appeal, and on remand, the trial court cannot increase the sentence beyond the five-year maximum.

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3.10: Key Takeaways

- An inhumane procedure punishes a defendant too severely for any crime. A disproportionate punishment punishes a defendant too severely for the crime he or she committed.
- Lethal injection is the most prevalent method of execution pursuant to the death penalty.
- Criminal homicide is the only crime against an individual that merits capital punishment.
- Criminal defendants who were juveniles when the crime was committed, are mentally incompetent, or have an intellectual disability cannot be subjected to capital punishment.
- Three-strikes laws punish criminal defendants more severely for committing a felony after they have committed one or two serious or violent felonies. Three-strikes laws have been held constitutional under the Eighth Amendment, even when they levy long prison sentences for relatively minor felonies.
- Sentencing enhancements beyond the statutory maximum are unconstitutional unless they are based on facts determined by a jury beyond a reasonable doubt under the Sixth Amendment right to a jury trial.

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3.11: Summary

The US Constitution protects criminal defendants from certain statutes and procedures. State constitutions usually mirror the federal and occasionally provide more protection to criminal defendants than the federal Constitution, as long as the state constitutions do not violate federal supremacy. Statutes can be unconstitutional as written or as enforced and must be supported by a sufficient government interest. Statutes that punish without a trial (bills of attainder) or criminal statutes that are applied retroactively (ex post facto) are unconstitutional under Article 1 §§ 9 and 10. Other constitutional protections are in the Bill of Rights, which is the first ten amendments, and the Fourteenth Amendment, which contains the due process clause and the equal protection clause.

The due process clause prohibits the government from taking an individual's life, liberty, or property arbitrarily, without notice and an opportunity to be heard. Statutes that are vague or criminalize constitutionally protected conduct (overbroad) violate due process. The Fifth Amendment due process clause applies to the federal government, and the Fourteenth Amendment due process clause applies to the states. The Fourteenth Amendment due process clause also selectively incorporates fundamental rights from the Bill of Rights and applies them to the states. Rights incorporated and applied to the states are the right to free speech, the right to privacy, the right to bear arms, the right to be free from cruel and unusual punishment, and the right to a jury trial. The Fourteenth Amendment also contains the equal protection clause, which prevents the government from enacting statutes that discriminate without a sufficient government interest.

The First Amendment protects speech, expression, and expressive conduct from being criminalized without a compelling government interest and a statute that uses the least restrictive means possible. Some exceptions to the First Amendment are precise statutes targeting fighting words, incitement to riot, hate crimes, obscenity, and nude dancing. The First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments also create a right to privacy that prevents the government from criminalizing the use of birth control, abortion, or consensual sexual relations.

The Second Amendment protects an individual's right to possess a usable handgun in the home for self-defense. This right is not extended to convicted felons, the mentally ill, commercial sale of firearms, and firearm possession near schools and government buildings. The Eighth Amendment protects criminal defendants from inhumane and excessive punishments. The Sixth Amendment ensures that all facts used to extend a criminal defendant's sentencing beyond the statutory maximum must be determined by a jury beyond a reasonable doubt.

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3.13: The Due Process and Equal Protection Clauses

Although the legislative branch's prohibited powers are in Article I of the Constitution, the Bill of Rights contains most of the constitutional protections afforded to criminal defendants. The **Bill of Rights** is the first ten amendments to the Constitution. In addition, the Fourteenth Amendment, which was added to the Constitution after the Civil War, has a plethora of protections for criminal defendants in the due process and equal protection clauses.

The Bill of Rights was originally written to apply to the federal government. However, US Supreme Court precedent has held that *any* constitutional amendment that is implicit to due process's concept of ordered liberty must be incorporated into the Fourteenth Amendment's protections and applied to the states (Duncan v. Louisiana, 2010). This doctrine is called **selective incorporation**, and it includes virtually all the constitutional protections in the Bill of Rights. Thus although the original focus of the Bill of Rights may have been limiting the federal government, modern interpretations of the Constitution ensure that its protections also extend to all levels of state and local government.

The Meaning of Due Process of Law

The **due process clause** states, "No person shall…be deprived of life, liberty, or property, without due process of law." The due process clause in the Fifth Amendment applies to *federal* crimes and federal criminal prosecutions. The federal due process clause is mirrored in the Fourteenth Amendment, which guarantees due process of law in *state* criminal prosecutions. Most states have a similar provision in their constitutions (Missouri Constitution, 2010).

Substantive due process protects individuals from an unreasonable loss of substantive rights, such as the right to speak freely and the right to privacy. **Procedural due process** protects individuals from being criminally punished without notice and an opportunity to be heard. Both substantive and procedural due processes ensure that individuals are not denied their life (capital punishment), liberty (incarceration), or property (forfeiture) *arbitrarily*.

Void for Vagueness

Void for vagueness challenges the wording of a statute under the due process clause. A statute is void for vagueness if it uses words that are indefinite or ambiguous. Statutes that are not precisely drafted do not provide notice to the public of exactly what kind of behavior is criminal. In addition, and *more important*, they give too much discretion to law enforcement and are unevenly enforced (U.S. v. White, 2010). With a void for vagueness challenge, the statute must be so unclear that "men of common intelligence must guess at its meaning," (Connally v. General Construction Co., 2010) which is an objective standard.

> **Example of a Statute That Is Void for Vagueness**
>
> A state legislature enacts a statute that criminalizes "inappropriate attire on public beaches." Larry, a law enforcement officer, arrests Kathy for wearing a two-piece bathing suit at the beach because in his belief, women should wear one-piece bathing suits. Two days later, Burt, another law enforcement officer, arrests Sarah for wearing a one-piece bathing suit at the beach because in his belief, women should not be seen in public in bathing suits. Kathy and Sarah can attack the statute on its face and as applied as void for vagueness. The term "inappropriate" is unclear and can mean different things to different people. Thus, it gives too much discretion to law enforcement, is subject to uneven application, and does not give Kathy, Sarah, or the public adequate notice of what behavior is criminal.

Overbreadth

A statute is **overbroad** if it criminalizes both constitutionally protected and constitutionally unprotected conduct. This challenge is different from **void for vagueness**, although certain statutes can be attacked on both grounds. An overbroad statute criminalizes *too much* and needs to be revised to target only conduct that is outside the Constitution's parameters.

Example of an Overbroad Statute

A state legislature enacts a statute that makes it criminal to photograph "nude individuals who are under the age of eighteen." This statute is probably overbroad and violates due process. While it prohibits constitutionally *unprotected* conduct, such as taking obscene photographs of minors, it also criminalizes First Amendment *protected* conduct, such as photographing a nude baby.

The Equal Protection Clause

The Fourteenth Amendment states in relevant part, "nor shall any State...deny to any person within its jurisdiction the equal protection of the laws." The **equal protection clause** applies to the *state* government. State constitutions generally have a similar provision (California Constitution, 2010). The equal protection clause prevents the state government from enacting criminal laws that *discriminate* in an unreasonable and unjustified manner. The Fifth Amendment due process clause prohibits the federal government from discrimination if the discrimination is so unjustifiable that it violates due process of law (Bolling v. Sharpe, 2010).

The prohibition on governmental discrimination is not absolute; it depends on the class of persons targeted for special treatment. In general, court scrutiny is heightened according to a sliding scale when the subject of discrimination is an arbitrary classification. Arbitrary means random and often includes characteristics an individual is born with, such as race or national origin. The most arbitrary classifications demand **strict scrutiny**, which means the criminal statute must be supported by a *compelling* government interest. Statutes containing classifications that are not arbitrary must have a **rational basis** and be supported by a *legitimate* government interest.

Criminal statutes that classify individuals based on their race must be given strict scrutiny because race is an arbitrary classification that cannot be justified. Modern courts do not uphold criminal statutes that classify based on race because there is no government interest in treating citizens of a different race more or less harshly (Loving v. Virginia, 2010).

Criminal statutes that have a rational basis for discrimination and are supported by a legitimate government interest *can* discriminate, and frequently do. Criminal statutes that punish felons more severely when they have a history of criminal behavior, for example, three-strikes statutes, are supported by the legitimate government interests of specific and general deterrence and incapacitation. Note that the basis of the discrimination, a criminal defendant's *status as a convicted felon*, is rational, not arbitrary like race. Thus although these statutes discriminate, they are constitutional pursuant to the equal protection clause.

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4: THE ELEMENTS OF A CRIME

Thus, an Olympic swimmer may be deemed by the community as a shameful coward, or worse, for not rescuing a drowning child in the neighbor's pool, but she is not a criminal.

—*State ex rel. Kuntz v. Thirteenth Jud. Dist.*, cited in Section 4 "Duty to Act Based on a Special Relationship"

4.1: Chapter Learning Objectives

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4.1: Chapter Learning Objectives

LO 1 Identify three elements required for a criminal act.

LO 2 Describe an exception to the criminal act element.

LO 3 Examine situations where an omission to act is criminal.

LO 4 Distinguish between actual and constructive possession.

LO-5 Identify the criminal intent element required when possession is the criminal act.

Crimes can be broken down into **elements**, which the prosecution must prove beyond a reasonable doubt. Criminal elements are set forth in criminal statutes, or cases in jurisdictions that allow for common-law crimes. With exceptions, *every* crime has at least three elements: a **criminal act**, also called **actus reus**; a criminal **intent**, also called **mens rea**; and **concurrence** of the two. The term **conduct** is often used to reflect the criminal act and intent elements.

As the Model Penal Code explains, "'conduct' means an action or omission and its accompanying state of mind" (Model Penal Code § 1.13(5)).

Recall from Chapter 1 "Introduction to Criminal Law" that not all crimes require a bad *result*. If a crime *does* require a bad result, the prosecution must also prove the additional elements of **causation** and **harm**.

Another requirement of some crimes is **attendant circumstances**. Attendant circumstances are specified factors that must be present when the crime is committed. These could include the crime's methodology, location or setting, and victim characteristics, among others.

This chapter analyzes the **elements** of every crime.

> **Example of a Crime That Has Only Three Elements**
>
> Janine gets into a fight with her boyfriend Conrad after the senior prom. She grabs Conrad's car keys out of his hand, jumps into his car, and locks all the doors. When Conrad strides over to the car, she starts the engine, puts the car into drive, and tries to run him down. It is dark and difficult for Janine to see, so Conrad easily gets out of her way and is unharmed. However, Janine is thereafter arrested and charged with attempted murder. In this case, the prosecution has to prove the elements of **criminal act**, **criminal intent**, and **concurrence** for attempted murder. The prosecution does *not* have to prove **causation** or that Conrad was **harmed** because attempt crimes, including attempted murder, do not have a bad result requirement. Attempt and other incomplete or inchoate crimes are discussed in Chapter 7 "Inchoate Offenses".

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4.2: Criminal Act

Criminal act, or **actus reus**, is generally defined as an unlawful bodily movement (N.Y. Penal Law, 2010). The criminal statute, or case in jurisdictions that allow common-law crimes, describes the criminal act element.

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 a *voluntary* act is followed by an *involuntary* one, the court may still impose criminal liability depending on the circumstances (Govt. of Virgin Islands v. Smith, 2010).

Example of an Involuntary and Noncriminal Act

Perry is hypnotized at the local county fair. The hypnotist directs Perry to smash a banana cream pie into his girlfriend Shelley's face. Smashing a pie into a person's face is probably *battery* in most states, but Perry did not commit the act *voluntarily*, so he should not be convicted of a crime. Punishing Perry for battery would not specifically deter Perry from performing the act again while hypnotized because he is not in control of his behavior when experiencing this mental state.

Example of a Voluntary Act Followed by a Nonvoluntary Act

Timothy attends a party at a friend's house and consumes several glasses of red wine. Timothy then attempts to drive his vehicle home. While driving, Timothy passes out at the wheel and hits another vehicle, killing its occupant. Timothy can probably be convicted of one or more crimes in this situation. Timothy's acts of drinking several glasses of wine and then driving a vehicle are *voluntary*. Thus even though Timothy got into a car accident while unconscious, his involuntary act was preceded by conscious, controllable, and voluntary action. A punishment in this instance could *specifically deter* Timothy from drinking and driving on another occasion and is appropriate based on the circumstances.

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4.2.1: Status as a Criminal Act

Generally, a defendant's **status** in society is not a criminal act. Status is *who* the defendant is, not what the defendant *does*. Similar to punishment for an involuntary act, when the government punishes an individual for status, it is essentially targeting that individual for circumstances that are outside his or her control. This punishment may be cruel and unusual pursuant to the Eighth Amendment if it is disproportionate to the defendant's behavior.

In ***Robinson v. California***, 370 U.S. 660 (1962), the US Supreme Court held that it is unconstitutional as cruel and unusual punishment pursuant to the Eighth Amendment to punish an individual for the **status** of being a drug addict—even if the drugs to which the defendant is addicted are *illegal*. The Court compared drug addiction to an illness, such as leprosy or venereal disease. Punishing a defendant for being sick not only is inhumane but also does *not* specifically deter, similar to a punishment for an involuntary act.

If the defendant can control the actions at issue in spite of his or her status, the defendant's conduct can be constitutionally criminalized and punished pursuant to the Eighth Amendment. In *Powell v. Texas*, 392 U.S. 514 (1968), the US Supreme Court upheld the defendant's conviction for "drunk in public," in spite of the defendant's status as an alcoholic. The Court held that it is difficult *but not impossible* for an alcoholic to resist the urge to drink, so the behavior the statute criminalized was voluntary. Also, the Court ruled that the state has an interest in treating alcoholism and preventing alcohol-related crimes that could injure the defendant and others. Pursuant to *Powell*, statutes that criminalize *voluntary acts* that *arise* from status are constitutional under the Eighth Amendment.

Example of a Constitutional Statute Related to Status

Refer to the example where Timothy drives under the influence of alcohol and kills another. A state statute that criminalizes killing another person while driving under the influence is constitutional as applied to Timothy, even if Timothy is an alcoholic. The state has an interest in treating alcoholism and preventing alcohol-related crimes that could injure or kill Timothy or another person. Timothy's act of driving while intoxicated is *voluntary*, even if his status as an alcoholic makes it more difficult for Timothy to control his drinking. Thus Timothy and other alcoholic defendants can be prosecuted and punished for killing another person while driving under the influence without violating the Eighth Amendment.

Thoughts

Thoughts are a part of criminal intent, *not* criminal act. Thoughts cannot be criminalized. You need to take a "*direct but ineffectual act*" in furtherance of the crime for the thought to become an attempted crime (***CA Penal Code 664***).

Example

Bryan, a housecleaner, fantasizes about killing their elderly client Jmail, and stealing all of their jewelry. Bryan writes their thoughts in a diary, documenting how they intend to rig the natural gas line so that the gas is pumped into the house all night while Jmail is sleeping. Bryan includes the date that they want to kill Jmail in their diary entry. As Bryan leaves Jmail's house, their diary accidentally falls out of their purse. Later, Jmail finds the diary on the floor and reads it. Jmail calls the police, gives them Bryan's diary, and insists they arrest Bryan for attempted murder. Although Bryan's murder plot is sinister and is documented in their diary, an arrest is improper in this case. Bryan cannot be punished for their *thoughts alone*. If Bryan took "*direct but ineffectual act*" in furtherance (substantial steps) toward killing Jmail, an attempted murder charge might be appropriate. However, at this stage, Bryan is only *planning* a crime, not *committing* a crime. Jmail may be able to go to court and get a restraining order against Bryan to prevent them from carrying out their murder plot, but Bryan cannot be incapacitated by arrest and prosecution for attempted murder in this case.

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4.2.2: Omission or Failure to Act

An exception to the requirement of a criminal act element is **omission to act**. Criminal prosecution for a *failure to act* is rare because the government is reluctant to compel individuals to put themselves in harm's way. However, under certain specific circumstances, omission to act can be criminalized.

An omission to act can only be criminal when the law imposes a *duty to act* . This legal duty to act becomes an element of the crime, and the prosecution must prove it beyond a reasonable doubt, along with proving the defendant's inaction under the circumstances. Failure or omission to act is only criminal in three situations:

when there is a *statute* that creates a legal duty to act,

when there is a *contract* that creates a legal duty to act, or

when there is a *special relationship between the parties* that creates a legal duty to act.

Duty to Act Based on a Statute

When a duty to act is statutory, it usually concerns a government interest that is *paramount*. Some common examples of statutory duties to act are the duty to file state or federal tax returns (26 U.S.C., 2010) or the duty of a teacher to report suspected child abuse (CA Welfare and Institutions Code)

Under common law, it was not criminal to stand by and refuse to help someone in danger.

Some states *supersede* the common law by enacting *Good Samaritan statute*s. Good Samaritan statutes typically contain provisions that insulate the actor from liability exposure when providing assistance.

As outlined in CA Health & Safety Code 1799.102, California's Good Samaritan law protects you from civil liability for negligence when:

you act in good faith,

you are not seeking compensation, and

you render emergency medical or non-medical care at the scene of an emergency.

Plus, if you seek emergency help for someone's drug-related overdose, you will not face criminal charges for drug possession.

Examples of good Samaritan-related acts include:

seeing a car crash into a tree while walking home from work and helping the injured driver out of the car

providing "light" medical care to a person after watching him fall off a stadium seat at a softball game

dragging a drowning swimmer out of a lake and performing CPR

Duty to Act Based on a Contract

A duty to act can be based on a contract between the defendant and another party. The most prevalent examples would be a physician's contractual duty to help a patient or a lifeguard's duty to save someone who is drowning.

Keep in mind that *experts* who are *not* contractually bound can ignore an individual's pleas for help without committing a crime, no matter how morally abhorrent that may seem. For example, an expert swimmer can watch someone drown if there is no statute, contract, or special relationship that creates a legal duty to act.

Duty to Act Based on a Special Relationship

A special relationship may also be the basis of a legal duty to act. The most common special relationships are parent-child, spouse-spouse, and employer-employee. Often, the rationale for creating a legal duty to act when people are in a special relationship is the *dependence* of one individual on another. A parent has the obligation by law to provide food, clothing, shelter, and medical care for his or her children, because children are dependent on their parents and do not have the ability to procure these items themselves (CA Welfare and Institutions Code 300)

In addition, if someone puts another person *in peril*, there may be a duty to *rescue* that person (State ex rel. Kuntz v. Thirteenth Jud. Dist., 2010). Although this is not exactly a special relationship, the victim may be dependent on the person who created the dangerous situation because he or she may be the only one present and able to render aid. On a related note, some jurisdictions also impose a duty to *continue to provide aid*, once aid or assistance has started (Jones v. U.S., 2010). Similar to the duty to rescue a victim the defendant has put in peril, the duty to continue to provide aid is rooted in the victim's dependence on the defendant and the unlikely chance that another person may come along to help once the defendant has begun providing assistance.

Example of a Failure to Act That Is Noncriminal

Recall the example from Chapter 1 "Introduction to Criminal Law" where the and Linda are shopping together and Clara stands by and watches as Linda shoplifts a bra. In this example, Clara does *not* have a duty to report Linda for shoplifting. Clara does not have a *contractual* duty to report a crime in this situation because she is not a law enforcement officer or security guard obligated by an employment contract. Nor does she have a *special relationship* with the store mandating such a report. Unless a *statute* or ordinance exists to force individuals to report crimes committed in their presence, which is extremely unlikely, Clara can legally observe Linda's shoplifting without reporting it. Of course, if Clara assists Linda with the shoplifting, she has then performed a criminal act or actus reus, and a criminal prosecution is appropriate.

Example of a Failure to Act That Is Criminal

Penelope stands on the shore at a public beach and watches as a child drowns. If Penelope is the lifeguard, she may have a duty to save the child based on a *contract*. If Penelope is the child's mother, she may have a duty to provide assistance based on their *special relationship*. If Penelope threw the child in the ocean, she may have a duty to rescue the child she *put in peril*. If Penelope is just a bystander, and no Good Samaritan law is in force, she has no duty to act and cannot be criminally prosecuted if the child suffers harm or drowns.

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4.2.3: Possession as a Crime

Although it is passive rather than active, possession is still considered a criminal act. The most common objects that are criminal to possess are illegal contraband, drugs, and weapons. There are two types of possession: **actual possession** and **constructive possession**. Actual possession indicates that the defendant has the item on or very near his or her person. Constructive possession indicates that the item is not on the defendant's person, but is within the defendant's area of control, such as inside a house or automobile with the defendant (State v. Davis, 2011). More than one defendant can be in possession of an object, although this would clearly be a constructive possession for at least one of them.

Because it is passive, possession should be *knowing*, meaning the defendant is aware that he or she possesses the item. For example in the jury instructions for CA Penal Code 496 Possession of Stolen Property (CALCRIM 1750) To prove that the defendant is guilty of this crime, the People must prove that:

The defendant (bought/received/sold/aided in selling/concealed or withheld from its owner/aided in concealing or withholding from its owner) property that had been (stolen/obtained by extortion);

[AND]

When the defendant (bought/received/sold/aided in selling/concealed or withheld/aided in concealing or withholding)the property, (he/she) knew that the property had been (stolen/obtained by extortion]

[AND

The defendant *actually knew* of the presence of the property.].

A statute permitting a conviction for possession *without* this knowledge or awareness lacks the criminal intent element and would be unenforceable.

> **Example of an Unenforceable Possession Statute**
>
> A state has a criminal statute that prohibits "being within 100 feet of any quantity of marijuana." Ricardo sits next to Jean on the subway. A law enforcement officer smells marijuana and does a pat-down search of Jean. He discovers that Jean has a large baggie of marijuana in his jacket pocket and arrests Jean and Ricardo for marijuana possession. Ricardo was within one hundred feet of marijuana as prohibited by the statute, but Ricardo *should not* be prosecuted for marijuana possession. No evidence exists to indicate that Ricardo knew Jean, or knew that Jean possessed marijuana. Thus Ricardo does not have the criminal intent or mens rea for possession, and the state's possession statute should not be enforced against him.

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4.2.4: Key Takeaways

- The elements of a crime are criminal act, criminal intent, concurrence, causation, harm, and attendant circumstances. Only crimes that specify a bad result have the elements of causation and harm.
- Criminal act is usually an unlawful bodily movement that is defined in a statute, or a case in jurisdictions that allow common-law crimes.
- The criminal act must be voluntary and cannot be based solely on the status of the defendant or the defendant's thoughts.
- An exception to the criminal act element is omission to act.
- Omission to act could be criminal if there is a statute, contract, or special relationship that creates a legal duty to act in the defendant's situation.
- Actual possession means that the item is on or very near the defendant's person. Constructive possession means that the item is within the defendant's control, such as inside a house or vehicle with the defendant.
- In most states, the defendant must be aware that he or she possesses the item to be convicted of possession

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4.3: Criminal Intent

Although there are exceptions that are discussed shortly, **criminal intent** or mens rea is an essential element of most crimes. Under the common law, *all* crimes consisted of an act carried out with a guilty mind. In modern society, criminal intent can be the basis for *fault*, and punishment according to intent is a core premise of criminal justice. As stated in Chapter 1 "Introduction to Criminal Law", **grading** is often related to the criminal intent element. Crimes that have an "evil" intent are **malum in se** and subject the defendant to the most severe punishment. Crimes that *lack* the intent element are less common and are usually graded lower, as either misdemeanors or infractions.

States and the federal government vary in their approach to defining criminal intent, and each jurisdiction describes the criminal intent element in a criminal statute, or case, in jurisdictions that allow common-law crimes. In this section, common-law definitions of criminal intent are explored, along with definitions of the criminal mental states in the Model Penal Code.

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4.3.1: Common-Law Criminal Intent

The common-law criminal intents ranked in order of culpability are **malice aforethought**, **specific intent**, and **general intent**. Statutes and cases use different words to indicate the appropriate level of intent for the criminal offense, so what follows is a basic description of the intent definitions adopted by many jurisdictions.

Malice Aforethought

Malice aforethought is a special common-law intent designated for only one crime: *murder*. The definition of malice aforethought is "intent to kill." Society considers intent to kill the most evil of all intents, so malice aforethought crimes such as first- and second-degree murder generally mandate the most severe of punishments, including the death penalty in jurisdictions that allow for it. Malice aforethought and criminal homicide are discussed in detail in Chapter 9 "Criminal Homicide".

Specific Intent

Specific intent is the intent with the highest level of culpability for crimes other than murder. Unfortunately, criminal statutes rarely describe their intent element as "specific" or "general," and a judge may be required to define the level of intent using the common law or a dictionary to explain a word's ordinary meaning. Typically, specific intent means that the defendant acts with a more sophisticated level of awareness (Connecticut Jury Instructions No. 2.3-1, 2011). Crimes that require specific intent usually fall into one of three categories: either the defendant intends to cause a certain bad *result*, the defendant intends to do *something more* than commit the criminal act, or the defendant acts with knowledge that his or her conduct is illegal, which is called **scienter**.

Example of Specific Intent to Bring about a Bad Result

A state statute defines mayhem as "physical contact with another, inflicted with the intent to maim, disfigure, or scar." This statute describes a specific intent crime. To be guilty of mayhem under the statute, the defendant must inflict the physical contact with the intent of causing the bad *result* of maiming, disfigurement, or scarring. If the prosecution cannot prove this high-level intent, the defendant may be acquitted (or charged and convicted of a lower-level intent crime like battery).

So if Pauline says, "It's time to permanently mess up that pretty face," and thereafter takes out a razor and slices Peter's cheek with it, Pauline might be found guilty of mayhem. On the other hand, if Pauline slaps Peter while he is shaving without making the comment, and the razor bites into his cheek, it is more challenging to prove that she *intended a scarring*, and Pauline might be found guilty only of battery.

Example of Specific Intent to Do More than the Criminal Act

A state statute defines theft as "a permanent taking of property belonging to another." This statute describes a specific intent crime. To be guilty of theft under the statute, the defendant must intend to do more than "take the property of another," which is the criminal act. The defendant must also *intend to keep* the property permanently.

So if Pauline borrows Peter's razor to shave her legs, she has "taken the property of another," but she has not committed theft for the simple reason that she intends to return the property after use.

Example of Scienter

Although the terms mens rea and scienter are sometimes used interchangeably, many jurisdictions define scienter as knowledge that an act is *illegal*. Scienter can be the basis of **specific intent** in some statutes. So a statute that makes it a crime to "willfully file a false tax return" may require knowledge that the tax return includes false

information *and* that it will be *unlawful* to file it (U.S. v. Pompanio, 2010). If the prosecution fails to prove beyond a reasonable doubt that the defendant knew his or her conduct was *illegal*, this could nullify scienter, and the prosecution cannot prove specific intent.

General Intent

General intent is less sophisticated than specific intent. Thus general intent crimes are easier to prove and can also result in a less severe punishment. A basic definition of general intent is the intent to perform the criminal act or actus reus. If the defendant acts intentionally but *without the additional desire* to bring about a certain result, or do anything other than the criminal act itself, the defendant has acted with general intent (People v. McDaniel, 2011).

Inference of General Intent

Intent is a notoriously difficult element to prove because it is locked inside the defendant's mind. Ordinarily, the only direct evidence of intent is a defendant's confession, which the government cannot forcibly obtain because of the Fifth Amendment privilege against self-incrimination. Witnesses who hear the defendant express intent are often unable to testify about it because of evidentiary rules prohibiting hearsay. However, many jurisdictions allow an **inference** of general intent based on the criminal *act* (Commonwealth v. Ely, 2011). In essence, if the jury accepts the inference, the prosecution does not have the burden of proving intent for a general intent crime.

Example of a General Intent Crime and an Inference of Intent

A state statute defines battery as "intentional harmful or offensive physical contact with another." This statute describes a general intent crime. To be guilty of battery under the statute, the defendant must *only* intend the harmful or offensive contact. The defendant does not have to desire that the contact produces a specific *result*, such as scarring, or death; nor does the defendant need **scienter**, or awareness that the physical contact is illegal.

If Addie balls up her fist and punches Eddie in the jaw after Eddie calls her a "stupid idiot," Addie has probably committed battery under the statute. A prosecutor could prove that Addie committed the *act* of harmful or offensive contact using Eddie's testimony and a physician's report. The jury could thereafter be instructed to "infer intent from proof of the act." If the jury accepts the inference and determines that Addie committed the criminal act, the jury could find Addie guilty of battery without additional evidence of intent.

Motive

Intent should not be confused with **motive**, which is the *reason* the defendant commits the criminal act or actus reus. Motive can generate intent, support a defense, and be used to determine sentencing. However, motive *alone* does not constitute mens rea and does not act as a *substitute* for criminal intent.

Example of Motive

Isabella, a housewife with no criminal record, sits quietly in court waiting to hear the jury verdict in a trial for the rape of her teenage daughter by Ignatius. Ignatius has been convicted of child rape in three previous incidents. The jury foreman announces the decision finding Ignatius not guilty. Ignatius looks over his shoulder at Isabella and smirks. Isabella calmly pulls a loaded revolver out of her purse, and then shoots and kills Ignatius. In this case, Isabella's *motive* is *revenge* for the rape of her teenage daughter, or the desire to protect other women from Ignatius' conduct. This motive generated Isabella's criminal *intent*, which is malice aforethought or intent to kill. In spite of Isabella's motive, which is probably understandable under the circumstances, Isabella can be found guilty of murder because she acted with the murder mens rea. However, Isabella's motive may be introduced at sentencing and may result in a reduced sentence such as life in prison rather than the death penalty. In addition, Isabella's motive may affect a prosecutor's decision to seek the death penalty at all because this would probably be disfavored by the public.

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4.3.2: Model Penal Code Criminal Intent

The Model Penal Code divides criminal intent into four states of mind listed in order of culpability: **purposely**, **knowingly**, **recklessly**, and **negligently**.

Purposely

A defendant who acts **purposely** intends to engage in conduct of that nature and intends to cause a certain result (N.H. Rev. Stat. Ann., 2011). Purposeful criminal intent resembles **specific intent** to cause harm, which was discussed previously. As the Model Penal Code states, "[a] person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result" (Model Penal Code § 2.02 (2) (a)).

> **Example of Purposely**
>
> Review the example given in "Example of Specific Intent to Bring about a Bad Result", where Pauline takes out a razor and slices Peter's cheek. In this example, Pauline is aware of the nature of the act (slicing someone's cheek with a razor). Pauline also appears to be acting with the intent to cause a specific result, based on her statement to Peter. Thus Pauline is acting with **specific intent** or **purposely** and can probably be convicted of some form of aggravated battery or mayhem in most jurisdictions.

Knowingly

Knowingly indicates that the defendant is aware of the nature of the act and its probable consequences (Utah Code Ann., 2011). Knowingly differs from purposely in that the defendant is not acting *to cause* a certain result but is acting with the awareness that the result is *practically certain* to occur (State v. Huff, 2011). The Model Penal Code describes knowingly as follows: "A person acts knowingly with respect to a material element of an offense when...he is aware that his conduct is of that nature...if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result" (Model Penal Code in § 2.02(2) (b)).

> **Example of Knowingly**
>
> Victor brags to his girlfriend Tanya that he can shoot into a densely packed crowd of people on the subway train without hitting any of them. Tanya dares Victor to try it. Victor removes a concealed weapon from his waistband and shoots, aiming at a group of people standing with their back to him. The shot kills Monica, who is standing the closest to Victor. In this case, Victor did not *intend* to shoot Monica. In fact, Victor's goal was to shoot and miss all the standing subway passengers. However, Victor was *aware* that he was shooting a loaded gun (the nature of the act) and was also *practically certain* that shooting into a crowd would result in somebody getting hurt or killed. Thus Victor acted knowingly according to the Model Penal Code. If the state in which Victor shoots Monica defines murder intent as **knowingly** under the Model Penal Code, then Victor has most likely committed murder in this case.

Recklessly

Recklessly is a lower level of culpability than knowingly, and reckless intent crimes are not as common as offenses criminalizing purposeful, knowing conduct. The *degree* of risk awareness is key to distinguishing a reckless intent crime from a knowing intent crime. A defendant acts recklessly if he or she consciously disregards a substantial and unjustifiable risk that the bad result or harm will occur (Colo. Rev. Stat. Ann., 2011). This is different from a knowing intent crime, where the defendant must be "practically certain" of the bad results. The reckless intent test is two pronged. First, the defendant must consciously disregard a substantial

risk of harm. The standard is subjective; the *defendant* must know of the substantial risk. 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 "Example of Knowingly", 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 Chapter 9 "Criminal Homicide".

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 (Idaho Code Ann., 2011). 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 "Example of Knowingly", 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.

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4.3.3: 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 material elements of the offense, unless a contrary purpose plainly appears" (Model Penal Code § 2.02(4)).

Example of a Crime That Requires More Than One Criminal Intent

A state statute defines burglary as "breaking and entering into a residence at nighttime with the intent to commit a felony once inside." In this statute, the elements are the following: (1) breaking, (2) and entering, (3) into a residence, (4) at nighttime. Breaking and entering are two **criminal act** elements. They must be committed with the *specific intent*, or *purposely*, to commit a felony once inside the residence. The elements of residence and nighttime are two **attendant circumstances**, which most likely have the lower level of *general intent* or *knowingly*. Thus this statute has *four* separate criminal intents that the prosecution must prove beyond a reasonable doubt for conviction.

Strict Liability

An *exception* to the requirement of a criminal intent element is **strict liability**. Strict liability offenses have *no* intent element (Ala. Code, 2011). This is a modern statutory trend, which abrogates the common-law approach that behavior is only criminal when the defendant commits acts with a guilty mind. Sometimes the rationale for strict liability crimes is the protection of the public's health, safety, and welfare. Thus strict liability offenses are often vehicle code or tax code violations, mandating a less severe punishment (Tex. Penal Code, 2011). With a strict liability crime, the prosecution has to prove only the criminal act and possibly causation and harm or attendant circumstances, depending on the elements of the offense.

Example of a Strict Liability Offense

A vehicle code provision makes it a crime to "travel in a vehicle over the posted speed limit." This is a **strict liability** offense. So if a law enforcement officer captures radar information that indicates Susie was traveling in a vehicle five miles per hour over the posted speed limit, Susie can probably be convicted of speeding under the statute. Susie's protests that she "didn't know she was traveling at that speed," are *not* a valid defense. Susie's *knowledge* of the nature of the act is irrelevant. The prosecution only needs to prove the **criminal act** to convict Susie because this statute is strict liability and does not require proof of criminal intent.

Transferred Intent

Occasionally, the defendant's criminal intent is *not directed toward the victim*. Depending on the jurisdiction, this may result in a *transfer* of the defendant's intent from the intended victim to the eventual victim, for the purpose of fairness (N.Y. Penal Law, 2011). Although this is a legal fiction, it can be necessary to reach a just result. **Transferred intent** is only relevant in crimes that require a bad result or victim. In a case where intent is transferred, the defendant could receive more than one criminal charge, such as a charge for "attempting" to commit a crime against the intended victim. Attempt and transferred intent are discussed in detail in Chapter 8 "Inchoate Offenses".

Example of Transferred Intent

Billy and his brother Ronnie get into an argument at a crowded bar. Billy balls up his fist and swings, aiming for Ronnie's face. Ronnie ducks and Billy punches *Amanda* in the face instead. Billy did not intend to batter Amanda. However, it is unjust to allow this protective action of Ronnie's to excuse Billy's conduct. Thus Billy's intent to hit Ronnie transfers in some jurisdictions over to Amanda. Billy can also be charged with attempted battery, which is assault, of Ronnie, resulting in *two* crimes rather than one under the **transferred intent** doctrine.

Vicarious Liability

Vicarious liability is similar to respondeat superior, a civil law concept discussed in Chapter 1 "Introduction to Criminal Law". Vicarious liability transfers a defendant's responsibility for the crime to a *different defendant*, on the basis of a *special relationship*. Under a theory of vicarious liability, the defendant does not need to commit the criminal act supported by criminal intent. The defendant just has to be involved with the criminal actor in a legally defined relationship. As in civil law, vicarious liability is common between employers and employees.

Corporate liability is a type of vicarious liability that allows a corporation to be prosecuted for a crime apart from its owners, agents, and employees (720 ILCS 5/5-4, 2011). This is a modern concept that did not exist at early common law. Although corporations cannot be incarcerated, they can be fined. Vicarious liability and corporate liability are discussed in more detail in Chapter 7 "Parties to Crime".

Example of Vicarious Liability

Don hires James to work in his liquor store. James is specially trained to ask for the identification of any individual who appears to be under the age of thirty and attempts to buy alcohol. One night, James sells alcohol to Ashley and does not request identification because Ashley is attractive and James wants to ask her out on a date. Unfortunately, Ashley is underage and is participating in a sting operation with local law enforcement. Certain statutes could *subject Don* to criminal prosecution for selling alcohol to an 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 (California Criminal Jury Instructions No. 252, 2011). 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.

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.

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4.4: Causation and Harm

As stated previously, **causation** and **harm** can also be elements of a criminal offense if the offense requires a bad result. In essence, if injury is required under the statute, or the case is in a jurisdiction that allows for common- law crimes, the defendant must *cause* the requisite *harm*. Many incidents occur when the defendant technically initiates circumstances that result in harm, but it would be unjust to hold the defendant criminally responsible. Thus causation should not be rigidly determined in every instance, and the trier of fact must perform an analysis that promotes fairness. In this section, causation in fact and legal causation are examined as well as situations where the defendant may be insulated from criminal responsibility.

Causation in Fact

Every causation analysis is twofold. First, the defendant must be the **factual or but for cause** of the victim's harm. The *but for* term comes from this phrase: "but for the defendant's act, the harm would not have occurred" (Del. Code Ann. tit. II, 2011). As the Model Penal Code states, "[c]onduct is the cause of a result when...(a) it is an antecedent but for which the result in question would not have occurred" (Model Penal Code § 2.03(1)(a)). Basically, the defendant is the factual or but for cause of the victim's harm if the defendant's act starts the chain of events that leads to the eventual result.

Example of Factual Cause

Henry and Mary get into an argument over their child custody agreement. Henry gives Mary a hard shove. Mary staggers backward, is struck by lightning, and dies instantly. In this example, Henry's act forced Mary to move into the area where the lighting happened to strike. However, it would be *unjust* to punish Henry for Mary's death in this case because Henry could not have imagined the eventual result. Thus although Henry is the **factual or but for cause** of Mary's death, he is probably not the **legal cause**.

Legal Causation

It is the second part of the analysis that ensures fairness in the application of the causation element. The defendant must also be the **legal** or **proximate cause** of the harm. Proximate means "near," so the defendant's conduct must be closely related to the harm it engenders. As the Model Penal Code states, the actual result cannot be "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability" (Model Penal Code § 2.03 (2) (b)). The test for legal causation is objective foreseeability (California Criminal Jury Instructions No. 520, 2011).

The trier of fact must be convinced that when the defendant acted, a *reasonable person* could have *foreseen* or predicted that the end result would occur. In the example given in "Example of Factual Cause", Henry is not the legal cause of Mary's death because a reasonable person could have neither foreseen nor predicted that a shove would push Mary into a spot where lightning was about to strike.

The Model Penal Code adjusts the legal causation foreseeability requirement depending on whether the defendant acted purposely, knowingly, recklessly, or negligently. If the defendant's behavior is reckless or negligent, the legal causation foreseeability requirement is analyzed based on the *risk* of harm, rather than the *purpose* of the defendant.

Example of Legal Causation

Imagine that Henry and Mary get into the same argument over their child custody agreement, but this time they are in their garage, which is crowded with furniture. Henry gives Mary a hard shove, even though she is standing directly in front of a large entertainment center filled with books and a heavy thirty-two-inch television set. Mary staggers backward into the entertainment center and it crashes down on top of her, killing her. In this situation, Henry is the factual cause of Mary's death because he started the chain of events that led to her death with his push. In addition, it is *foreseeable* that Mary

might suffer a serious injury or death when shoved directly into a large and heavy piece of furniture. Thus in this example, Henry could be the factual *and* legal cause of Mary's death. It is up to the trier of fact to make this determination based on an assessment of objective foreseeability and the attendant circumstances.

Intervening Superseding Cause

Another situation where the defendant is the factual but not the legal cause of the requisite harm is when something or someone interrupts the chain of events started by the defendant. This is called an **intervening superseding cause**. Typically, an intervening superseding cause cuts the defendant off from criminal liability because it is much closer, or *proximate*, to the resulting harm (Connecticut Jury Instructions No. 2.6-1, 2011). If an intervening superseding cause is a different individual acting with criminal intent, the *intervening* individual is criminally responsible for the harm caused.

Example of an Intervening Superseding Cause

Review the example with Henry and Mary in "Example of Legal Causation". Change the example so that Henry pulls out a knife and chases Mary out of the garage. Mary escapes Henry and hides in an abandoned shed. Half an hour later, Wes, a homeless man living in the shed, returns from a day of panhandling. When he discovers Mary in the shed, he kills her and steals her money and jewelry. In this case, Henry is still the **factual cause** of Mary's death, because he chased her into the shed where she was eventually killed. However, Wes is probably the **intervening superseding cause** of Mary's death because he interrupted the chain of events started by Henry. Thus *Wes* is subject to prosecution for Mary's death, and Henry may be prosecuted only for assault with a deadly weapon.

One and Three Years and a Day Rules

In criminal homicide cases, the causation analysis could be complicated by a victim's *survival* for an extended time period. Because of modern technology, victims often stay alive on machines for many years after they have been harmed. However, it may be unreasonable to hold a defendant responsible for a death that occurs several years after the defendant's criminal act. A few states have rules that solve this dilemma.

Some states have either a **one year and a day rule** or a **three years and a day rule** (S.C. Code Ann., 2011). These rules create a timeline for the victim's death that changes the causation analysis in a criminal homicide case. Under one or three years and a day rules, the victim of a criminal homicide must die within the specified time limits for the defendant to be criminally responsible. If the victim does not die within the time limits, the defendant may be charged with *attempted murder*, rather than criminal homicide. California makes the timeline a *rebuttable presumption* that can be overcome with evidence proving that the conduct was criminal and the defendant should still be convicted (Cal. Penal Code, 2011).

Death timeline rules are often embodied in a state's common law and have lost popularity in recent years (Key v. State, 2011). Thus many states have abolished arbitrary time limits for the victim's death in favor of ordinary principles of legal causation (Rogers v. Tennessee, 2011). Death timeline rules are not to be confused with the **statute of limitations**, which is the time limit the government has to *prosecute* a criminal defendant.

- Factual cause means that the defendant starts the chain of events leading to the harm. Legal cause means that the defendant is held criminally responsible for the harm because the harm is a foreseeable result of the defendant's criminal act.
- An intervening superseding cause breaks the chain of events started by the defendant's act and cuts the defendant off from criminal responsibility.
- One and three years and a day rules create a timeline for the victim's death in a criminal homicide

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4.5: Summary

Crimes are made up of parts, referred to as elements. The criminal elements are criminal act or actus reus, criminal intent or mens rea, concurrence, causation, harm, and attendant circumstances. Only crimes that specify a bad result require the causation and harm elements.

Criminal acts must be voluntary or controllable and cannot consist solely of the defendant's status or thoughts. Just one voluntary act is needed for a crime, so if a voluntary act is followed by an involuntary act, the defendant can still be criminally responsible. Omission or failure to act can also be criminal if there is a duty to act based on a statute, contract, or special relationship. Possession is passive, but it can still be a criminal act. The most common items that are criminal to possess are illegal contraband, drugs, and weapons. Possession can be actual if the item is on or very near the defendant's person, or 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 specified 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 events started by the defendant's criminal act and insulates the defendant from criminal liability. When the intervening superseding cause is an individual, the intervening individual is criminally responsible for the crime. Some states have rules that protect the defendant from criminal responsibility for homicide when the victim lives a long time after the criminal act. These death timeline rules require the victim to die within one or three years and a day from the defendant's criminal act and are becoming increasingly unpopular. Many states have abolished death timeline rules in favor of ordinary principles of legal causation.

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5: CRIMINAL DEFENSES

A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence...

—Fla. Stat. Ann. §776.013(4), cited in "Defense of Habitation"

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5.1: Chapter Learning Obectives

1. Distinguish between a denial or failure of proof defense and an affirmative defense.
2. Distinguish between imperfect and perfect defenses.
3. Distinguish between factual and legal defenses.
4. Give examples of factual and legal defenses.
5. Distinguish between defenses based on justification and excuse.

A plethora of criminal defenses exist. Defenses may completely *exonerate* the criminal defendant, resulting in an acquittal, or *reduce the severity* of the offense. Chapter 3 “Constitutional Protections” discussed defenses based on the federal Constitution. This chapter reviews the categorization of nonconstitutional criminal defenses, along with the elements of various defenses sanctioning the use of force.

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5.2: Categorization of Defenses

Defenses can be categorized as denial or failure of proof, affirmative, imperfect, or perfect. Defenses can also be categorized as factual, legal, based on justification, or excuse. Lastly, defenses can be created by a court (**common law**), or created by a state or federal legislature (**statutory**).

Definition of Denial or Failure of Proof and Affirmative Defenses

As stated in Chapter 2 "The Legal System in the United States", a criminal defendant will be acquitted if the prosecution cannot prove *every element* of the offense beyond a reasonable doubt. In certain cases, the defendant can either *deny* that a criminal element(s) exists or simply sit back and wait for the prosecution to fail in meeting its burden of proof. This legal strategy is sometimes referred to as either a **denial or failure of proof defense**.

An **affirmative defense** is not connected to the prosecution's burden of proof. When the defendant asserts an affirmative defense, the defendant raises a *new* issue that must be proven to a certain evidentiary standard. State statutes often specify whether a defense is affirmative. The Model Penal Code defines an affirmative defense as a defense that is deemed affirmative in the Code or a separate statute, or that "involves a matter of excuse or justification peculiarly within the knowledge of the defendant" (Model Penal Code § 1.12 (3) (c)). Procedurally, the defendant must assert any affirmative defense before or during the trial, or the defense cannot be used as grounds for an appeal.

> **Example of an Affirmative Defense**
>
> A fight breaks out at a party, and Juan is severely injured. Jasmine and Jerome are arrested and charged for battering Juan. Jerome claims that *he* did not touch Juan; *someone else* battered him. Jasmine claims that *she* did not batter Juan because she was legally defending herself against *Juan's* attack. Jerome's claim focuses on the elements of battery and asserts that these elements cannot be proven beyond a reasonable doubt. Technically, Jerome can do nothing and be acquitted if the prosecution fails to prove that he was the criminal actor. Jasmine's self-defense claim is an **affirmative** defense. Jasmine must do something to be acquitted: she must prove that Juan attacked *her* to a certain evidentiary standard.

Burden of Proof for Affirmative Defenses

As stated in Chapter 2 "The Legal System in the United States", states vary as to their requirements for the defendant's burden of proof when asserting an affirmative defense (Findlaw.com, 2010). Different defenses also have different burdens of proof. Some states require the defendant to meet the burden of production, but require the prosecution to thereafter meet the burden of persuasion, *disproving* the defense to a preponderance of evidence, or in some states, beyond a reasonable doubt. Other states require the defendant to meet the burden of production and the burden of persuasion. In such states, the defendant's evidentiary standard is preponderance of evidence, *not* beyond a reasonable doubt. In the example given in "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.

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 between the two is significant. A defendant who is successful with an imperfect defense is still *guilty* of a crime; a defendant who is successful with a perfect defense is *innocent*.

Example of Imperfect and Perfect Defenses

LuLu flies into a rage and kills her sister Lola after she catches Lola sleeping with her fiancé. LuLu is thereafter charged with first-degree murder. LuLu decides to pursue two defenses. First, LuLu claims that the killing should be *manslaughter* rather than first-degree murder because she honestly but unreasonably believed Lola was going to attack *her*, so she thought she was acting in self-defense. Second, LuLu claims she was insane at the time the killing occurred. The claim of manslaughter is an **imperfect** defense that will reduce LuLu's sentence, but will not acquit her of criminal homicide. The claim of insanity is a **perfect** defense that will result in an acquittal.

Definition of Factual and Legal Defenses

A defense must be based on specific *grounds*. If a defense is based on an issue of **fact**, it is a **factual defense**. If a defense is based on an issue of **law**, it is a **legal defense**.

Example of Factual and Legal Defenses

Armando is charged with the burglary of Roman's residence. Armando decides to pursue two defenses. First, Armando claims that he was with Phil on the date and time of the burglary. This is called an **alibi defense**. Second, Armando claims that it is too late to prosecute him for burglary because of the **expiration of the statute of limitations**. Armando's alibi defense is a **factual** defense; it is based on the *fact* that Armando could not have committed the burglary because he was somewhere else at the time it occurred. Armando's statute of limitations defense is a **legal** defense because it is based on a *statute* that limits the amount of time the government has to prosecute Armando for burglary.

Definition of Justification and Excuse

With the exception of alibi, most affirmative defenses are based on either **justification** or **excuse**. Typically, justification and excuse defenses admit that the defendant committed the criminal act with the requisite intent, but insist that the conduct should not be criminal.

A defense based on justification focuses on the *offense*. A justification defense claims that the defendant's conduct should be legal rather than criminal because it supports a principle valued by society. A defense based on excuse focuses on the *defendant*. An excuse defense claims that even though the defendant committed the criminal act with criminal intent, the defendant should not be responsible for his or her behavior.

Example of Justification and Excuse

Review the examples of affirmative, imperfect, and perfect defenses given in "Categorization of Defenses". Jasmine's self-defense claim is based on **justification**. Society believes that individuals should be able to protect themselves from harm, so actions taken in self-defense are justified and noncriminal. Note that a self- defense claim focuses on the *offense* (battery) in light of the circumstances (to prevent imminent harm). LuLu's insanity claim is based on **excuse**. Although LuLu killed Lola with criminal intent, if LuLu is truly insane it is not be fair or just to punish her for her behavior. Note that an insanity claim focuses on the *defendant* (a legally insane individual) and whether he or she should be criminally responsible for his or her conduct.

Key Points

Defense Type	Characteristics
Common-law	Created by a court
Statutory	Created by a state or federal legislature
Denial or failure of proof	Creates doubt in one or more elements of the offense and prevents the prosecution from meeting its burden of proof
Affirmative	Raises an issue separate from the elements of the offense
Imperfect	Reduces the severity of the offense
Perfect	Results in an acquittal
Factual	Based on an issue of fact
Legal	Based on an issue of law
Alibi	Asserts that the defendant was somewhere else when the crime was committed
Expiration of the statute of limitations	Asserts that it is too late for the government to prosecute the defendant for the crime
Justification	Claims that the criminal conduct is justified under the circumstances
Excuse	Claims that the defendant should be excused for his or her conduct

- A denial or failure of proof defense focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof. An affirmative defense is a defense 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.

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5.2.1: Key Points

Defense Type	Characteristics
Common-law	Created by a court
Statutory	Created by a state or federal legislature
Denial or failure of proof	Creates doubt in one or more elements of the offense and prevents the prosecution from meeting its burden of proof
Affirmative	Raises an issue separate from the elements of the offense
Imperfect	Reduces the severity of the offense
Perfect	Results in an acquittal
Factual	Based on an issue of fact
Legal	Based on an issue of law
Alibi	Asserts that the defendant was somewhere else when the crime was committed
Expiration of the statute of limitations	Asserts that it is too late for the government to prosecute the defendant for the crime
Justification	Claims that the criminal conduct is justified under the circumstances
Excuse	Claims that the defendant should be excused for his or her conduct

- A denial or failure of proof defense focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof. An affirmative defense is a defense 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.

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5.3: Self Defense

As stated previously, **self-defense** is a defense based on **justification**. Self-defense can be a defense to assault, battery, and criminal homicide because it always involves the use of force. In the majority of states, self-defense is a **statutory** defense (Mich. Comp. Laws, 2010). However, it can be modified or expanded by courts on a case- by-case basis.

Most states have special requirements when the defendant uses **deadly force** in self-defense. **Deadly force** is defined as any force that could potentially kill. An individual does not have to actually die for the force to be considered deadly. Examples of deadly force are the use of a knife, gun, vehicle, or even bare hands when there is a disparity in size between two individuals.

Self-defense can operate as a **perfect** or **imperfect** defense, depending on the circumstances. Defendants who commit criminal homicide justified by self-defense can be acquitted, or have a murder charge reduced from first to second or third degree, or have a charge reduced from murder to manslaughter. Criminal homicide is discussed in detail in Chapter 9 “Criminal Homicide”.

To successfully claim self-defense, the defendant must prove four elements. First, with exceptions, the defendant must prove that he or she was confronted with an **unprovoked** attack. Second, the defendant must prove that the threat of injury or death was **imminent**. Third, the defendant must prove that the **degree of force** used in self-defense was objectively reasonable under the circumstances. Fourth, the defendant must prove that he or she had an **objectively reasonable fear** that he or she was going to be injured or killed unless he or she used self-defense. The Model Penal Code defines self-defense in § 3.04(1) as “justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”

Provocation

In general, if the defendant initiates an attack against another, the defendant cannot claim self-defense (State v. Williams, 2010). This rule has two exceptions. The defendant can be the initial aggressor and still raise a self- defense claim if the attacked individual responds with *excessive* force under the circumstances, or if the defendant *withdraws* from the attack and the attacked individual persists.

Excessive Force Exception

In some jurisdictions, an individual cannot respond to the defendant’s attack using excessive force under the circumstances (State v. Belgard, 2010). For example, an individual cannot use **deadly force** when the defendant initiates an attack using **nondeadly force**. If an individual does resort to deadly force with a nondeadly force attack, the defendant can use reasonable force in self-defense.

> **Example of the Excessive Force Exception**
>
> Patty and Paige get into an argument over a loan Patty made to Paige. Paige calls Patty a spoiled brat who always gets her way. Patty slaps Paige across the face. Paige grabs a carving knife from the kitchen counter and tries to stab Patty. Patty wrestles the knife away and stabs Paige in the chest, killing her. In this example, Patty provoked the attack by slapping Paige across the face. However, the slap is **nondeadly force**. In many jurisdictions, Paige cannot respond to nondeadly force with **deadly force**, like a knife. Paige used excessive force in her response to Patty’s slap, so Patty can use deadly force to defend herself and may *not* be responsible for criminal homicide under these circumstances.

Withdrawal Exception

In some jurisdictions, the defendant can be the initial aggressor and still use force in self-defense if the defendant withdraws from the attack, and communicates this withdrawal to the attacked individual (N.Y. Penal Law, 2010). If the attacked individual

persists in using force against the defendant after the defendant's withdrawal, rather than notifying law enforcement or retreating, the defendant is justified in using force under the circumstances.

Example of Withdrawal

Change the excessive force exception example in "Example of the Excessive Force Exception". Imagine that after Patty slaps Paige across the face, Paige begins pounding Patty with her fists. Patty manages to escape and runs into the garage. She huddles against the garage wall. Paige chases Patty into the garage. Patty says, "Please, please don't hurt me. I'm sorry I slapped you." Paige kicks Patty in the back. Patty turns around and karate chops Paige in the neck, rendering her unconscious. In many jurisdictions, Patty's karate chop is lawful under a theory of self-defense because she completely *withdrew* from the attack. Thus Patty is probably not criminally responsible for battery, based on the karate chop to the neck. However, Patty *could* be criminally responsible for battery based on the slap to Paige's face because this physical contact was unprovoked and not defensive under the circumstances.

Imminence

The defendant cannot use any degree of force in self-defense unless the defendant is faced with an **imminent** attack (State v. Taylor, 2010). Imminent means the attack is *immediate* and not something that will occur in the future. If the defendant is threatened with a future attack, the appropriate response is to inform law enforcement, so that they can incapacitate the threatening individual by arrest or prosecution. Another situation where imminence is lacking is when the attack occurred in the *past*. When the defendant uses force to remedy a previous attack, this is retaliatory, and a self-defense claim is not appropriate. The legal response is to inform law enforcement so that they can incapacitate the attacker by arrest or prosecution.

Some state courts have expanded the imminence requirement to include situations where a husband in a domestic violence situation uses force or violence regularly against the defendant, a battered wife, therefore creating a threat of imminent harm every day (Bechtel v. State, 2010). If a jurisdiction recognizes the **battered wife defense**, the defendant—the battered wife—can legally use force against her abusive husband in self-defense in situations where harm is not necessarily immediate.

Example of an Attack That Is Not Imminent

Vinny tells Fiona that if she does not pay him the $1,000 she owes him, he will put out a contract on her life. Fiona pulls out a loaded gun and shoots Vinny. Fiona cannot successfully argue self-defense in this case. Vinny's threat was a threat of future harm, *not* imminent harm. Thus Fiona had plenty of time to contact law enforcement to help protect her safety.

Example of an Attack That Is Retaliatory

Dwight and Abel get into a fist fight. Dwight knocks Abel unconscious. Dwight observes Abel for a few minutes, and then he picks up a large rock and crushes Abel's skull with it, killing him. Dwight cannot claim self-defense in this situation. Once Dwight realized that Abel was unconscious, he did not need to continue to defend himself against an imminent attack. Dwight's conduct appears *retaliatory* and is not **justified** under these circumstances.

Example of an Imminent Attack under the Battered Wife Defense

Spike severely beats and injures his wife Veronica every couple of days. Spike's beatings have become more violent, and Veronica starts to fear for her life. One night, Veronica shoots and kills Spike while he is sleeping. In states that have expanded self-defense to include the battered wife defense, Veronica may be successful on a theory of self-defense.

Proportionality

The defendant cannot claim self-defense unless the degree of force used is **objectively reasonable** under the circumstances. This requirement primarily focuses on the use of **deadly force** and when it is legally justified. In general, deadly force can by employed in self-defense when a reasonable person feels threatened with imminent **death**, **serious bodily injury**, and, in some jurisdictions, a **serious felony** (Or. Rev. Stat. 2010). Serious bodily injury and serious felony are technical terms that are defined in a statute or case, depending on the jurisdiction. The Model Penal Code states that deadly force is not justifiable "unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat" (Model Penal Code § 3.04(2)(b)).

Example of Appropriate Deadly Force

Nicholas, an intruder, pins Wanda to the floor of her garage and begins to forcibly remove her clothing. Wanda feels around the floor with her hand and finds a screwdriver. She plunges the screwdriver into Nicholas's neck, killing him. Wanda has used appropriate force and can claim self-defense in most jurisdictions. A reasonable person in Wanda's situation would feel deadly force is necessary to repel Nicholas's sexual assault. Nicholas's attack is a **serious felony** that could result in **serious bodily injury** or **death**. Thus the use of deadly force is legally **justified** under these circumstances.

Duty to Retreat

Early common law stated that the defendant had a duty to **retreat to the wall** before using deadly force against an attacker. The majority of states have rejected this doctrine and instead allow the defendant to **stand his or her ground** if the defendant is not the initial aggressor in the confrontation (State v. Sandoval, 2010). In jurisdictions that still follow the **retreat doctrine**, the defendant must retreat if there is an objectively reasonable belief that the attacker will cause death or serious bodily injury, and a retreat won't unreasonably increase the likelihood of death or serious bodily injury (Connecticut Criminal Jury Instructions, 2010). The Model Penal Code defines the duty to retreat by stating that the use of deadly force is not justifiable if "the actor knows that he can avoid the necessity of using such force with complete safety by retreating" (Model Penal Code § 3.04 (2) (b) (ii)). An established exception to the retreat doctrine in jurisdictions that follow it is the defense of the home, which is called the **castle doctrine**. The castle doctrine is discussed shortly.

Example of the Duty to Retreat

Sandy and Sue have an argument in the park. Sue pulls a knife out of a sheath that is strapped to her leg and begins to advance toward Sandy. Sandy also has a knife in her pocket. In a state that follows the **retreat doctrine**, Sandy must attempt to escape, if she can do so safely. In a state that follows the **stand-your-ground doctrine**, Sandy can defend herself using her own knife and claim lawful self-defense. Note that Sandy was not the *initial aggressor* in this situation. If Sandy pulled a knife first, she could *not* use the knife and claim self-defense, whether the state follows the stand-your-ground doctrine or the duty to retreat doctrine.

Objectively Reasonable Fear of Injury or Death

The defendant cannot claim self-defense unless a reasonable person in the defendant's situation would believe that self-defense is necessary to avoid injury or death. If the defendant honestly but *unreasonably* believes self-defense is necessary under the circumstances, a claim of **imperfect self-defense** may reduce the severity of the offense (State v. Faulkner, 2010). However, the defendant is still guilty of a crime, albeit a less serious crime.

Example of Unjustified Conduct

Justin, who weighs over two hundred pounds and is six feet tall, accidentally bumps into Wanda, a slender ten-year-old child. Wanda spins around and shakes her fist at Justin. Justin responds by shoving Wanda so hard that she crashes into a telephone pole and is killed. Justin probably *cannot* claim self-defense under these circumstances. A reasonable person would not believe Wanda is about to seriously injure or kill Justin. Thus Justin's response is unnecessary and unjustified in this case.

Example of Imperfect Self-Defense

Change the unjustified conduct example given in "Example of Unjustified Conduct". Imagine that a slender, female ten-year-old severely abused Justin when he was younger. Since the abusive incident, Justin has an unreasonable fear of female children and honestly believes that they can and will hurt him if provoked. If the trier of fact determines that Justin honestly but unreasonably believed that Wanda was about to inflict serious bodily injury or kill him, any charge of murder could be reduced to manslaughter on a theory of **imperfect self-defense**.

Key Points

- Self-defense is a defense based on justification that allows a defendant to use physical force to protect himself or herself from injury or death.
- Deadly force is any force that can produce death. An individual does not have to die for the force to be deemed deadly.
- Four elements are required for self-defense: (1) an unprovoked attack, (2) which threatens imminent injury or death, and (3) an objectively reasonable degree of force, used in response to (4) an objectively reasonable fear of injury or death.
- Two exceptions to the unprovoked attack rule are an individual's use of excessive force in response to an initial attack and the defendant's withdrawal from the initial attack.
- The battered wife defense asserts that a woman who is a victim of spousal abuse may use force in self- defense under certain circumstances, even when the threat of harm is not immediate. The battered wife defense is justified with respect to the imminence requirement: because the abuse is so constant, the battered wife faces an imminent threat every day.
- Deadly force is appropriate in self-defense when the attacker threatens death, serious bodily injury, and, in some jurisdictions, a serious felony.
- The duty to retreat doctrine is a common-law rule requiring a defendant to retreat if it is safe to do so, instead of using deadly force in self-defense. The stand-your-ground doctrine is a rule allowing the defendant to use deadly force if appropriate in self-defense, rather than retreating.
- Imperfect self-defense is a defense available when the defendant has an honest but unreasonable belief that force is necessary to defend against injury or death. Imperfect self-defense reduces the severity of the offense, but does not result in acquittal.

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5.4: Other Use-of-Force Defenses

Key Study Points for this Section

1. Ascertain the elements required for the defense of others.
2. Define real and personal property.
3. Explain the appropriate circumstances and degree of force a defendant can use when defending property.
4. Ascertain the elements required for the defense of ejection of trespasser.
5. Distinguish defense of property from defense of habitation.
6. Ascertain the three elements required for the use of deadly force in defense of habitation under modern castle laws.
7. Identify three common features of modern castle laws.
8. Ascertain the constitutional parameters of the use of force by law enforcement to arrest or apprehend criminal suspects.

Aside from self-defense, a defendant can legally use force to defend another *person*, real or personal *property*, and *habitation*. In addition, *law enforcement* can use force to arrest or capture individuals who reasonably appear to be committing crimes. In this section, the elements of several use-of-force defenses will be reviewed. Keep in mind that these defenses can be statutory, common-law, perfect, or imperfect, depending on the facts and the jurisdiction.

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5.4.1: Defense of Others

According to early common law, a defendant could use force to defend another only when the defendant and the person defended had a *special relationship*, such as a family connection. Most jurisdictions now reject this common-law restriction on defense of others and allow a defendant to defend *anyone* to the same degree that he or she could use self-defense (People v. Kurr, 2010). Thus in a majority of jurisdictions, **defense of others** requires the same elements as self-defense: the individual defended must be facing an unprovoked, imminent attack, and the defendant must use a reasonable degree of force with a reasonable belief that force is necessary to repel the attack.

Occasionally, a defendant uses force to defend another who has no legal right to use force in self-defense. Under the common law, the defendant could not use force legally if the individual defended could not use force legally in self-defense. However, the majority of states now allow a defendant to use force to defend another person if it *reasonably appears* that use of force is justified under the circumstances (Commonwealth v. Miranda, 2010). The Model Penal Code allows the defense of another when "under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force" (Model Penal Code § 3.05(1) (b)). Thus if the defendant has a *subjective belief* that the individual defended could use force legally in self-defense, defense of others is appropriate under the Model Penal Code.

Example of Defense of Others

Alex and Shane, aspiring law enforcement officers, are performing a training maneuver in a rural area. Their instructor Devin is watching nearby. Alex pretends to attack Shane. Just as Devin is about to demonstrate a takedown, Timmy, who is jogging in the area, dashes over and begins beating Alex. Under the older common-law rule, Timmy could be successfully prosecuted for battery of Alex. Shane did not have the right to use self-defense during a practice maneuver, so neither did *Timmy*. In jurisdictions that allow defense of others if it reasonably appears that self-defense is warranted, Timmy could probably use the defense to battery because it *reasonably appeared* that Alex was about to unlawfully attack Shane. In jurisdictions that follow the Model Penal Code, Timmy can most likely use defense of others as a defense to battery because it is clear *Timmy* honestly believed Shane had the right to use self-defense in this situation.

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5.4.2: Defense of Property

All jurisdictions allow individuals to use force in **defense of property** under certain specified circumstances. Property can be real or personal. **Real property** is land and anything permanently attached to it. This includes a home. However, defense of the home is discussed in "Defense of Habitation". **Personal property** is any movable object.

In the majority of states, the defendant can use force only to defend real or personal property if the defendant has an objectively reasonable belief that an *imminent* threat of damage, destruction, or theft will occur (California Criminal Jury Instructions, 2010). The Model Penal Code provides "the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary: (a) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property" (Model Penal Code §3.06(1) (a)). Thus if the defendant has a *subjective belief* that force is immediately necessary to protect real or personal property, force is appropriate under the Model Penal Code.

The amount of force that a defendant may legally use to protect real or personal property is *reasonable* force, under the circumstances (K.S.A., 2010). The defendant can also chase someone who steals personal property and take the item back (Conn. Gen. Stat., 2010). The Model Penal Code provides "the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary...to retake tangible movable property" (Model Penal Code §3.06(1) (b)). In general, the Model Penal Code and most states do not authorize the use of **deadly force** to protect property (other than the home) under any circumstances (Fla. Stat. Ann., 2010).

Example of Defense of Property

Kelsey sees Keith, her stepbrother, approaching her brand new car with a key in his hand. It appears that Keith is abbout to scrape the paint on the door of the car with this key. Kelsey tackles Keith to prevent him from vandalizing the car. Kelsey has probably used *reasonable* force under the circumstances and can claim defense of property as a defense to battery. If Keith testifies that he was simply going to hand Kelsey the key, which she left in the house, the attack could still be justified if the trier of fact determines that it was *objectively reasonable* for Kelsey to believe Keith was about to damage her property. In jurisdictions that follow the Model Penal Code, Kelsey can probably use defense of property as a defense to battery because it is clear *Kelsey* believed that force was immediately necessary to protect her personal property in 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.

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5.4.3: 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 (N.J. Stat., 2010). The degree of force that can be used to eject the trespasser is *reasonable force*, under the circumstances (Iowa Code, 2010). Deadly force is never reasonable to eject a trespasser unless the trespasser threatens imminent deadly force against the defendant or another individual (State v. Curley, 2010). 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, lifts 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.

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5.4.4: 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 (Colo. Rev. Stat. Ann., 2010). In 2005, Florida began a wave of castle law modifications that resulted in most states revising their defense of habitation laws (Fla. Stat. Ann., 2010). Generally, three elements must be present before the use of deadly force is appropriate to defend habitation under modern castle laws. First, the intruder must actually *enter* or be in the process of entering the residence owned by the defendant (Fla. Stat. Ann., 2010). This excludes intruders who are outside or in the **curtilage**, which is the protected area around the home. Second, the residence must be *occupied* when the entry occurs. This excludes devices like **spring-guns** that protect unoccupied dwellings with deadly force (People v. Ceballos, 2010). Third, the defendant must have an *objectively reasonable* belief that the intruder intends to commit a crime of *violence* against the occupant(s) after entry (Or. Rev. Stat., 2010). The Model Penal Code provides "[t]he use of deadly force is not justifiable…unless the actor believes that…the person against whom the force is used is attempting to dispossess him of his dwelling…or…attempting to commit…arson, burglary, robbery or other felonious theft…and either…has employed or threatened deadly force…or…the use of force other than deadly force would expose the actor or another in his presence to substantial danger of serious bodily harm" (Model Penal Code § 3.06 (3)(d)).

The majority of states' castle laws abolish any **duty to retreat** when inside the home (Alaska Stat., 2010). Florida's castle law creates a presumption that the defendant has a reasonable fear of imminent peril of death or great bodily injury when the intruder makes an unlawful or forceful entry (Fla Stat. Ann., 2010). This compels the prosecution to *disprove* the defendant's reasonable belief of death or great bodily injury beyond a reasonable doubt, which is extremely difficult. Additional features of many castle laws are **civil immunity** and **criminal immunity** from prosecution (720 ILCS, 2010). **Immunity from prosecution** means that a defendant who complies with the castle law requirements cannot be sued for damages or prosecuted for a crime based on injury or death to the intruder.

Example of Defense of Habitation under a Castle Law

Nate, a homeowner with three children, hears the front door open in the middle of the night. Nate removes a handgun from the nightstand and creeps silently down the stairs. He sees Bob tiptoeing toward his daughter's bedroom. Nate shoots and kills Bob. Unfortunately, Bob is Nate's daughter's boyfriend, who was trying to enter her bedroom for a late-night get-together. Nate could probably assert the defense of **protection of habitation** under modern castle laws in most jurisdictions. Bob made **entry** into an **occupied residence**. It is difficult to identify individuals in the dark and to ascertain their motives for entering a residence without the owner's consent. Thus it was *objectively reasonable* for Nate to feel threatened by Bob's presence and to use deadly force to protect his domicile and its residents. If Nate is successful with his defense, he will also be **immune** from a *civil suit* for damages if the castle law in his jurisdiction provides this immunity.

Change the example with Nate and Bob so that Bob enters the residence during the day, and Nate identifies him as his daughter's boyfriend. Under these circumstances, the prosecution could rebut any presumption that Nate's actions were objectively reasonable. A reasonable person would ask Bob why he was entering the residence before shooting and killing him. The trier of fact might determine that Nate's intent was not to protect himself and his family, but to *kill* Bob, which would be malice aforethought. If Nate's actions are not justifiable by the defense of habitation, he could be charged with and convicted of first-degree murder in this situation.

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5.4.5: Use of Force in Arrest and Apprehension of Criminal Suspects

Occasionally, law enforcement must use *force* to effectuate an arrest or apprehend a criminal suspect. The *appropriate* use of force during an arrest or apprehension can operate as a defense to assault, battery, false imprisonment, kidnapping, and criminal homicide. At early common law, law enforcement could use reasonable, nondeadly force to arrest an individual for a misdemeanor and reasonable, even deadly force, to arrest an individual for *any* felony. Modern law enforcement's ability to use deadly force is governed by the US Constitution.

The US Supreme Court clarified the constitutional standard for law enforcement's use of deadly force in *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, the Court invalidated a Tennessee statute that allowed law enforcement to exercise *any* degree of force to apprehend and arrest a fleeing felon. The law enforcement officer in *Garner* admitted that he shot and killed a suspect, reasonably believing he was *unarmed*. The Court held that the Fourth Amendment governed law enforcement's use of deadly force in this situation because the use of deadly force is a **seizure**. Thus law enforcement's use of deadly force must be scrutinized pursuant to the standard of constitutional *reasonableness*. According to the Court, the only constitutionally reasonable circumstances under which law enforcement can use deadly force to arrest or apprehend a fleeing felon is when law enforcement has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

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", "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 Colin uses 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 a *misdemeanor*, 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.

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5.4.6: Key Takeaways

- Defense of others has the same elements as self-defense: the individual defended must be facing an unprovoked, imminent attack, and the defendant must use a reasonable degree of force with a reasonable belief that force is necessary to repel the attack.
- Real property is land and anything permanently attached to it. Personal property is any movable object.
- The defendant can use nondeadly force to defend real or personal property if the defendant has an objectively reasonable belief that an imminent threat of damage, destruction, or theft will occur.
- Property owners can use reasonable nondeadly force to eject a trespasser after first asking the trespasser to leave.
- Only nondeadly force may be used to defend property; deadly force may be used to defend habitation.
- The defendant can use deadly force to defend habitation under modern castle laws if an intruder enters occupied premises, and the defendant has an objectively reasonable belief that the intruder will seriously injure or kill the occupants.
- Modern castle laws abolish the duty to retreat when inside the home, occasionally include a presumption that the defendant has an objectively reasonable belief the intruder is going to seriously injure or kill the occupants, and provide civil and criminal immunity from prosecution.
- Use of deadly force by law enforcement is considered a seizure under the Fourth Amendment, so law enforcement cannot use deadly force to apprehend or arrest a criminal suspect unless there is probable cause to believe the suspect will inflict serious physical injury or death upon the officer or others.

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5.5: Defenses Based on Choice

Study Points

1. Ascertain the three elements required for the choice of evils defense.
2. Distinguish between the choice of evils defense and the duress defense.
3. Identify one crime that is not justifiable by the choice of evils defense or the duress defense

Occasionally, the law protects a defendant from criminal responsibility when the defendant has *no choice* but to commit the crime. In this section, we review the choice of evils and duress defenses.

Choice of Evils Defense

The **choice of evils defense** (called the necessity defense in some jurisdictions) protects a defendant from criminal responsibility when the defendant commits a crime to avoid a greater, imminent harm. Under the Model Penal Code, "[c]onduct which the actor believes to be necessary to avoid harm or evil…is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged" (Model Penal Code § 3.02(1)(a)). The choice of evils defense can be statutory or common-law, perfect or imperfect, depending on the jurisdiction.

The choice of evils defense generally requires three elements. First, there must be more than one harm that will occur under the circumstances. Usually, the harms are the product of nature, or are circumstances beyond the defendant's control (State v. Holmes, 2010). Second, the harms must be ranked, with one of the harms ranked more severe than the other. The ranking is generally up to the legislature or common law. In many jurisdictions, the loss of life is never justifiable under this defense and cannot be ranked lower than any other harm (Ky. Rev. Stat. Ann., 2010). Third, the defendant must have an *objectively reasonable* belief that the greater harm is *imminent* and can only be avoided by committing the crime that results in the lesser harm (Tenn. Code Ann., 2010).

The choice of evils defense is rarely used and is generally only a defense to the loss or destruction of property. When the defense is perfect, it results in an acquittal. When the defense is imperfect, it results in a reduction in sentence or the defendant's conviction of a lesser offense.

Example of the Choice of Evils Defense

Tamara gets lost while hiking in a remote, mountainous area. After wandering around for hours with the temperature dropping, Tamara finds a locked cabin. Tamara breaks a window and climbs inside. Once inside, Tamara prepares some canned chili, drinks tap water, and uses the telephone to call law enforcement. Tamara could probably plead and prove choice of evils as a defense to burglary and theft in many jurisdictions. Tamara was confronted with two harms: harm to her personal safety and well-being and harm to the real and personal property of another. The harm to Tamara's health and safety is ranked *more severe* than the minimal harm to property. It is *objectively reasonable* to break into and enter a cabin and use some of the supplies inside to prevent *imminent* injury or death. Thus although Tamara committed burglary and theft in many jurisdictions, she did so with the reasonable belief that she was saving her own life. A trier of fact could find that the harm avoided by Tamara's actions was greater than the harm caused by the burglary and theft, and Tamara could be acquitted, or have her sentence or crime reduced, depending on the jurisdiction.

Change the facts in the preceding example, and imagine that Tamara steals money and jewelry in addition to the chili and tap water. Tamara could not successfully prove the defense of choice of evils to this additional theft. No harm was avoided by Tamara's theft of the money and jewelry. Thus choice of evils cannot justify this crime. Change the facts in the

preceding example, and imagine that Tamara kills the cabin's owner because he refuses to allow her to enter. Tamara could not successfully prove the defense of choice of evils under these circumstances. Tamara's life is *no more important* than the cabin owner's. Thus Tamara cannot *rank* the harms, and choice of evils cannot justify criminal homicide in this case.

The Duress Defense

In some jurisdictions, the choice of evils defense is called the **duress** defense if the choice of evils is deliberately brought on by another *individual*, rather than by nature, an act of God, or circumstances outside the defendant's control. The Model Penal Code defines the duress defense as "an affirmative defense that the actor engaged in the conduct…because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another" (Model Penal Code § 2.09(1)).

Three elements are required for the duress defense. First, the defendant or another person must face a threat of *imminent* serious bodily injury or death (Conn. Gen. Stat., 2010). Second, the defendant must have an *objectively reasonable* belief that the only way to avoid the serious bodily injury or death is to commit the crime at issue (Haw. Rev. Stat., 2010). Third, in most jurisdictions, the crime committed cannot be criminal homicide (RCW 9A.16.060, 2010). Like choice of evils, the duress defense is rarely used and can be statutory or common law, perfect or imperfect, depending on the jurisdiction.

Example of the Duress Defense

Keisha, a bank teller, hands Brian, a bank robber, money out of her drawer after he points a loaded gun at her head. Technically, Keisha embezzled the money from the bank, but she did so based on the *objectively reasonable* fear that Brian would kill her if she failed to comply with his demands. Keisha can successfully claim **duress** as a defense to any charge of theft. If Brian had pointed the gun at another client in line at the bank instead of Keisha, Keisha could still prevail using the duress defense because duress also applies when the threat of death or serious bodily injury is to *another* person.

Change the example with Keisha and Brian, and imagine that Brian's threat is made in a phone call, rather than in person. Brian threatens to kill Keisha if she doesn't place thousands of dollars in an envelope and mail it to him at a specified address. If Keisha complies, Keisha cannot prove duress as a defense to theft. Brian's threat by phone call is not a threat of *imminent* death. In addition, it is not objectively reasonable to be frightened by a voice on the telephone. Keisha could hang up the phone and contact law enforcement, instead of timidly complying with Brian's demands.

Change the preceding example with Keisha and Brian, and imagine that Brian orders Keisha to kill his ex-wife Pat, who works at the station next to Keisha. Brian thereafter hands Keisha a switchblade. Keisha cannot kill Pat and claim duress as a defense to murder in most states. Keisha's life is no more *valuable* than Pat's. Therefore, Keisha cannot legally choose to commit the crime of murder and justify the crime with the duress defense.

Key Takeaways

- Three elements are required for the choice of evils defense: the defendant must be faced with two or more evils, the evils must be ranked, and it must be objectively reasonable for the defendant to choose to commit the crime to avoid the imminent evil that is ranked higher.
- Choice of evils is often based on nature or an act of God; duress is generally brought on by another individual
- Choice of evils and duress are generally not defenses to criminal homicide

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5.6: Consent

Key Study Points

1. Ascertain the two elements required for the consent defense.
2. Identify three situations where consent can operate as a legal defense.

Consent by the victim can also form the basis of a justification defense to criminal conduct. **Consent** is most commonly used as a defense to sex crimes such as rape, and lack of consent is a criminal **element** of most sexual offenses that must be proven beyond a reasonable doubt. Thus consent to sexual acts is discussed in Chapter 10 "Sex Offenses and Crimes Involving Force, Fear, and Physical Restraint". In this section, consent to *nonsexual* conduct is explored. Consent is a defense that can be statutory or common law, perfect or imperfect, depending on the jurisdiction.

Elements of the Consent Defense

Consent can be a valid defense to a crime only if the victim *chooses* to render it. Thus it must be proffered knowingly and voluntarily, or it is ineffective. Under the Model Penal Code, consent is ineffective if "it is given by a person who is legally incompetent to authorize the conduct…it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable to make a reasonable judgment…it is induced by force, duress or deception" (Model Penal Code § 2.11(3)). In general, consent is not **knowing** if it is given by an individual who is too young, mentally incompetent (Colo> Rev. Stat. Ann., 2010), or intoxicated. In general, consent is not **voluntary** if it is induced by force, threat of force, or trickery (Del. Code Ann. tit. 11, 2010).

Example of Unknowing Consent

Gina drinks six glasses of wine at a party and offers to be the "donkey" in a game of pin the tail on the donkey. Other party members watch as Gina staggers her way to the front of the room and poses in front of the pin the tail on the donkey poster. Geoff walks up to Gina and stabs her several times in the buttocks with a pin. Geoff probably cannot claim consent as a defense to battery in this case. Gina consented to battery while she was intoxicated, and clearly she was unable to make a reasonable judgment. Thus her consent was not given **knowingly** and was ineffective in this situation.

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.

Situations Where Consent Can Operate as a Defense

Consent is a defense to only a few crimes. In most jurisdictions, consent can operate only as a defense to *sexual* conduct, injury that occurs during a *sporting* event, and crimes that do not result in *serious bodily injury* or *death* (Me. Rev. Stat. Ann., 2010). As the Model Penal Code states, "[w]hen conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if: (a) the bodily harm consented to or threatened by the conduct consented to is not serious; or (b) the conduct and the harm are reasonably foreseeable hazards of joint participation in

a lawful athletic contest or competitive sport" (Model Penal Code § 2.11(2)).

Example of Legal Consent

Review the examples with Gina and Geoff. Change the examples, and imagine that Gina did not consume any alcohol and was not threatened by Geoff. If Gina offers to be the donkey in the pin the tail on the donkey game and Geoff stabs her in the buttocks with the pin, Geoff may be able to use consent as a defense to battery. Gina's consent appears to be **knowing** and **voluntary**. Gina probably does not suffer **serious bodily injury** from the pin stab in the buttocks. Thus the elements of legal consent exist, and this situation is appropriate for the consent defense.

Situations Where Consent Can Operate as a Defense

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5.6.1: Key Takeaways

- Two elements are required for the consent defense: the defendant must consent knowingly (cannot be too young, mentally incompetent, or intoxicated) and voluntarily (cannot be forced, threatened, or tricked).
- Three situations where consent can operate as a defense are sexual offenses, situations that do not result in serious bodily injury or death, and sporting events.

Section Summary

Defenses can be denial or failure of proof, affirmative, imperfect, perfect, factual, legal, common law (created by case law), or statutory (created by a state or federal legislature). A denial or failure of proof defense creates doubt in one or more of the elements of the offense and prevents the prosecution from meeting its burden of proof. An affirmative defense raises an issue separate from the elements of the offense and must be asserted before or during the trial or it cannot serve as the basis for an appeal. Defendants have either the burden of production or the burden of production and persuasion to a preponderance of evidence for an affirmative defense. An imperfect defense reduces the severity of the offense, or sentence. A perfect defense results in an acquittal. A factual defense is grounded in the facts of the case, while a legal defense depends on a statute or common-law principle. 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 at the time the crime occurred. An example of a legal defense is expiration of the statute of limitations, which means it is too late to prosecute the defendant for the offense.

Defenses can also be based on justification or excuse. A defense based on justification focuses on the offense and deems the conduct worthy of protection from criminal responsibility. A defense based on excuse focuses on the defendant and excuses his or her conduct under the circumstances.

Self-defense justifies the defendant's conduct in using physical force as protective. Self-defense is legal only when the defendant is faced with an unprovoked, imminent attack, and it is objectively reasonable that the degree of force used in response is necessary to avoid the attack. The defendant can be the initial aggressor and still use self-defense if the attacked individual uses too much force in response to the defendant's attack or if the defendant withdraws from the attack and is still pursued by the attacked individual. The attack does not necessarily have to be imminent if the defendant is a battered wife. Deadly force is any force that can kill under the circumstances. Deadly force can be used in self-defense only if the defendant is faced with imminent death, serious bodily injury, or the commission of a serious felony. 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.

The common-law defense of **duress** exists in some jurisdictions, but held that the facts in the defendant's case did not indicate that she was under duress. The court stated the defendant had lawful alternatives to driving while under the influence, such as calling a taxi or a friend for a ride or walking.

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The use of drugs or controlled substances, dependence on drugs or controlled substances or voluntary intoxication shall not, as such, constitute a defense to a criminal charge…

—Or. Rev. Stat. § 161.125(1), cited in "Intoxication"

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5.7: The Insanity Defense

Key Study Points

1. Identify four versions of the insanity defense.
2. Ascertain the two elements required for the M'Naghten insanity defense.
3. Ascertain the two elements required for the irresistible impulse insanity defense.
4. Compare the M'Naghten, irresistible impulse, and substantial capacity tests.
5. Ascertain the basis of the Durham insanity defense.
6. Identify the various burdens of proof for the insanity defense.
7. Distinguish between diminished capacity and the insanity defense.
8. Compare the insanity defense with mental competence to stand trial.
9. Compare the insanity defense with the guilty but mentally ill verdict.
10. Compare different commitment procedures for an insane criminal defendant.
11. Distinguish temporary from permanent insanity.

With the exception of alibi and the expiration of the statute of limitations, Chapter 5 "Criminal Defenses, Part 1" explored criminal defenses based on **justification**. This chapter reviews criminal defenses based on **excuse**, including the **insanity defense**. Remember that defenses based on excuse focus on the *defendant* and claim that the defendant should be excused from criminal responsibility for his or her conduct under the circumstances.

Although controversial, most states and the federal government recognize an **insanity defense** (18 U.S.C., 2010). Montana, Utah, Kansas, and Idaho are the only states that do not (Findlaw.com, 2010). The insanity defense is the subject of much debate because it excuses even the most evil and abhorrent conduct, and in many jurisdictions, legal insanity functions as a perfect defense resulting in *acquittal*. However, the insanity defense is rarely used and hardly ever successful. This is generally because of the difficulty in proving *legal* insanity.

Many criminal defendants suffer from mental illness and can produce evidence of this illness such as psychiatric or layperson testimony. Often, mental disturbance is apparent from the defendant's conduct under the circumstances. However, legal insanity differs from *medical* insanity and is generally much more difficult to establish. The rationale behind creating a different standard for legal insanity is the goal of a criminal prosecution discussed in Chapter 1 "Introduction to Criminal Law". Criminal prosecution should deter as well as incapacitate. While the purpose of a medical diagnosis is to eventually *cure* the defendant's disorder, the purpose of criminal law is to *punish* the defendant. Thus the defendant's conduct is not excused if the defendant or society can benefit from punishment.

The policy supporting the insanity defense is twofold. First, an insane defendant does not have *control* over his or her conduct. This is similar to a defendant who is hypnotized, or sleepwalking. Second, an insane defendant does not have the ability to *form criminal intent*. Without the ability to control conduct, or the understanding that conduct is evil or wrong by society's standards, an insane defendant presumably will commit crimes again and again. Thus no deterrent effect is served by punishment, and treatment for the mental defect is the appropriate remedy.

Four variations of the insanity defense currently exist: M'Naghten, irresistible impulse, substantial capacity, and Durham.

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5.7.1: M'Naghten Insanity Defense

The **M'Naghten insanity defense**, also called the **right-wrong test**, is the most common insanity defense in the United States. It is also the oldest and was created in England in 1843. The defense is named after Daniel M'Naghten. M'Naghten was under the paranoid delusion that the Prime Minister of England, Sir Robert Peel, was trying to kill him. When he tried to shoot Sir Peel from behind, he inadvertently shot Sir Peel's Secretary, Edward Drummond, who thereafter died. M'Naghten was put on trial for murder and, to the shock of the nation, the jury found him not guilty by reason of insanity (Queen v. M'Naghten, 2010). After a public outcry at this verdict, the British House of Lords developed a test for insanity that remains relatively intact today.

The M'Naghten insanity defense is *cognitive* and focuses on the defendant's awareness, rather than the ability to *control* conduct. The defense requires two elements. First, the defendant must be suffering from a *mental defect* at the time he or she commits the criminal act. The mental defect can be called a "defect of reason" or a "disease of the mind," depending on the jurisdiction (Iowa Code, 2010). Second, the trier of fact must find that because of the mental defect, the defendant did not know either the *nature and quality* of the criminal act or that the act was *wrong*.

The terms "defect of reason" and "disease of the mind" can be defined in different ways, but in general, the defendant must be cognitively impaired to the level of not knowing the nature and quality of the criminal act, or that the act is wrong. Some common examples of mental defects and diseases are psychosis, schizophrenia, and paranoia.

Jurisdictions vary as to the level of awareness the defendant must possess. Some jurisdictions use the term "know," or "understand," (Cal. Penal Code, 2010) while others use the term "appreciate" (Ala. Code, 2010). If know or understand is the standard, the trier of fact must ascertain a basic level of awareness under the attendant circumstances. If appreciate is the standard, the trier of fact must analyze the defendant's emotional state, and evidence of the defendant's character or personality may be relevant and admissible.

A defendant does not know the nature and quality of a criminal act if the defendant is completely oblivious to what he or she is doing. This is quite rare, so most defendants claiming insanity choose to assert that they did not know their act was *wrong*. However, jurisdictions differ as to the meaning of "wrong." Some jurisdictions define wrong as "legally wrong," meaning the defendant must be unaware that the act is against the law (State v. Crenshaw, 2010). Others define wrong as "legally *and morally* wrong," meaning the defendant must also be unaware that the act is condemned by society (State v. Skaggs, 2010). Generally, the only instance where the defendant must be "morally wrong," standing alone, is when the defendant claims that the conduct was performed at the command of God, which is called the **deific defense** (State v. Worlock, 2010). Whether the standard is legally wrong or morally wrong, if there is any evidence of a cover-up or an attempt to hide or escape, it is apparent that the defendant knew the difference between right and wrong, defeating the claim of insanity under M'Naghten.

Example of a Case Inappropriate for the M'Naghten Insanity Defense

Susan wants to marry a single man, but he does not want the responsibility of caring for her children. Susan decides to kill her children. She drives her two sons, aged three and five, out to the lake. She puts the car in park, gets out, and then puts it in gear, watching as it drives into the water. Both of her sons drown. Later that day, Susan files a police report stating that a stranger kidnapped her children at gunpoint. While searching the area for the kidnapper, the police discover the children's bodies and evidence indicating that Susan killed them.

Susan recants her kidnapping story and admits she killed her children. However, she claims she is not guilty by reason of insanity. Susan's claim will probably not be successful if she killed her children in a jurisdiction that recognizes the M'Naghten insanity defense. Susan tried to mislead the police, demonstrating her awareness that she had done something wrong. Thus although Susan's behavior appears mentally imbalanced, she clearly *knew the difference* between right and wrong, and her conduct is not excusable under M'Naghten's rigid requirements.

Example of a Case Appropriate for the M'Naghten Insanity Defense

Andrea, a diagnosed schizophrenic, drowns five of her young children in the bathtub. Andrea promptly phones 911 and tells the operator that her children are dead. The operator dispatches an emergency call to law enforcement. When law enforcement officers arrive at Andrea's house, she informs them that she killed her children so that they could leave this earth and enter heaven.

Andrea thereafter claims she is not guilty for killing her children by reason of insanity. Andrea could be successful if the jurisdiction in which she killed her children recognizes the M'Naghten insanity defense. Andrea suffers from a **mental defect**, schizophrenia. In addition, there is *no* evidence indicating Andrea knew her conduct was **wrong**, such as an attempted escape, or cover-up. In fact, Andrea herself contacted law enforcement and immediately told them about her criminal acts. Thus both of the M'Naghten elements appear to be present, and Andrea's conduct may be excusable under the circumstances.

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5.7.2: Irresistible Impulse Insanity Defense

Another variation of the insanity defense is the **irresistible impulse defense**. This defense has lost popularity over the years and is rejected by most of the states and the federal government (18 U.S.C., 2010). In some cases, the irresistible impulse insanity defense is *easier* to prove than the M'Naghten insanity defense, resulting in the acquittal of more mentally disturbed defendants.

The irresistible impulse insanity defense generally supplements M'Naghten, so the focus is on the defendant's awareness (cognitive) *and* the defendant's will (ability to control conduct). In jurisdictions that recognize the irresistible impulse insanity defense, the first element is the same as M'Naghten; the defendant must suffer from a mental defect or disease of the mind. However, the second element adds the concept of **volition**, or free choice. If the defendant cannot control his or her conduct because of the mental defect or disease, the defendant's conduct is excused even if the defendant understands that the conduct is wrong (State v. White, 2010). This is a softer stance than M'Naghten, which does *not* exonerate a defendant who is aware conduct is wrong. The challenge for the trier of fact in an irresistible impulse jurisdiction is distinguishing between conduct that can be *controlled* and conduct that cannot.

Example of a Case Inappropriate for the Irresistible Impulse Insanity Defense

Jolene, who has been diagnosed with paranoia, decides she must cut off all her sorority sisters' hair because they are "out to get her." She drives to the sorority house with a Taser and scissors in her backpack. Her plan is to subdue each sister with the stun gun and then hack off her hair. As she arrives at the house, she sees Agnes, one of her sorority sisters, trip and fall in the parking lot, ripping her cashmere sweater and scraping her chin. Feeling a stab of pity, Jolene ignores Agnes and walks hurriedly toward the building. As she enters, Ashley, another sorority sister, turns, scowls at Jolene, and barks, "What in the world are you wearing? You look like you just rolled out of bed!" Jolene pulls the stun gun out of her backpack and shoots Ashley. While Ashley is lying on the floor, Jolene takes out the scissors and cuts Ashley's hair off at the scalp.

Jolene claims she is not guilty for assault and battery of Ashley by reason of insanity. If Jolene attacked Ashley in a jurisdiction that recognizes the irresistible impulse insanity defense, she probably will not be successful with her claim. Jolene has been diagnosed with **paranoia**, which is a mental defect or disease. However, Jolene seems aware that shooting someone with a stun gun and cutting off her hair is *wrong* because she spared Agnes based on pity. In addition, Jolene's choice not to attack Agnes indicates she has *control* over her conduct. Thus Jolene is **cognitive** of the difference between right and wrong and has the **will** to suppress criminal behavior, defeating any claim of insanity under the irresistible impulse insanity defense.

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5.7.3: The Substantial Capacity Test

The **substantial capacity test** is the insanity defense created by the Model Penal Code. The Model Penal Code was completed in 1962. By 1980, approximately half of the states and the federal government adopted the substantial capacity test (also called the **Model Penal Code** or **ALI defense**) (Rolf, C. A., 2010). However, in 1982, John Hinckley successfully claimed insanity using the substantial capacity test in his federal trial for the attempted murder of then-President Ronald Reagan. Public indignation at this not-guilty verdict caused many states and the federal government to *switch* from the substantial capacity test to the more inflexible M'Naghten standard (18 U.S.C., 2010). In addition, jurisdictions that switched to M'Naghten also shifted the burden of proving insanity to the *defendant* (Rolf, C. A., 2010). The defendant's burden of proof for the insanity defense is discussed shortly.

The substantial capacity test is as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law" (Model Penal Code § 4.01(1)). The defense has two elements. The first element requires the defendant to have a mental disease or defect, like the 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 claim. In addition, Loreen's behavior at the mental hospital indicates that she lacks the substantial capacity to conform or control her conduct. Even after a lifetime of being punished over and over for mixing her meds together and putting them in other people's food or drink, Loreen still does it. Lastly, in a substantial capacity jurisdiction, testimony from Loreen's friends at the mental hospital may be admissible to support her claim of insanity, and her lack of ability to "appreciate" the criminality of her conduct.

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5.7.4: The Durham Insanity Defense

The **Durham insanity defense** is used only in New Hampshire and has been the established insanity defense in New Hampshire since the late 1800s. The Durham defense, also called the **Durham rule** or the **product test**, was adopted by the Circuit Court of Appeals for the District of Columbia in the case of *Durham v. U.S.*, 214 F.2d 862 (1954). The defense set forth in that case is as follows: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect" (Durham v. U.S., 2010). However, the court failed to give definitions for product, mental disease, or mental defect. Thus the Durham insanity defense is extremely difficult to apply, and the D.C. Circuit rejected it in 1972 in the case of *U.S. v. Brawner*, 471 F.2d 969 (1972), which was later superseded by federal statute (18 U.S.C., 2010).

In general, the Durham insanity defense relies on ordinary principles of **proximate causation**. The defense has two elements. First, the defendant must have a mental disease or defect. Although these terms are not specifically defined in the *Durham* case, the language of the judicial opinion indicates an attempt to rely more on objective, psychological standards, rather than focusing on the defendant's subjective cognition. The second element has to do with **causation**. If the criminal conduct is "caused" by the mental disease or defect, then the conduct should be excused under the circumstances.

Example of the Durham Insanity Defense

Arianna has been diagnosed with **paranoia**. Most psychiatric experts agree that individuals afflicted with paranoia unreasonably believe that the human population is "out to get them." Arianna works under the direct supervision of Nora, who has a physical condition called "walleye." Nora's walleye makes it appear that she is looking to the side when she addresses people. Arianna gradually becomes convinced that Nora is communicating secret messages to their coworkers when she is speaking to Arianna. Arianna is genuinely frightened that Nora is telling their coworkers to kill her, and she decides she needs to defend herself. Arianna brings a gun to work one day, and when Nora begins talking to her about her tendency to take overlong lunches, Arianna pulls the gun out of her cubicle and shoots and kills Nora.

Arianna claims she is not guilty for killing Nora by reason of insanity. If Arianna killed Nora in New Hampshire, she might be successful with her claim. Arianna has a mental disease or defect, **paranoia**. Arianna can probably produce evidence, such as psychiatric expert testimony, that her paranoia "caused" or "produced" her criminal conduct, which was shooting Nora. Thus a trier of fact could acquit Arianna on the grounds that her conduct is excusable under these circumstances.

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5.7.5: Proving Insanity

There is generally a **presumption** that criminal defendants are *sane*, just as there is a presumption that they are *innocent*. Therefore, at a minimum, a defendant claiming insanity must produce evidence that rebuts this presumption. Some states require the prosecution to thereafter prove sanity beyond a reasonable doubt or to a preponderance of evidence (Elkins, J.R., and students, 2010).

Post-*Hinckley*, many states have converted the insanity defense into an affirmative defense. Thus as discussed in Chapter 5 "Criminal Defenses, Part 1", the defendant may also have the burden of persuading the trier of fact that he or she is insane to a preponderance of evidence (New Jersey Jury Instruction on Insanity, 2010). The federal government and some other states require the defendant to prove insanity by **clear and convincing evidence**, which is a higher standard than preponderance of evidence (Tenn. Code Ann., 2010).

Diminished Capacity

A claim of **diminished capacity** differs from the insanity defense. Diminished capacity is an **imperfect failure of proof defense** recognized in a minority of jurisdictions. Diminished capacity could reduce a first-degree murder charge to second-degree murder or manslaughter if the defendant lacks the mental capacity to form the appropriate criminal intent **for first-degree murder**.

In California, diminished capacity was abolished as an affirmative defense after San Francisco Supervisor Dan White used it successfully in his trial for the murder of fellow Supervisor Harvey Milk. A jury convicted White of voluntary manslaughter rather than first-degree premeditated murder after reviewing evidence that proved his diet of junk food (Twinkies) created a chemical imbalance in his brain. In the aftermath of this highly publicized trial, California passed legislation eliminating the diminished capacity defense and limiting the admissibility of evidence of diminished capacity only to sentencing proceedings (Cal. Penal Code, 2010).

Similar to diminished capacity is the **syndrome defense**. A syndrome that negates the requisite intent for the crime could function as a **failure of proof defense** in a minority of jurisdictions. Some common examples of syndromes the American Psychiatric Association recognizes in the *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition (*DSM-IV*), are antisocial personality disorder, posttraumatic stress disorder, and intermittent explosive disorder. Some common examples of syndromes identified but not recognized in *DSM- IV* are battered woman or battered wife syndrome (discussed in Chapter 5 "Criminal Defenses, Part 1") and caffeine withdrawal. Although successful use of the syndrome defense is rare, at least one case has excused a defendant's drunken driving and assault and battery against a police officer because of premenstrual syndrome (PMS) (Baltimore.com, 2011).

Mental Competence to Stand Trial

The insanity defense is different from **mental competence to stand trial**. The insanity defense pertains to the defendant's mental state when he or she commits the crime. If the insanity defense is successful, it *exonerates* the defendant from guilt. Mental competence to stand trial is analyzed at the time the trial is to take place. If the defendant is mentally incompetent to stand trial, the trial is delayed until the defendant regains competency.

Although a detailed discussion of mental competence to stand trial is beyond the scope of this book, in general, a criminal defendant must be able to understand the charges against him or her, and be able to assist in his or her defense. As the Model Penal Code provides, "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures" (Model Penal Code § 4.04). A defendant who is mentally incompetent at the time of trial is subject to mental health treatment or even involuntary medication until competence is regained.

Guilty but Mentally Ill

Post-*Hinckley*, some states adopted the **guilty but mentally ill verdict**. A defendant who is found **guilty but mentally ill** is not *acquitted* but punished and treated for mental health simultaneously while in prison. Typically, the guilty but mentally ill verdict is available only when the defendant fails to prove legal insanity, and requires the defendant to prove mental illness at the time of the crime to a preponderance of evidence (725 ILCS, 2010).

> **Example of Guilty but Mentally Ill**
>
> Review the example with Jolene in "Example of a Case Inappropriate for the Irresistible Impulse Insanity Defense". In this example, Jolene has been diagnosed with paranoia, but shows an ability to control and understand the wrongfulness of her conduct, so she probably will not be successful with an irresistible impulse insanity defense. If Jolene is in a state that offers a guilty but mentally ill verdict, Jolene may be an appropriate candidate because she was mentally ill at the time she assaulted and battered her sorority sister. If Jolene is found guilty but mentally ill, she will be treated for her mental health simultaneously while serving any prison sentence.

Disposition of the Legally Insane

The not guilty by reason of insanity verdict means that the defendant is absolved from criminal responsibility and devoid of any criminal record for the offense. However, it does *not* mean that the defendant is free to return to society.

In several states and federally, a defendant who is found not guilty by reason of insanity is *automatically committed* to a treatment facility until there is a determination that mental health has been restored (18 U.S.C., 2010). This is also the Model Penal Code approach. As the Model Penal Code states in § 4.08(1), "[w]hen a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, care and treatment."

Other states have a hearing on sanity after the judgment or verdict of not guilty by reason of insanity is returned. If the defendant is deemed mentally competent at the hearing, he or she is *released*. If the defendant is found mentally ill at the hearing, he or she is *committed* to the appropriate treatment facility (Ohio Rev. Code Ann., 2010).

Temporary Insanity

Many states also recognize **temporary insanity**, which does not differ in analysis from permanent insanity except for the duration of the mental illness (Malo, A., Barach, M. P., & Levin, J. A., 2010). In a state that recognizes temporary insanity, the elements of the state's insanity defense, either **M'Naghten**, **irresistible impulse**, **substantial capacity**, or **Durham**, must be present at the time the crime was committed. If the defendant is found not guilty by reason of insanity for the criminal offense, but regains mental competence at the time of prosecution, the defendant is *released* after the verdict is rendered. The trial court will order release based on the commitment procedure discussed in "Disposition of the Legally Insane".

> **Example of Temporary Insanity**
>
> In Virginia in 1994, Lorena Bobbitt was tried for the crime of slicing off her husband's penis. Bobbitt pleaded not guilty to malicious wounding by reason of insanity. Bobbitt successfully established the **irresistible impulse insanity defense** by presenting evidence of years of spousal abuse, a forced abortion, and rape on the night of the incident (Bell, R., 2010; law.jrank.org, 2010). After the jury returned the verdict of not guilty by reason of insanity, Bobbitt was evaluated, deemed mentally competent, and released (Bell, R., 2010).

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5.7.6: Key Takeaways

- 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 have the mental capacity to form first-degree murder criminal intent. The insanity defense is generally a perfect affirmative defense in many jurisdictions.
- The insanity defense exonerates the defendant from criminal responsibility. Mental incompetence to stand trial delays the criminal trial until mental competency is regained.
- The guilty but mentally ill verdict finds the criminal defendant guilty but orders him or her to undergo mental health treatment while incarcerated. The insanity defense is generally a perfect affirmative defense in many jurisdictions.
- The federal government and some states automatically commit a criminal defendant to a mental health facility after an acquittal based on insanity. Other states have a postverdict hearing to rule on commitment.
- A claim of temporary insanity is the same as a claim of insanity except for the duration of the mental illness.

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5.8: Infancy, Intoxication, Ignorance, and Mistake

Study Points

1. Define the infancy defense.
2. Distinguish a juvenile court adjudication from a criminal prosecution.
3. Ascertain four criteria that could support a juvenile court waiver of jurisdiction.
4. Identify a situation where voluntary intoxication may provide a defense.
5. Define involuntary intoxication.
6. Compare the defenses of voluntary and involuntary intoxication.
7. Identify a situation where mistake of law may provide a defense.
8. Identify a situation where mistake of law is not a valid defense.
9. Identify a situation where mistake of fact may provide a defense.
10. Identify a situation where mistake of fact is not a valid defense.

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5.8.1: Infancy

Many states recognize the defense of **infancy**. **Infancy** asserts that the defendant is not subject to criminal prosecution because he or she is *too young* to commit a crime. The policy supporting the infancy defense is the belief that juvenile defendants are too immature to form criminal intent. The infancy defense is typically statutory and can be perfect or imperfect, depending on the jurisdiction.

States divide up the jurisdiction of criminal defendants between juvenile courts and adult courts. Juvenile court systems generally retain jurisdiction over criminal defendants under the age of sixteen, seventeen, or eighteen, with exceptions. The Model Penal Code position is that "[a] person shall not be tried for or convicted of an offense if: (a) at the time of the conduct charged to constitute the offense he was less than sixteen years of age, [in which case the Juvenile Court shall have exclusive jurisdiction]" (Model Penal Code § 4.10(1)(a)).

The primary purpose of a juvenile court adjudication is **rehabilitation**. The goal is to reform the minor before he or she becomes an adult. In most states, the infancy defense protects a youthful defendant from criminal prosecution as an *adult*; it does not prohibit a juvenile adjudication. Most minor defendants are adjudicated in juvenile court, so the infancy defense is rarely used.

Juveniles *can* be prosecuted as adults under certain specified circumstances. At early common law, criminal defendants were divided into three age groups. Those under the age of seven were deemed incapable of forming criminal intent, and could not be criminally prosecuted. Defendants between the ages of seven and fourteen were provided a **rebuttable presumption** that they lacked the mental capacity to form criminal intent. Once a defendant turned fourteen, he or she was subject to an adult criminal prosecution. Modern *statutes* codify the adult criminal prosecution standard for different age groups. Some states follow the early common law and set up rebuttable and irrebuttable presumptions based on the defendant's age (RCW 9A.04.050, 2010). Other states set forth a minimum age, such as fourteen or sixteen, and defendants who have reached that age are prosecuted as adults (N.Y. Penal Law § 30.00, 2010).

When a juvenile court has jurisdiction, the jurisdiction must be forfeited if the juvenile is to be prosecuted as an adult. This process is called **waiver**. Juvenile courts can have exclusive jurisdiction over minors under eighteen, or **concurrent or simultaneous jurisdiction** with adult courts, depending on the state.

States vary as to the waiver procedure. Some states allow judges to use discretion in granting the waiver, while others vest this power in the legislature or the prosecutor (Sickmund, M., 2010). A few factors serve as criteria supporting the waiver to adult criminal court: the nature of the offense, the sophistication it requires, the defendant's criminal history, and the threat the defendant poses to public safety (Kent v. United States, 2010).

> **Example of the Infancy Defense**
>
> Mario is ten years old. Mario shoplifts some candy from the local market and is arrested. The newly elected district attorney decides to make an example of Mario, and begins an adult criminal prosecution against him for theft. In Mario's state, the juvenile court has exclusive jurisdiction over individuals under the age of eighteen. Mario can probably claim **infancy** as a perfect defense to the theft charge. Mario should be adjudicated in juvenile court, not prosecuted as an adult. Therefore, the juvenile court has jurisdiction in this case and Mario's criminal prosecution should be dismissed.

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5.8.2: Intoxication

Intoxication is another defense that focuses on the defendant's inability to form the requisite criminal intent. In general, intoxication can be based on the defendant's use of alcohol, legal drugs, or illegal drugs. The Model Penal Code defines intoxication as "a disturbance of mental or physical capacities resulting from the introduction of substances into the body" (Model Penal Code § 2.08(5) (a)). The intoxication defense could be perfect or imperfect, statutory or common law, depending on the jurisdiction.

Intoxication is a state that is achieved either *voluntarily* or *involuntarily*. Most states frown on the use of voluntary intoxication as a defense, and allow it only to reduce the severity of the crime charged (N.Y. Penal Law § 15.25, 2010). Recall from Chapter 4 "The Elements of a Crime" that if a defendant voluntarily undertakes action, such as drinking or ingesting drugs, the **voluntary act** requirement is met. Conduct that occurs *after* the voluntary intoxication probably is not excused unless the intoxication prevents the defendant from forming the criminal intent required for the offense (Or. Rev. Stat., 2010). If the crime charged is a reckless intent crime, voluntary intoxication rarely provides even an imperfect defense (Tenn. Code Ann., 2010).

Involuntary intoxication is more likely to provide a defense than voluntary intoxication. Generally, a defendant can claim involuntary intoxication if he or she ingested the drug or alcohol unknowingly or under force, duress, or fraud (California Jury Instructions No. 3427, 2010). Involuntary intoxication could affect the defendant's ability to form criminal intent, thus negating specific intent, dropping murder a degree, or converting murder to manslaughter. The Model Penal Code equates involuntary intoxication with the substantial capacity test, providing "[i]ntoxication which (a) is not self-induced...is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law" (Model Penal Code § 2.08 (4)).

> **Example of the Intoxication Defense**
>
> Clint slips a date rape drug into Delilah's drink at a fraternity party. Delilah is twenty-one and legally able to consume alcohol. The date rape drug produces a state of unconsciousness during which Delilah severely beats a sorority sister. Delilah can probably claim involuntary intoxication as a defense in this situation. Although Delilah voluntarily drank the alcohol, she became intoxicated from the date rape drug that she ingested *unknowingly*. Delilah could be acquitted or could have a charge of aggravated battery reduced, depending on the jurisdiction.

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5.8.3: 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 (Tex. Penal Code, 2010). 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 negligence required to establish a material element of the offense; or (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense" (Model Penal Code § 2.04(1)).

Most states require that the mistake of law be founded on a *statute* or *judicial decision* that is later overturned (La. Rev. Stat. Ann, 2010). The Model Penal Code states, "A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when…the actor…acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid…contained in…a statute or…judicial decision" (Model Penal Code § 2.04(3) (b)).

Incorrect advice from a licensed attorney *cannot* form the basis of a mistake of law defense (Hopkins v. State, 2010). Nor can mistake of law be rooted in *ignorance of the law* because all individuals are required to know the criminal laws effective in their jurisdiction. The Model Penal Code provides, "A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise made available prior to the conduct" (Model Penal Code § 2.04(3) (a)).

Example of the Mistake of Law Defense

Shelby, an attorney, researches current case law and determines that it is legal to sell products over the Internet and not charge sales tax. Shelby starts selling designer clothing on eBay and does not charge her customers any sales tax. The case decision that Shelby relied on is *overturned* by a court of appeals. Shelby can probably assert **mistake of law** as a defense to the crime of evading payment of sales tax.

Example of a Case That Is Inappropriate for the Mistake of Law Defense

Review the mistake of law defense example given in "Example of the Mistake of Law Defense". Assume that in Shelby's state, it is currently illegal to sell products over the Internet without charging sales tax.

Jonathan meets with Shelby, and asks her to research whether he needs to charge sales tax when he sells products over the Internet. Shelby agrees to research the matter and get back to Jonathan the next day with an answer. After Jonathan leaves, Shelby is contacted by her friend Margaret, who wants to take an impromptu trip to New York City. Margaret asks Shelby if she would like to come along. Shelby agrees, rushes home, packs for the trip, and leaves with Margaret. The next day while Shelby is watching a Broadway play with Margaret, Jonathan calls Shelby on her cell phone and asks Shelby what her research revealed about the sales tax question. Even though she has *not* done any research on the matter, Shelby responds, "I just finished the research. You do not need to charges sales tax when you sell products over the Internet." If Jonathan thereafter relies on Shelby's incorrect advice, and sells products over the Internet without charging sales tax, he probably will *not* be able to assert **mistake of law** as a defense. Incorrect advice from an attorney cannot excuse criminal conduct, even if the crime is committed *because* of the faulty legal opinion. Therefore, Jonathan could be charged with tax evasion in this situation.

Mistake of Fact

Mistake of fact is more likely to provide a defense than mistake of law. If the facts *as the defendant believes them to be* negate the requisite intent for the crime at issue, the defendant can assert mistake of fact as a defense (N.H. Rev. Stat. Ann., 2010). Mistake of fact is generally not a defense to **strict liability** crimes because intent is not an element of a strict liability offense (People v. Olsen, 2010).

Example of the Mistake of Fact Defense

Mickie sees Rachel, his neighbor, riding his bicycle in her driveway. Mickie walks quickly up to Rachel and demands that she get off the bike and return it to his garage. Frightened, Rachel hops off and runs to her house, leaving the bike behind. Mickie walks the bike over to his garage. Once Mickie reaches the garage, he sees that his bike, which is an exact replica of Rachel's, is already inside. Mickie may be able to use **mistake of fact** as a defense to theft. As is discussed in Chapter 11 "Crimes against Property", the intent for theft is the intent to take the property of *another* person. Mickie believed Rachel's bike was *his*. Thus Mickie's mistake of fact negates the intent required for this offense.

Example of a Case That Is Inappropriate for the Mistake of Fact Defense

Tina is pulled over for speeding. Tina claims her speedometer is broken, so she was mistaken as to her speed. Tina probably *cannot* assert **mistake of fact** as a defense in this case. Speeding is generally a **strict liability** offense. Thus Tina's mistaken belief as to the facts is not *relevant* because there is no intent required for this crime.

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5.8.4: Key Takeaways

- Infancy is a defense to an adult criminal prosecution if the defendant is too young to form the requisite criminal intent for the offense.
- The purpose of an adult criminal prosecution is punishment; the purpose of a juvenile adjudication is rehabilitation of the minor before he or she becomes an adult.
- Four criteria that could support a juvenile court waiver of jurisdiction are the nature of the offense, the sophistication it requires, the defendant's criminal history, and the threat the defendant poses to public safety.
- Voluntary intoxication may provide a defense if the intoxication prevents the defendant from forming the requisite criminal intent for the offense.
- Involuntary intoxication is intoxication achieved unknowingly or pursuant to force, duress, or fraud.
- Voluntary intoxication is frowned on as a defense and in many states does not provide a defense to certain crimes, such as reckless intent crimes. Involuntary intoxication is more likely to serve as a defense any time the defendant is incapable of forming the requisite criminal intent for the offense.
- Mistake of law may provide a defense if the defendant believes his or her conduct is legal because of reliance on a statute or judicial opinion that is later overturned.
- Mistake of law is not a defense when the defendant believes his or her conduct is legal because of reliance on the incorrect advice of an attorney.
- If the facts as the defendant believes them to be prevent the defendant from forming the requisite intent for the crime, mistake of fact could be a valid defense.
- Mistake of fact is not a defense to strict liability crimes because intent is not an element.

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5.9: Entrapment

Study Points

- Compare the subjective and objective entrapment defenses

Historically, no legal limit was placed on the government's ability to induce individuals to commit crimes. The Constitution does not expressly prohibit this governmental action. Currently, however, all states and the federal government provide the defense of **entrapment**. The entrapment defense is based on the government's use of inappropriately persuasive tactics when apprehending criminals. Entrapment is generally a perfect affirmative statutory or common-law defense.

Entrapment focuses on the *origin* of criminal intent. If the criminal intent originates with the *government or law enforcement*, the defendant is entrapped and can assert the defense. If the criminal intent originates with the *defendant*, then the defendant is acting independently and can be convicted of the offense. The two tests of entrapment are **subjective entrapment** and **objective entrapment**. The federal government and the majority of the states recognize the subjective entrapment defense (Connecticut Jury Instruction on Entrapment, 2010). Other states and the Model Penal Code have adopted the objective entrapment defense (People v. Barraza, 2010).

Subjective Entrapment

It is entrapment pursuant to the subjective entrapment defense when law enforcement pressures the defendant to commit the crime against his or her will. The subjective entrapment test focuses on the *defendant's* individual characteristics more than on law enforcement's behavior. If the facts indicate that the defendant is *predisposed* to commit the crime without law enforcement pressure, the defendant will not prevail on the defense.

The defendant's criminal record is admissible if relevant to prove the defendant's criminal nature and predisposition. Generally, law enforcement can furnish criminal opportunities and use decoys and feigned accomplices without crossing the line into subjective entrapment. However, if it is clear that the requisite intent for the offense originated *with law enforcement*, not the *defendant*, the defendant can assert subjective entrapment as a defense.

Example of Subjective Entrapment

Winifred regularly attends Narcotics Anonymous (NA) for her heroin addiction. All the NA attendees know that Winifred is a dedicated member who has been clean for ten years, Marcus, a law enforcement decoy, meets Winifred at one of the meetings and begs her to "hook him up" with some heroin. Winifred refuses. Marcus attend the next meeting, and follows Winifred out to her car pleading with her to get him some heroin. After listening to Marcus explain his physical symptoms of withdrawal in detail, Winifred feels pity and promises to help Marcus out. She agrees to meet Marcus in two hours with the heroin. When Winifred and Marcus meet at the designated location, Marcus arrests Winifred for sale of narcotics. Winifred may be able to assert entrapment as a defense if her state recognizes the **subjective entrapment defense**. Winifred has not used drugs for ten years and did not initiate contact with law enforcement. It is unlikely that the intent to sell heroin *originated* with Winifred because she has been a dedicated member of NA, and she actually met Marcus at an NA meeting while trying to maintain her sobriety. Thus it appears that Marcus *pressured* Winifred to sell heroin against a natural *predisposition*, and the entrapment defense may excuse her conduct.

Objective Entrapment

The objective entrapment defense focuses on the *behavior of law enforcement*, rather than the individual defendant. If law enforcement uses tactics that would induce a *reasonable*, *law-abiding* person to commit the crime, the defendant can successfully assert the entrapment defense in an objective entrapment jurisdiction. The objective entrapment defense focuses on a reasonable

person, not the actual defendant, so the defendant's predisposition to commit the crime is not relevant. Thus in states that recognize the objective entrapment defense, the defendant's criminal record is not admissible to disprove the defense.

Example of Objective Entrapment

Winifred has a criminal record for prostitution. A law enforcement decoy offers Winifred $10,000 to engage in sexual intercourse. Winifred promptly accepts. If Winifred's jurisdiction recognizes the **objective entrapment defense**, Winifred may be able to successfully claim entrapment as a defense to prostitution. A *reasonable*, *law- abiding person* could be tempted into committing prostitution for a substantial sum of money like $10,000. The objective entrapment defense focuses on *law enforcement* tactics, rather than the predisposition of the defendant, so Winifred's criminal record is irrelevant and is not admissible as evidence. Thus it appears that law enforcement used an excessive inducement, and entrapment may excuse Winifred's conduct in this case.

Key Takeaways

- The subjective entrapment defense focuses on the individual defendant, and provides a defense if law enforcement pressures the defendant to commit the crime against his or her will. If the defendant is predisposed to commit the crime without this pressure, the defendant will not be successful with the defense. Pursuant to the subjective entrapment defense, the defendant's criminal record is admissible to prove the defendant's predisposition. The objective entrapment defense focuses on law enforcement behavior, and provides a defense if the tactics law enforcement uses would convince a reasonable, law-abiding person to commit the crime. Under the objective entrapment defense, the defendant's criminal record is irrelevant and inadmissible.

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5.10: Summary

The federal government and every state except Montana, Utah, Kansas, and Idaho recognize the insanity defense. A not guilty by reason of insanity verdict is an acquittal for the offense. The policy supporting the insanity defense is the lack of deterrent effect when punishing the legally insane. Four insanity defenses are recognized in the United States: M'Naghten, irresistible impulse, substantial capacity, and Durham. The M'Naghten insanity defense is cognitive and excuses criminal conduct when the defendant is suffering from a mental defect or disease that prevents the defendant from knowing the nature or quality of conduct or from knowing that conduct is wrong. The irresistible impulse insanity defense adds a volitional component and excuses conduct the defendant cannot control because of a mental defect or disease. The substantial capacity test was created by the Model Penal Code and softens the requirements to substantial, rather than total, capacity to appreciate the criminality of conduct or to conform conduct to the law. The Durham insanity defense is recognized only in New Hampshire, and excuses conduct that is the product of or caused by a mental disease or defect. Jurisdictions vary as to the burden of proving insanity. All jurisdictions require the defendant to rebut a presumption that he or she is sane; some also require the defendant to persuade the trier of fact that he or she is legally insane to a preponderance of evidence or clear and convincing evidence (which is a higher standard than preponderance of evidence).

A minority of jurisdictions recognizes diminished capacity and the syndrome defense when the defendant cannot form the requisite criminal intent for the offense because of a mental impairment. The criminal defendant must also be mentally competent to stand trial, which means the defendant can understand the charges brought against him or her and can assist in any defense. Some jurisdictions recognize a guilty but mentally ill verdict, which does not exonerate the defendant, but provides for mental health treatment while incarcerated. Temporary insanity is also a defense in some jurisdictions and does not differ from the insanity defense except for the duration of the mental defect or disease.

The infancy defense excuses conduct when the defendant is too young to form criminal intent for the offense. The infancy defense is generally not available in juvenile adjudications, so it is rarely asserted because most youthful defendants are under the jurisdiction of juvenile courts. Juvenile courts can waive this jurisdiction and allow for an adult criminal prosecution under certain circumstances, considering the criteria of the nature of the offense, the sophistication it requires, the defendant's prior criminal history, and the threat the defendant poses to public safety.

Other excuse defenses are intoxication, ignorance, and mistake. Voluntary intoxication is frowned on as a defense, but will occasionally excuse conduct if it negates certain high-level criminal intent requirements. Involuntary intoxication, which is intoxication achieved unknowingly, or under duress or fraud, is more likely to provide a defense if it affects the defendant's capacity to form criminal intent. Ignorance of the law is not a defense because individuals are expected to know the laws of their jurisdiction. Mistake of law, which means the defendant does not know conduct is illegal, functions as a defense if the mistake is based on a judicial opinion or statute that is later overturned. Mistake of law is not a defense if the mistake is rooted in incorrect legal advice from an attorney. Mistake of fact is a defense if the facts as the defendant believes them to be negate the intent required for the offense.

Entrapment is also a defense in every jurisdiction. Most states and the federal government recognize the subjective entrapment defense, which focuses on the defendant's predisposition, and does not excuse conduct if the defendant would have committed the crime without law enforcement pressure. In a subjective entrapment jurisdiction, the defendant's criminal record is admissible to prove predisposition to commit the crime at issue. Objective entrapment is the Model Penal Code approach and excuses conduct if the pressure by law enforcement would induce a reasonable, law-abiding person to commit the crime. The defendant's criminal record is not admissible to show predisposition in an objective entrapment jurisdiction because the focus is on law enforcement tactics, not the defendant's nature.

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6: PARTIES TO CRIME

6.1: Study Points

6.2: Accomplice Liability

6.3: Vicarious Liability

6.4: Accessory

6.5: Key Takeaways

6.6: Summary

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6.1: Study Points

- Identify the four parties to crime at early common law.
- Identify the parties to crime in modern times.
- Define the criminal act element required for accomplice liability.
- Define the criminal intent element required for accomplice liability.
- Define the natural and probable consequences doctrine.
- Discuss the consequences of accomplice liability.
- Determine whether an accomplice can be prosecuted when the principal is not prosecuted or acquitted

Often more than one criminal defendant plays a role in the commission of a crime. Defendants working together with a common criminal purpose or design are acting with **complicity**. When the participation and criminal conduct varies among the defendants, an issue arises as to *who* is responsible for *which* crime and to *what degree*. This chapter analyzes different parties to crime, along with their accompanying criminal liability. Chapter 8 “Inchoate Offenses” examines crimes that necessarily involve more than one person such as **conspiracy** and **solicitation**, as well as another **inchoate** or incomplete crime, **attempt**.

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6.2: Accomplice Liability

At early common law, parties to crime were divided into four categories. A **principal in the first degree** actually committed the crime. A **principal in the second degree** was present at the scene of the crime and assisted in its commission. An **accessory before the fact** was not present at the scene of the crime, but helped prepare for its commission. An **accessory after the fact** helped a party to the crime after its commission by providing comfort, aid, and assistance in escaping or avoiding arrest and prosecution or conviction.

In modern times, most states and the federal government divide parties to crime into two categories: **principal**, and **accessories** (Idaho Code Ann., 2010). The criminal actor is referred to as the **principal**, although all **accomplices** have equal criminal responsibility as is discussed in "Parties to Crime".

Accomplice Elements

An accomplice under most state and federal statutes is responsible for the same crime as the criminal actor or **principal** (18 U.S.C., 2010). However, accomplice liability is **derivative**; the accomplice does not actually have to commit the crime to be responsible for it. The policy supporting accomplice liability is the idea that anParties to Crime 228

individual who willingly participates in furthering criminal conduct should be accountable for it to the same extent as the criminal actor. The degree of participation is often difficult to quantify, so statutes and cases attempt to segregate blameworthy accomplices based on the **criminal act** and **intent** elements, as is discussed in Section 7.1 "Parties to Crime".

Accomplice Act

In the majority of states and federally, an accomplice must voluntarily act in some manner to *assist* in the commission of the offense. Some common descriptors of the **criminal act** element required for accomplice liability are aid, abet, assist, counsel, command, induce, or procure (K.S.A., 2010). Examples of actions that qualify as the accomplice criminal act are helping plan the crime, driving a getaway vehicle after the crime's commission, and luring a victim to the scene of the crime. The Model Penal Code defines the accomplice criminal act element as "aids...or attempts to aid such other person in planning or committing [the offense]" (Model Penal Code § 2.06(3) (a) (ii)).

In many states, **words** are enough to constitute the criminal act element required for accomplice liability (N.Y. Penal Law, 2010). On the other hand, mere presence at the scene of the crime, even presence at the scene combined with *flight*, is not sufficient to convert a bystander into an accomplice (Commonwealth v. Hargrave, 2010). However, if there is a **legal duty to act**, a defendant who is present at the scene of a crime without preventing its occurrence could be liable as an accomplice in many jurisdictions (People v. Rolon, 2010). As the Model Penal Code provides, "[a] person is an accomplice of another person in the commission of an offense if...having a legal duty to prevent the commission of the offense, fails to make proper effect so to do" (Model Penal Code § 2.06(3)(a)(iii)).

Example of a Case Lacking Accomplice Act

Review the criminal law issues example in Chapter 1 "Introduction to Criminal Law", "Example of Criminal Law Issues". In that example, Clara and Linda go on a shopping spree. Linda insists that they browse an expensive department store. After they enter the lingerie department, Linda surreptitiously places a bra into her purse. Clara watches, horrified, but does not say anything, even though a security guard is standing nearby. As Linda and Clara leave the store, an alarm is activated. Linda and Clara run away with the security guard in pursuit. In this case, Clara has probably *not* committed the criminal act element required for accomplice liability. Although Clara was *present at the scene* of the crime and did not alert the security guard, mere presence at the scene is not sufficient to constitute the accomplice criminal act. Clara fled the scene when the alarm went off, but presence at the scene of a crime combined with flight is *still not enough* to comprise the accomplice criminal act. Thus Clara has probably not committed theft as an accomplice, and only Linda is subject to a criminal prosecution for this offense.

Example of Accomplice Act

Phoebe, the parent of a two-year-old named Eliza, watches silently as her live-in boyfriend Ricky beats Eliza. In Phoebe's state, parents have a duty to come to the aid of their children if their safety is threatened. Ricky severely injures Eliza, and both Phoebe and Ricky are arrested and charged with battery and child endangerment. Phoebe probably *has* committed the criminal act element required for accomplice liability in many jurisdictions. Phoebe does not personally act to physically harm her child. However, her *presence at the scene* combined with a *legal duty to act* could be enough to make her an accomplice. Thus Phoebe has most likely committed battery and child endangerment as an accomplice, and both *she* and *Ricky* are subject to a criminal prosecution for these offenses.

Accomplice Intent

The criminal intent element required for accomplice liability varies, depending on the jurisdiction. In many jurisdictions, the accomplice must act with **specific intent** or **purposely** when aiding or assisting the principal (Or. Rev. Stat., 2010). Specific intent or purposely means the accomplice desires the principal to commit the crime. The Model Penal Code follows this approach and requires the accomplice to act "with the purpose of promoting or facilitating the commission of the offense" (Model Penal Code § 2.06(3) (a)). In other jurisdictions, if the crime is *serious* and the accomplice acts with **general intent** or **knowingly** or has *awareness* that the principal will commit the crime with his or her assistance, intent to further the crime's commission could be inferred (People v. Lauria, 2010). In a minority of jurisdictions, only **general intent** or acting **knowingly** that the crime will be promoted or facilitated is required, regardless of the crime's seriousness (Washington Rev. Code Ann., 2010).

Example of Accomplice Intent

Joullian, a hotel owner, rents a hotel room to Winnifred, a prostitute. In a state that requires an accomplice to act with **specific intent** or **purposely**, Joullian must *desire* Winnifred to commit prostitution in the rented room to be Winnifred's accomplice. Evidence that Joullian stands to benefit from Winnifred's prostitution, such as evidence that he will receive a portion of the prostitution proceeds, could help prove this intent. If Joullian's state allows for an inference of **specific intent** or **purposely** with *serious* crimes when an accomplice acts with **general intent** or **knowingly**, it is unlikely that prostitution is a felony that would give rise to the inference. If Joullian's state requires only **general intent** or **knowingly** for accomplice liability regardless of the crime's seriousness, to be deemed an accomplice Joullian must simply be *aware* that renting Winnifred the room will promote or facilitate the act of prostitution.

The Natural and Probable Consequences Doctrine

Accomplice liability should be imputed only to blameworthy, deserving defendants. However, in some jurisdictions, if the crime the defendant intentionally furthers is *related* to the crime the principal actually commits, the defendant is deemed an accomplice. As with legal causation, discussed in Chapter 4 "The Elements of a Crime", foreseeability is the standard. Under the **natural and probable consequences doctrine**, if the defendant assists the principal with the intent to further a specific crime's commission, and the principal commits a *different* crime that is *foreseeable* at the time of the defendant's assistance, the defendant could be liable as an accomplice (ME Rev. Stat. Ann., 2010). Several jurisdictions have rejected this doctrine as an overly harsh extension of accomplice liability (Bogdanov v. People, 2010).

Example of the Natural and Probable Consequences Doctrine

José shows up drunk and unruly at his friend Abel's house and tells Abel he wants to "beat the hell" out of his girlfriend Maria. José asks Abel to drive him to Maria's house, and Abel promptly agrees. Abel drives José to Maria's house and waits in the car with the engine running. José forces his way into Maria's house and then beats and thereafter rapes her. If José and Abel are in a jurisdiction that recognizes the natural and probable consequences doctrine, the trier of fact could find

that Abel is an accomplice to the battery, burglary, and rape of Maria. Abel appears to have the criminal intent required to be an accomplice to **battery** because he assisted José in his quest to *beat* Maria. If burglary and rape were *foreseeable* when Abel drove a drunk and angry José to Maria's house, the natural and probable 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**.

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 extenuating 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 "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 "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 (Standefer v. U.S., 2010). 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 commission, punishment for the completed crime is appropriate. As the Model Penal Code states, "[a]n accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense...or has been acquitted" (Model Penal Code § 2.06(7)).

Example of Prosecution of an Accomplice When the Principal Is Not Prosecuted

Review the example in Section 7 "Example of the Natural and Probable Consequences Doctrine" with José and Abel. Assume that after José burglarizes, beats, and rapes Maria, local police arrest José and Abel. The police transport José and Abel to the police station and take them to separate rooms for interrogation. The police officer who interrogates José is a rookie and forgets to read José his Miranda rights. Thereafter, the police contact Maria, but she refuses to cooperate with the investigation because she fears reprisal from José. The district attorney decides not to prosecute José because of the tainted interrogation. In this case, Abel could *still be prosecuted* for battery and possibly rape and burglary as an accomplice in some jurisdictions. Although José is the **principal** and actually committed the crimes, it is not necessary for José to suffer the same criminal prosecution and punishment as Abel. If the elements required for accomplice liability are present, Abel can be fully responsible for the crimes *committed by José*, whether or not José is prosecuted for or convicted of these offenses.

Key Takeaways

- The four parties to crime at early common law were principals in the first degree, principals in the second degree, accessories before the fact, and accessories after the fact. These designations signified the following:
- Principals in the first degree committed the crime.
- Principals in the second degree were present at the crime scene and assisted in the crime's commission.

- Accessories before the fact were not present at the crime scene, but assisted in preparing for the crime's commission.
- Accessories after the fact helped a party to the crime avoid detection and escape prosecution or conviction.
- In modern times, the parties to crime are principals and their accomplices, and accessories.
- The criminal act element required for accomplice liability is aiding, abetting, or assisting in the commission of a crime. In many jurisdictions, words are enough to constitute the accomplice criminal act element, while mere presence at the scene without a legal duty to act is not enough.
- The criminal intent element required for accomplice liability is either specific intent or purposely or general intent or knowingly.
- The natural and probable consequences doctrine holds an accomplice criminally responsible if the crime the principal commits is foreseeable when the accomplice assists the principal.
- The consequences of accomplice liability are that the accomplice is criminally responsible for the crimes the principal commits.
- In many jurisdictions, an accomplice can be prosecuted for an offense even if the principal is not prosecuted

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6.3: Vicarious Liability

Vicarious liability, a concept discussed in Chapter 4 "The Elements of a Crime", also transfers liability from one defendant to another. However, vicarious liability should not be confused with accomplice liability. Accomplice liability is based on the defendant's participation in a criminal enterprise and **complicity** with the criminal actor or principal, but vicarious liability transfers a defendant's criminal responsibility for the crime to a different defendant because of a *special relationship*. With vicarious liability, the acting defendant also is criminally responsible for his or her conduct. Similar to the civil law concept of respondeat superior discussed in Chapter 1 "Introduction to Criminal Law", vicarious liability in criminal law is common between employers and employees. It is also the basis of **corporate liability**, which is discussed in "Corporate Liability".

Corporate Liability

At early common law, corporations were not criminally prosecutable as separate entities, which was most likely because in England, corporations were owned and operated by the government. In modern times, American corporations are private enterprises whose actions can seriously injure other individuals and the economy. Thus a corporation can be criminally

responsible for conduct apart from its owners, agents, or employees (New York Central R. Co. v. U.S., 2010). In general, this is a **vicarious liability**, transferring criminal responsibility for an offense *from* an **agent** or **employee** of the corporation *to* the corporation itself, based on the employment relationship. Of course, the agent or employee also is responsible for the crime he or she commits.

A corporation is vicariously liable only if an agent or employee commits a crime *during* the agent or employee's scope of employment (720 ILCS, 2010). As the Model Penal Code states, "[a] corporation may be convicted of the commission of an offense if...the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment" (Model Penal Code § 2.07(1)(a)). The criminal punishment for a corporation is generally payment of a fine.

> **Example of Corporate Liability**
>
> Harry, an employee of Burger King Corporation, shreds corporate documents in his office when Burger King is sued civilly for sexual harassment in a multimillion-dollar class action suit. Under modern theories of corporate liability, both Harry and Burger King could be criminally prosecuted for obstruction of justice. Note that Burger King's liability is **vicarious** and depends on its relationship with Harry as an employer and the fact that Harry is acting within the scope of employment. Vicarious liability is distinguishable from **accomplice liability**, where the accomplice must be complicit with the criminal actor. The owners of Burger King, who are the corporate shareholders, did not actively participate in Harry's conduct, although they will share in the punishment if the corporation is fined.

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 (State v. Akers, 2010). 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.

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6.4: Accessory

1. Distinguish between accomplice liability and the crime of accessory.
2. Define the criminal act element required for an accessory.
3. Define the criminal intent element required for an accessory. Compare various approaches to grading the crime of accessory

As stated in "Accomplice Liability", 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" (Mass. Gen. Laws ch. 274, 2011) or "hindering prosecution" (Haw. Rev. Stat., 2011).

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 s*eparate 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** (Va. Code Ann., 2010). 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 (N.R.S., 2010). In a minority of states, the defendant can be an accessory to any crime (Haw. Rev. Stat., 2011).

In many states, **words** are enough to constitute the accessory criminal act element (Minn. Stat. Ann., 2010). Often special categories of individuals are exempted from liability as an accessory, typically family members by blood or marriage (Vt. Stat. Ann. tit. 13, 2010).

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 accident, which is most likely **felony** drunk driving and hit and run. He also sheltered his father for the night, *concealing* him from law enforcement. If Jim is in a state that exempts family members from accessory liability, he may not be subject to prosecution because the principal to the crime(s) is his father. If Jim is not in a state that relieves family members from accessory liability, he could be fully prosecuted for and convicted of this offense.

Accessory Intent

The criminal intent element required for an accessory has two parts. First, the defendant must act with **general intent** or **knowingly** or *awareness* that the principal committed a crime. Second, the defendant must help or assist the principal escape or evade arrest or prosecution for and conviction of the offense with **specific intent** or **purposely** (Mass. Gen. Laws ch. 274, 2010).

Example of Accessory Intent

Review the example with Jim and James given in "Example of Accessory Act". In this case, Jim is **aware** that James committed a crime because James told Jim he got into an accident and James's intoxicated condition was apparent. Nonetheless, Jim **purposely** helped James evade arrest and an alcohol screening by sheltering him in his home while the effects of the alcohol dissipated. Thus Jim probably has the **criminal intent** required for liability as an accessory in most jurisdictions. If Jim is not in a state that exempts family members from accessory liability, he could be fully subject to prosecution for and conviction of this offense.

Accessory Grading

As stated in "Accessory", in many jurisdictions accessory is an offense that is **graded** less severely than the crime committed by the principal. Accessory is typically graded as a misdemeanor (Haw. Rev. Stat., 2011), although in some jurisdictions it is graded as a felony (Idaho Code Ann., 2011).

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6.5: Key Takeaways

- Accomplice liability holds a complicit defendant accountable for the crime the principal commits; accessory is a separate crime that is typically a misdemeanor.
- The criminal act element required for an accessory is aiding or assisting the principal escape or evade arrest, prosecution for, or conviction of a felony, high-level misdemeanor, or any crime, depending on the jurisdiction. In many jurisdictions words are enough to constitute the accessory criminal act element.
- The criminal intent element required for an accessory has two parts. The defendant must act with general intent or knowingly that the principal committed the crime, with specific intent or purposely to help the principal escape or evade arrest, prosecution for, or conviction of the offense.
- In many jurisdictions, the crime of accessory is graded lower than the crime the principal committed; typically, it is graded as a misdemeanor, although in some jurisdictions, it is graded as a felony.

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6.6: 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 complicity 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 commit the crime creates an inference of intent if the offense is serious. In a minority of jurisdictions, general intent or knowingly that the principal will commit the crime is sufficient.

The natural and probable consequences doctrine holds accomplices criminally responsible for all crimes the principal commits that are reasonably foreseeable. In many jurisdictions an accomplice can be prosecuted for a crime the principal commits even if the principal is not prosecuted or acquitted.

Vicarious liability transfers criminal responsibility from one party to another because of a special relationship. Vicarious liability is common between employers and employees and is the basis for corporate criminal liability. Pursuant to modern corporate criminal liability, a corporation can be fined for a crime(s) a corporate agent or employee commits during the scope of employment. The corporate agent or employee also is criminally responsible for his or her conduct. In general, the law disfavors individual criminal vicarious liability. The law in this area is evolving as the incidence of juveniles committing crimes increases.

In modern times, an accessory is the equivalent of an accessory after the fact at common law. The criminal act element required for an accessory is providing assistance to a principal in escape, avoiding detection, or arrest and prosecution, or conviction for the commission of a felony, high-level misdemeanor, or any crime, depending on the jurisdiction. Words are enough to constitute the accessory criminal act. Several jurisdictions exempt family members from criminal responsibility for acting as an accessory.

The criminal intent element required for an accessory in most jurisdictions is general intent or knowingly that the principal committed a crime, and specific intent or purposely that the principal escape, avoid detection, or arrest and prosecution, or conviction for the offense. Accessory is a separate crime that is usually graded as a misdemeanor, although some jurisdictions grade accessory as a felony.

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7: INCHOATE OFFENSES

And so long as the partnership in crime continues, the partners act for each other in carrying it forward.

—*Pinkerton v. U.S.*, cited in Section 8.2.4 “Consequences of Conspiracy”

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7.4: Summary

7.5: References

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7.1: Criminal Attempt

Study Points

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*" (Yourdictionary.com, 2010). 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 Section 8.1 "Attempt".

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7.1.1: Study Points

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7.1.2: The History of Attempt

At early English common law, attempt was not a crime (Schulhofer, S. J. and Kahan, D. M., 2010). 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)

(Schulhofer, S. J. and Kahan, D. M., 2010). In *Scofield*, a servant was convicted of a misdemeanor for attempting to burn down his master's house with a lighted candle. A subsequent case, *Rex v. Higgins*, 102 Eng. Rep. 269 (K.B. 1801), upheld an indictment for attempted theft and firmly established the crime of attempt in English jurisprudence. In modern times, most states criminalize attempt, the majority in statutes, except in some states that permit common-law crimes. However, even in statutes, the word "attempt" is often left undefined, forcing courts to derive the meaning from common-law principles.

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7.1.3: Attempt Statutes

In general, there are two types of attempt statutes. Some states have **general attempt** statutes that set forth attempt elements and apply them to *any* criminal offense (Tex. Penal Code, 2010). Other states and the federal government have **specific attempt** statutes that define attempt according to *specified* crimes, such as murder, robbery, or rape (18 U.S.C., 2011). Keep in mind that several states do not criminalize attempt in a statute and consider it a common-law crime (Grill v. State, 2010).

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7.1.4: Attempt Act

The **criminal act** element required for attempt varies, depending on the jurisdiction. As Chapter 4 “The Elements of a Crime” stated, **thoughts** are *not* criminal acts. Thus a defendant does not commit attempt by plotting or planning an offense. An extension of this rule dictates that mere preparation is not enough to constitute the attempt criminal act element (People v. Luna, 2010). However, the crux of any attempt case is *how close* to completing the offense the defendant must get to fulfill the attempt criminal act requirement. In many statutes and cases, the attempt act is loosely defined to allow the trier of fact the flexibility needed to separate true criminal attempt from noncriminal preparation.

Jurisdictions use four tests to ascertain whether the defendant has committed the attempt criminal act: **proximity test**, **res ipsa loquitur test**, **probable desistance test**, and the Model Penal Code’s **substantial steps test**.

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7.1.5: Proximity Test

The **proximity test** measures the defendant's progress by examining how close the defendant is to completing the offense. The distance measured is the distance between preparation for the offense and successful termination. It is the amount *left to be done*, not what has *already been done*, that is analyzed (Commonwealth v. Hamel, 2010). In some jurisdictions, if the defendant's criminal intent is clear, the defendant does not need to come as close to completion of the offense (People v. Dillon, 2010). Generally, the defendant does not have to reach the last step before completion (People v. Dillon, 2010), although many defendants do.

Example of the Proximity Test

Melissa and Matthew decide they want to poison their neighbor's dog because it barks loudly and consistently every night. Melissa buys some rat poison at the local hardware store. Matthew coats a raw filet mignon with the poison and throws it over the fence into the neighbor's yard. Fortuitously, the neighbors are on an overnight camping trip, and the dog is with them. The next day, after a night of silence, Melissa feels regret and climbs over the fence to see what happened to the dog. When she sees the filet untouched on the ground, she picks it up and takes it back over the fence, later disposing of it in the trash. If Melissa and Matthew are in a jurisdiction that follows the **proximity test**, Melissa and Matthew have probably committed the criminal act element required for attempt. Melissa and Matthew finished *every act* necessary to commit the crime of destruction of property or animal cruelty (poisoning the dog). The only reason the crime was not successfully consummated was the absence of the dog, which is a circumstance outside their control. Thus Melissa and Matthew could most likely be charged with and convicted of this offense. If Melissa bought the rat poison but thereafter changed her mind and talked Matthew out of poisoning the dog, her actions would be a *preparation*, not a positive step toward commission of the crime. If Matthew coated the filet with poison but then changed his mind and threw the filet away, he would still be "too far" away from completing the offense. However, once the filet is thrown over the fence, the crime is *proximate* to completion; the only step left is the victim's (dog's) participation.

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7.1.6: Res Ipsa Loquitur Test

Res ipsa loquitur means "*the thing speaks for itself*" (USLegal.com, 2010). The res ipsa loquitur test, also called the **unequivocality test**, analyzes the facts of each case independently. Under res ipsa loquitur or unequivocality, the trier of fact must determine that at the moment the defendant *stopped* progressing toward completion of the offense, it was clear that the defendant had *no other purpose* than commission of the specific crime at issue. This determination is based on the defendant's act— which manifests the intent to commit the crime (Hamiel v. Wisconsin, 2010).

Example of the Res Ipsa Loquitur Test

Harry wants to kill his wife Ethel for the proceeds of her life insurance policy. Harry contacts his friend Joe, who is reputed to be a "hit man," and sets up a meeting for the next day. Harry meets with Joe and asks him if he will murder Ethel for one thousand dollars. Joe agrees, and Harry pulls out a wad of cash 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 **unequivocality 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.

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7.1.7: 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 (U.S. v. Mandujano, 2010).

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.

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7.1.8: 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 a test that is more likely to result in a conviction because it classifies as "substantial" those acts the other tests might consider only "preparatory" (People v. Dillon, 2011).

The substantial steps test has two parts. First, the defendant must take substantial steps toward completion of the crime. As the Model Penal Code states, "[a] person is guilty of an attempt to commit a crime if…he…does…anything which…is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime" (Model Penal Code § 5.01(1)(c)). Second, the defendant's actions must be "strongly corroborative of the actor's criminal purpose" (Model Penal Code § 5.01(2)). To further elucidate the test, the Model Penal Code provides seven examples of actions that constitute **substantial steps**, as long as they are *corroborative of* the defendant's *intent*. The seven examples are lying in wait; enticing the victim to go to the scene of the crime; investigating the potential scene of the crime; unlawfully entering a structure or vehicle where the crime is to be committed; possessing materials that are specially designed for unlawful use; possessing, collecting, or fabricating materials to be used in the crime's commission; and soliciting an innocent agent to commit the crime (Model Penal Code § 5.01(2)).

Example of the Substantial Steps Test

Kevin wants to rob an armored car that delivers cash to the local bank. After casing the bank for two months and determining the date and time that the car makes its delivery, Kevin devises a plan that he types on his computer. On the date of the next delivery, Kevin hides a weapon in his jacket pocket and makes his way on foot to the bank. Thereafter, he hides in an alley and waits for the truck to arrive. When the truck drives up and parks in front of the bank, Kevin walks over to the driver's door and reaches for his weapon. He is immediately apprehended by a security guard who saw him emerge from the alley. If Kevin is in a **substantial steps** jurisdiction, he has probably committed the criminal act element required for attempt. Kevin cased the bank, planned the robbery, showed up on the appointed date and time with a concealed weapon, and hid in an alley to wait for the truck to appear. These actions are (1) investigating the potential scene of the crime, (2) possessing materials to be used in the crime's commission, and (3) lying in wait. Thus Kevin has completed *three* substantial steps that corroborate his intent as expressed in the plan he typed, which is most likely sufficient to constitute the attempt criminal act element under the Model Penal Code.

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7.1.9: Preparatory Crimes

Some states have statutes criminalizing behavior that would be considered *preparatory* under any of the four attempt act tests. For example, some statutes prohibit the mere *possession* of burglar's tools (N.Y. Penal Law, 2010) or even the *manufacture* of burglar's tools (Conn. Gen. Stat., 2010). A defendant could be convicted of a preparatory crime *and attempt* if the criminal act element for both is present under the circumstances.

Example of a Preparatory Crime and Attempt

Hal manufactures a lock pick and takes it to the local coin shop, which is closed. Hal takes the lock pick out and begins to insert it into the coin shop doorknob. A security guard apprehends Hal before he is able to pick the lock.

If Hal is in a jurisdiction that prohibits the manufacture of burglar's tools, he probably could be charged with and convicted of manufacture of burglar's tools *and* attempted burglary because he has committed the criminal act element required for both of these offenses.

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7.1.10: Attempt Intent

The criminal intent element required for attempt in the majority of jurisdictions is the **specific intent** or **purposely** to commit the crime at issue (N.Y. Penal Law, 2010). Generally, no such thing exists as *reckless* or *negligent* attempt. Thus if the prosecution fails to prove beyond a reasonable doubt that the defendant acted purposefully with intent to commit the crime attempted, this could operate as a **failure of proof defense**.

Example of a Case Lacking Attempt Intent

Eric is hiking in a jurisdiction that criminalizes **reckless** burning. Eric pauses in front of a sign that states "Fire Danger Today: High." Eric reads the sign, pulls out a cigarette, lights it, and throws the lit match into some dry brush near the sign. He starts hiking and when he finishes his cigarette, he tosses the lit cigarette butt into some arid grass. Neither the brush nor the grass burns. Eric probably does *not* have the requisite criminal intent for attempted reckless burning. Attempt requires **purposeful** conduct. Eric's conduct is **reckless** because he is aware of a risk and disregards it. If Eric takes the match or lit cigarette and tries to ignite a fire with them, it is likely that he has the appropriate criminal intent for attempted arson. However, in this case Eric's actions demonstrate careless behavior that probably is not sufficient for the crime of attempt.

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7.1.11: Defenses to Attempt

Along with failure of proof defenses to the criminal act and criminal intent elements, **legal impossibility** and **voluntary abandonment** can also function as affirmative defenses to attempt in many jurisdictions.

Impossibility as a Defense to Attempt

Two types of impossibility defenses exist: **legal impossibility**, which can function as a defense to attempt, and **factual impossibility**, which generally cannot. Legal impossibility means that the defendant believes what he or she is attempting to do is *illegal*, when it is not. Factual impossibility means that the defendant could not complete the crime attempted because the *facts* are not as he or she believes them to be. The Model Penal Code disallows factual impossibility as a defense by stating that conduct is an attempt when the defendant "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be" (Model Penal Code § 5.01(1) (a)).

Example of Legal Impossibility

Review the example given in Section 8 "Res Ipsa Loquitur Test" with Melissa and Matthew and the attempted poisoning of the neighbor's dog. Assume that Melissa is eighteen. Melissa believes that an individual must be twenty-one to purchase rat poison because that is the law in the state where she lived five years ago. Actually, the state in which Melissa currently resides allows the purchase of rat poison by those who are eighteen or older. The first store Melissa enters asks for identification when she tries to pay for the rat poison, so Melissa makes an excuse and leaves. The second store Melissa enters does not ask for identification, and she successfully makes the rat poison purchase. Melissa has probably *not* attempted to purchase rat poison illegally in the first store she entered. Melissa's act in attempting to purchase the rat poison is legal under the circumstances. Thus her mistaken belief that she is attempting to commit a crime does not transform this legal act into an *illegal* one.

Example of Factual Impossibility

Recall from the example given in Section 8 "Res Ipsa Loquitur Test" that Matthew threw a filet coated with rat poison over the fence into the neighbor's yard with the intent to poison the neighbor's dog. Both Melissa and Matthew are under the *mistaken* belief that the dog is present and will eat the filet. However, the dog is on an overnight camping trip with its owners. This **mistake of fact** probably will *not* excuse Melissa and Matthew's attempt. Melissa and Matthew purposely engaged in conduct that would result in the poisoning of the dog if the facts were as Melissa and Matthew believed them to be. Thus Melissa and Matthew have most likely committed attempted destruction of property or animal cruelty regardless of the fact that their plan could not succeed under the circumstances.

Voluntary Abandonment as a Defense to Attempt

Many jurisdictions allow a defendant who **voluntarily abandons** the planned offense to use this abandonment as an affirmative defense to attempt (Fla. Stat. Ann., 2010). The defense has two parts. First, the defendant must have a change of heart that is *not motivated* by an increased possibility of detection, or a change in circumstances that make the crime's commission more difficult. As the Model Penal Code states, "it is an affirmative defense that he abandoned his effort to commit the crime…under circumstances manifesting a complete and voluntary renunciation of his criminal

purpose…[R]enunciation of criminal purpose is not voluntary if it is motivated…by circumstances…which increase the probability of detection…or which make more difficult the accomplishment of the criminal purpose" (Model Penal Code § 5.01(4)). Second, the abandonment must be complete and cannot simply be a postponement. Under the Model Penal Code, "[r]enunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar…victim" (Model Penal Code § 5.01(4)). The voluntary abandonment defense gives defendants incentive to stop progressing toward consummation of the offense and prevents the crime from occurring without the need for

law enforcement intervention.

Example of Voluntary Abandonment as a Defense to Attempt

Review the example with Melissa and Matthew in "Res Ipsa Loquitur Test". If Melissa changes her mind after purchasing the rat poison and talks Matthew out of poisoning the neighbor's dog, Melissa has **voluntarily abandoned** the crime and cannot be charged with attempt. If Matthew changes his mind after coating the filet with rat poison and throws the filet away, Matthew has **voluntarily abandoned** the crime and cannot be charged with attempt. Note that both Melissa's and Matthew's actions are in the very early stages of the crime of destruction of property or animal cruelty and probably will be considered preparatory, rather than constituting the criminal act element required for attempt. When Melissa climbs over the fence, picks up the filet, and takes it back to her house for disposal, it is most likely too late to voluntarily abandon the crime. At this point, the crime of attempt has already been committed, and neither **voluntary abandonment** nor **factual impossibility** can function as defenses.

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7.1.12: Key Takeaways

- An inchoate crime is a crime that might not be completed.
- General attempt statutes set forth the elements of attempt and apply them to any crime. Specific attempt statutes define attempt according to specified crimes, such as attempted murder, robbery, or rape.
- The four tests jurisdictions use to ascertain the criminal act element required for attempt are proximity, res ipsa loquitur, probable desistance, and substantial steps.
- The proximity test determines how close the defendant is to committing the crime by analyzing how much is left to accomplish after preparation for the offense.
- The res ipsa loquitur test, also called the unequivocality test, examines the defendant's actions at a moment in time to determine whether the defendant has no other purpose than committing the crime at issue.
- The probable desistance test analyzes whether the defendant has progressed so far that it is probable he or she will not desist without interruption from law enforcement or other intervening circumstances.
- The substantial steps test is the Model Penal Code test and ascertains whether the defendant has completed substantial steps toward commission of the crime that are corroborative of the defendant's criminal intent.
- Preparatory crimes criminalize preparing to commit a crime, which would be a stage that is too premature to constitute the criminal act element required for attempt.
- The criminal intent element required for attempt is specific intent or purposely to commit the crime at issue.
- Aside from failure of proof defenses to attempt act and intent, two potential defenses to attempt are legal impossibility and voluntary abandonment.
- Factual impossibility means the defendant cannot complete the crime because the facts are not as the defendant believes them to be. Factual impossibility is generally not a defense to attempt. Legal impossibility means the defendant believes he or she is attempting to commit a crime, but the defendant's actions are actually legal. Legal impossibility is generally a defense to attempt.
- Voluntary abandonment is when the defendant voluntarily and completely withdraws from commission of the offense before it is consummated.
- In many jurisdictions, attempt merges into the offense if it is completed, which means that a defendant cannot be charged with attempt and the completed crime.
- In a jurisdiction that allows for transferred intent, a defendant's intent can transfer from the intended victim to the actual victim. The defendant can thereafter be criminally responsible for the completed crime against the actual victim and attempt against the intended victim.
- Some jurisdictions grade attempt lower than the completed offense; others grade attempt the same as the completed offense, with exceptions

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7.2: Conspiracy

Study Points

- Explain why conspiracy is an inchoate crime.
- Define the criminal act element required for conspiracy.
- Compare the conspiracy overt act requirement with the criminal act element required for attempt.
- Define the criminal intent element required for conspiracy.
- Ascertain whether a coconspirator can be criminally responsible when another coconspirator is not prosecuted or acquitted.
- Ascertain whether a coconspirator must know every other coconspirator to be guilty of conspiracy.
- Distinguish between a wheel and chain conspiracy.
- Define the Pinkerton rule.
- Define Wharton's rule.
- Identify an affirmative defense to conspiracy.
- Ascertain whether merger applies to conspiracy.
- Compare various approaches to conspiracy grading.
- Define federal RICO.

Conspiracy punishes defendants for agreeing to commit a criminal offense. Conspiracy is an inchoate crime because it is possible that the defendants never will commit the planned offense. However, a conspiracy is complete as soon as the defendants become **complicit** and commit the **conspiracy act** with the **conspiracy intent**. The rationale for punishing defendants for planning activity, which generally is not sufficient to constitute the crime of attempt, is the increased likelihood of success when defendants work together to plot and carry out a criminal offense (Dennis v. U.S., 2011). If the defendants commit the crime that is the object of the conspiracy, the defendants are responsible for the conspiracy *and* the completed crime, as is discussed in "Consequences of Conspiracy".

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7.2.1: Conspiracy Act

In many jurisdictions, the **criminal act** element required for conspiracy is an agreement to commit any criminal offense (Fla. Stat. Ann., 2011). The agreement does not need to be formal or in writing (State v. Bond, 2011). Some states also criminalize as conspiracy the agreement to falsely indict another for a crime and the agreement to falsely maintain any lawsuit, even a civil lawsuit (Cal. Penal Code, 2011). Other states only criminalize as conspiracy the agreement to commit a felony (Tex. Penal Code, 2011).

In some states and federally, an **overt act** in furtherance of the conspiracy is also required (18 U.S.C., 2011).

The Model Penal Code requires an overt act only when the planned crime is "other than a felony of the first or second degree" (Model Penal Code § 5.03(5)). The overt act does not have to be *criminal* and may be planning or preparatory activity that would be insufficient to constitute the criminal act element required for **attempt** (State v. Verive, 2011).

Example of Conspiracy Act

Review the example with Melissa and Matthew in "Res Ipsa Loquitur Test". In this example, Melissa and Matthew agree to poison the neighbor's dog because it barks every night. After deciding they will poison the dog, Melissa buys rat poison, and Matthew thereafter coats a filet mignon with it and throws it over the fence into the neighbor's yard. In a jurisdiction that defines the criminal act element for conspiracy as an agreement between two or more to commit a criminal offense, Melissa and Matthew probably committed the conspiracy criminal act *as soon as they agreed* to poison the dog. Their agreement could be verbal and does not need to be formal or in writing. If Melissa and Matthew are in a jurisdiction that requires an **overt act** in furtherance of the conspiracy, Melissa and Matthew probably have not committed the conspiracy criminal act until Melissa *buys the rat poison*. Note that the purchase of the rat poison is not sufficient to constitute the criminal act element required for **attempted** destruction of property or animal cruelty, as discussed in "Res Ipsa Loquitur Test". However, it would likely be enough to support the **conspiracy** to commit destruction of property or animal cruelty.

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7.2.2: Conspiracy Intent

The essence of conspiracy is agreement, which requires two or more parties. However, the modern approach is that a conspiracy may be formed as long as *one* of the parties has the appropriate intent (Ind. Code, 2011). Pursuant to this unilateral view of conspiracy, a conspiracy may exist between a defendant and a law enforcement decoy who is pretending to agree.

In the majority of jurisdictions, the criminal intent element required for conspiracy is **specific intent** or **purposely** to agree with another to commit the crime at issue (Connecticut Criminal Jury Instructions 3.3-1, 2011). As the Model Penal Code states, "[a] person is guilty of conspiracy...if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person...that they...will engage in conduct which constitutes such crime" (Model Penal Code § 5.03(1) (a)). This intent has two components. The prosecution must prove that the conspirator intended to *agree* and also intended to *commit* the underlying offense (State v. Lewis, 2011).

Example of Conspiracy Intent

Shelley and Sam meet at a bar and discuss their lack of finances. Shelley mentions that she and her friend Steffy work at a convenience store. Sam asks Shelley if she would like to help him rob the convenience store when Steffy is working. Shelley agrees. The two plan the robbery. Shelley and Sam agree that Shelley will drive the getaway car on the appointed date and time. Shelley informs Sam that Steffy is extremely meek and fearful and will readily hand over cash out of the cash register if Sam uses a fake handgun. Shelley and Sam probably have the criminal intent element required for conspiracy. Shelley and Sam have the intent to *agree to work together* because they both need each other to successfully complete the convenience store robbery. In addition, Shelley and Sam have the intent to *successfully commit the robbery* because they both want the money the robbery will produce. Thus if no overt act is required in 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.

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7.2.3: 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 (Tex. Penal Code, 2011). In addition, a coconspirator does not need to *know* every other coconspirator to be accountable as a member of the conspiracy (Neb. Rev. Stat. Ann., 2011). 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.

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7.2.4: Consequences of Conspiracy

In some states and federally, individuals who enter into a conspiracy are criminally responsible for *every reasonably foreseeable* crime committed in furtherance of the conspiracy (U.S. v. Castaneda, 2011). This rule is called the **Pinkerton rule**, based on the US Supreme Court case that created it (*Pinkerton v. U.S.*, 328 U.S. 640 (1946).). One factor used to determine foreseeability is the degree of the defendant's involvement in the conspiracy. A defendant who plays a minor role is less likely to be criminally responsible than a defendant who has a more substantive involvement (U.S. v Castaneda, 2011).

Example of the Pinkerton Rule

Review the example in "Example of Conspiracy Intent" with Shelley and Sam. Assume that on the night of the convenience store robbery, Lucy, an armed, off-duty police officer, wanders into the store to purchase cigarettes at the moment Sam pulls out his fake handgun. Lucy yanks her concealed handgun out of her waistband and tells Sam to drop the weapon. Jolene, another customer in the store, observes the two pointing guns at each other and suffers a fatal heart attack. In many jurisdictions, both Shelley and Sam probably could be criminally responsible for **conspiracy** to commit robbery, **attempted** robbery, and the **murder** of Jolene. Shelley and Sam attempted to commit the robbery *in furtherance* of the conspiracy. Both played a *major* role in the conspiracy and the attempted robbery. Thus both are accountable for the foreseeable consequences. Robbery is a crime of violence, so a death that occurs during a robbery is foreseeable, even though Sam is armed with only a pretend handgun. Thus Shelley and Sam may be charged with and convicted of Jolene's murder, which is most likely felony murder. Felony murder is discussed in detail in Chapter 9 "Criminal Homicide".

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7.2.5: Wharton's Rule

A criminal offense that requires two parties cannot be the object of a conspiracy that consists of two parties. This rule is called **Wharton's rule**, or the **concert of action rule** (USLegal, 2011). However, a statute can expressly criminalize a conspiracy to commit any crime, *abrogating* the rule. Currently, Wharton's rule can operate as a judicial **presumption**, to be applied in the absence of legislative intent to the contrary (Ianelli v. U.S., 2011).

> **Example of a Case Where Wharton's Rule Is Inapplicable**
>
> Joanne and Robert conspire with Don, Joanne's pimp, to engage in prostitution. Joanne and Robert get caught in the act of engaging in prostitution by Edward, a police officer. Wharton's rule probably does not apply in this case. Although engaging in prostitution requires *two* parties, the conspiracy to engage in prostitution has *three* members—Don, Joanne, and Robert. Thus Wharton's rule is likely inapplicable, and Don, Joanne, and Robert might have committed conspiracy to engage in prostitution. Note that if only Joanne and Robert conspire to engage in prostitution, Wharton's rule may act as a judicial presumption that they cannot commit conspiracy *and* the crime it furthers.

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7.2.6: Renunciation as a Defense to Conspiracy

One potential affirmative defense to conspiracy is **renunciation**. Similar to voluntary abandonment in attempt, **renunciation** can operate as a defense to conspiracy in some jurisdictions if the defendant completely and voluntarily renounces the conspiracy (N.J. Stat., 2011). The renunciation must also thwart the crime that is the object of the conspiracy. The Model Penal Code allows the defense and provides, "It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose" (Model Penal Code § 5.03(6)).

Example of Renunciation

Review the example with Shelley and Sam in "Example of Conspiracy Intent". In this example, Shelley and Sam agree to commit a robbery at the convenience store where Steffy is a cashier. Adjust the example so that Shelley has a change of heart and contacts law enforcement about the robbery before she drives Sam to the convenience store in the getaway car. Law enforcement officers ask Shelley to help them apprehend Sam, and she agrees. Shelley drives Sam to the convenience store as planned. Two law enforcement officers dress in plainclothes and pretend to be shopping in the convenience store when Sam arrives. As soon as Sam pulls out his fake handgun, they arrest him. If Shelley is in a jurisdiction that recognizes the **renunciation** defense, she probably will have a valid defense to a charge of conspiracy. Although Shelley committed the criminal act for conspiracy with the requisite criminal intent, she *voluntarily* and *completely* renounced the conspiracy and *thwarted* the crime that was its object. Thus Shelly has likely met the requirements of renunciation, and only Sam may be charged with a crime or crimes in this scenario.

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7.2.7: Merger

At early common law, conspiracy, which was a misdemeanor, **merged** into the completed felony that was its object. The merger was based on the significant procedural differences between misdemeanor and felony trials. As the differences diminished, so did the merger concept. In modern times, conspiracy does not merge into the completed offense (Callanan v. U.S., 2011). Thus a defendant can be charged with and convicted of conspiracy *and* any crime the conspiracy furthers, as is discussed more fully in "Consequences of Conspiracy".

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7.2.8: Conspiracy Grading

Some states **grade** conspiracy the same as the most serious offense that is the conspiracy's object (18 Pa. Cons. Stat., 2011). Others grade conspiracy lower than the most serious conspired offense and do not criminalize the conspiracy to commit a simple, low-level misdemeanor (Tenn. Code Ann., 2011). Another view is to set a separate penalty for the conspiracy to commit specific crimes (Cal. Penal Code, 2011). It is not unconstitutional to punish conspiracy more severely than the crime conspired (Clune v. U.S., 2011).

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7.2.9: Federal RICO

In response to an increase in organized crime, the federal government enacted the **Racketeer Influenced and Corrupt Organization Act (RICO)** (18 U.S.C. §§ 1961- 1968)). RICO provides extensive criminal penalties and also a civil cause of action for **organized crime** and includes all offenses that are criminal under state or federal law. Although RICO was originally intended to focus on sophisticated criminal businesses such as loan sharking, mafia, and high-stakes gambling operations (Blakey, G. R., 2011), its modern application is much broader and encompasses many white-collar crimes and small-time conspiracies. A criminal organization always involves more than one member, and at the very least rudimentary planning, so conspiracy is a common RICO charge and is often easier to prove than a completed criminal offense. Recently, RICO has been criticized as being overused and applied in a manner inconsistent with its original purpose, especially when it targets smaller, low-member criminal "organizations." Some examples of highly publicized RICO defendants are Hell's Angels (Zimmerman, Keith and Zimmerman, Kent, 2011), Catholic priests in sex abuse cases (Smith, G., 2011), and Major League Baseball (Sportsbusinessdaily.com, 2011).

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7.2.10: Key Takeaways

- Conspiracy is an inchoate crime because the defendants might never complete the offense that is the conspiracy's object.
- The criminal act element required for conspiracy is an agreement to commit any crime, commit a felony, falsely indict another for a crime, or falsely maintain any lawsuit, depending on the jurisdiction.
- The overt act required for conspiracy can be preparatory activity; the criminal act element required for attempt must be more than mere preparation.
- The criminal intent element required for conspiracy is specific intent or purposely to agree to commit the offense that is the conspiracy's object.
- The acquittal of or failure to prosecute one coconspirator does not prohibit the prosecution of other coconspirators in some jurisdictions.
- A coconspirator does not need to know every other coconspirator; as long as a coconspirator is aware that there are other members, he or she can be criminally responsible for conspiracy.
- A wheel conspiracy connects all members to one central member. A chain conspiracy interconnects the members in a linear fashion.
- The Pinkerton rule holds conspiracy members criminally responsible for every foreseeable crime committed in furtherance of the conspiracy.
- Wharton's rule could create a judicial presumption that a defendant cannot be criminally responsible for conspiracy and the crime that is its object if the conspiracy has only two members, and the crime that is its object requires two defendants.
- Renunciation is an affirmative defense to conspiracy in some jurisdictions if the defendant voluntarily and completely renounces the conspiracy and thwarts the crime that is its object.
- Generally, conspiracy does not merge like attempt; a defendant can be convicted of conspiracy and the crime conspired.
- Some jurisdictions grade conspiracy the same as the conspired offense; other jurisdictions grade conspiracy lower than the conspired offense. It is not unconstitutional to grade conspiracy higher than the offense that is its object.
- Federal RICO is a statute that is designed to punish organized crime.

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7.3: Solicitation

Study Points

- Explain why solicitation is an inchoate crime.
- Define the criminal act element required for solicitation.
- Define the criminal intent element required for solicitation.
- Determine whether the defense of renunciation is available for solicitation.
- Discuss various approaches to solicitation grading.

Solicitation can be a precursor to conspiracy because it criminalizes the *instigation* of an agreement to commit a criminal offense. Solicitation is an inchoate crime because it is possible that the conspiracy will *never be formed*, and the crime that is its object will *not be committed*. Many of the rules that apply to attempt and conspiracy also apply to solicitation, as is discussed in Section 8.3 “Solicitation”.

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7.3.1: Solicitation Act

The **criminal act** element required for solicitation is generally **words** that *induce* another to commit a capital felony, first-degree felony (Tex. Penal Code, 2011), or any crime (N.Y. Penal Law, 2011). Typical words of inducement are request, command, encourage, hire, procure, entice, and advise. The Model Penal Code defines solicitation as follows: "[a] person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime" (Model Penal Code § 5.02(1)). However, the Model Penal Code does not require direct *communication*, if "conduct was designed to effect such communication." (Model Penal Code § 5.02(2)).

Example of Solicitation Act

Jimmy calls his friend Choo, who is reputed to be a "fence," and asks Choo to help him sell some stolen designer shoes. If Jimmy is in a jurisdiction that criminalizes the "request" to commit *any crime*, Jimmy probably has committed the criminal act element required for solicitation. If Jimmy is in a jurisdiction that only criminalizes solicitation to commit a *capital felony* or *first-degree felony*, then Jimmy probably has not committed the criminal act element required for solicitation because selling stolen property is not generally graded that severely. If Jimmy is in a jurisdiction that follows the Model Penal Code, and Jimmy and Choo had a long-standing arrangement whereby Jimmy puts stolen items in a storage facility so that Choo can sell them, Jimmy will not have to communicate his request to Choo. He simply will have to place the shoes in the storage facility to commit the criminal act element required for solicitation.

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7.3.2: Solicitation Intent

The criminal intent element required for solicitation is **specific intent** or **purposely** to promote the crime's commission in most jurisdictions and under the Model Penal Code, as set forth in "Solicitation Act" (Or. Rev. Stat., 2011).

Example of Solicitation Intent

Review the solicitation act example in "Example of Solicitation Act". In this example, Jimmy *desires* Choo to commit the crime of selling stolen property so that he can reap a benefit from his stolen designer shoes. Thus Jimmy probably has the criminal intent required for solicitation. If Jimmy is in a jurisdiction that criminalizes solicitation to commit any crime, Jimmy could be charged with and convicted of this offense.

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7.3.3: Renunciation as a Defense to Solicitation

Similar to conspiracy, many jurisdictions allow **renunciation** as an **affirmative defense** to solicitation (Ariz. Rev. Stat., 2011). The renunciation must be *voluntary* and *complete* and must *thwart* the crime that is solicited. As the Model Penal Code states, "it is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose" (Model Penal Code § 5.02(3)).

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7.3.4: Solicitation Grading

Jurisdictions vary as to how they **grade** solicitation. Some jurisdictions grade solicitation according to the crime solicited, with more serious crimes accorded a more severe solicitation punishment (Ala. Code, 2011). Others grade solicitation the same as the crime solicited, with exceptions (N.H. Rev. Stat. Ann., 2011). Some states grade solicitation as a misdemeanor, *regardless* of the crime solicited (Commonwealth v. Barsell, 2011).

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7.3.5: Key Takeaways

- Solicitation is an inchoate crime because the crime that is solicited may not be completed.
- The criminal act element required for solicitation is words or conduct that induces another to commit any crime, a capital felony, or first-degree felony.
- The criminal intent element required for solicitation is specific intent or purposely to induce another to commit any crime, a capital felony, or first-degree felony.
- Renunciation is an affirmative defense to solicitation if the defendant voluntarily and completely renounces his or her criminal purpose and thwarts the commission of the solicited crime.
- Jurisdictions vary in their approach to grading solicitation. Some jurisdictions grade solicitation on a sliding scale according to the crime solicited, some grade solicitation the same as the crime solicited, and some grade solicitation as a misdemeanor, regardless of the crime solicited.

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7.4: Summary

An inchoate crime might never be completed. The rationale of punishing a defendant for an inchoate crime is prevention and deterrence. The three inchoate crimes are attempt, conspiracy, and solicitation.

The criminal act element required for attempt must be more than thoughts or mere preparation. Modern jurisdictions use four tests to ascertain attempt. The proximity test analyzes how close the defendant is to completing the offense by examining how much is left to be done. The defendant may have to come dangerously close to completion but generally does not have to reach the last act before completion. The res ipsa loquitur test looks at the moment in time when the defendant stopped progressing toward completion to see if the defendant's acts indicate that the defendant has no other purpose than commission of the offense. The probable desistance test focuses on how far the defendant has progressed to see if it is probable that the defendant won't desist until the crime is complete. The Model Penal Code substantial steps test has two parts. First, the defendant must take substantial steps toward completion of the crime.

Second, the defendant's actions must strongly corroborate the defendant's criminal purpose.

Some jurisdictions also criminalize preparatory crimes such as the manufacture or possession of burglar's tools. Preparatory crimes can be combined with attempt under the appropriate circumstances.

The criminal intent element required for attempt is the specific intent or purposely to commit the crime attempted. Legal impossibility can be a defense to attempt if the defendant mistakenly believes that a legal act attempted is illegal. Factual impossibility is not a defense to attempt if the crime cannot be completed because the facts are not as the defendant believes them to be. Voluntary abandonment is also a defense to attempt in some jurisdictions if the defendant voluntarily and completely renounces the attempted crime.

If a jurisdiction recognizes transferred intent, a defendant can be criminally responsible for attempt against the intended victim and the completed offense against the actual victim. In many jurisdictions, attempt merges into the crime if the crime is completed.

Jurisdictions vary as to how they grade attempt; either attempt is graded the same or lower than the completed offense.

The criminal act element required for conspiracy is an agreement to commit any crime, commit a felony, falsely indict another for a crime, or falsely maintain any lawsuit, depending on the jurisdiction. Some jurisdictions also require an overt act in furtherance of the conspiracy that could be a legal or preparatory act.

The criminal intent element required for conspiracy in many jurisdictions is the specific intent or purposely to agree and to commit the crime at issue. In some states, a coconspirator can be prosecuted even if another coconspirator is not prosecuted or acquitted. Coconspirators do not need to know every other coconspirator, as long as they are aware that other coconspirators exist. A wheel conspiracy connects all members to one central member. A chain conspiracy connects members to each other in a linear fashion.

The Pinkerton rule holds coconspirators criminally responsible for every foreseeable crime committed in furtherance of the conspiracy. Wharton's rule creates a judicial presumption that a crime requiring two parties merges into a conspiracy made up of two parties.

Renunciation can be a defense to conspiracy if a coconspirator voluntarily and completely abandons the conspiracy and thwarts the crime that is its object. Conspiracy generally does not merge into the conspired offense. Jurisdictions vary as to how they grade conspiracy. Usually it is graded the same or lower than the crime that is the conspiracy's object, but it is not unconstitutional to punish conspiracy more severely than the conspired offense. The federal RICO statute is targeted at organized crime, including conspiracy.

Solicitation is the instigation of an agreement to commit any crime or, in some jurisdictions, a capital or first-degree felony. The criminal act element required for solicitation is words or conduct of inducement. The criminal intent element required for solicitation is specific intent or purposely to promote the crime solicited.

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8.1: Introduction

In this chapter we discuss homicide and the different variations of what that means. We focus on the California Penal Code , California Jury Instructions, and the associated case law. This edition of the text was revised June 2024 and was current as of that date.

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8.2: Study Guide

Chapter Terms

- affirmative defense
- Aiding and Abetting
- Capital murder
- corpus delicti
- deadly weapon
- End of Life Options Act
- felony murder rule
- Feticide
- Fetus
- First-degree murder
- Gross negligence
- homicide
- Intent to Kill
- involuntary manslaughter
- *justifiable homicide*
- legally dead
- lying in wait
- malice aforethought
- Manslaughter
- Murder
- negligence
- Premeditated murder
- second-degree murder
- Watson Admonition

CA Criminal Codes

- PC 187
- PC 189
- PC 190.2 C 2
- 192

Jury Instructions

CALCRIM 520

Court Cases (short citation)

Kennedy v. Louisiana, 2010

People v. Watson (1981)

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8.3: Homicide

Study Points

- Define homicide.
- Recognize that all homicides are not criminal.
- Identify the corpus delicti components in a criminal homicide.
- Compare the definition of fetus in criminal homicide and feticide statutes.
- Compare common-law feticide and suicide with modern views.
- 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 can vary from state to state. You also learn that suicide is not criminal, but *assisted suicide* might be, depending on the circumstances.

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8.3.1: History of Homicide Laws

Homicide is *the killing of one human being by another*. Homicide *is not* always criminal. For example, a lawful execution by the State pursuant to a death warrant (capital murder death penalty cases) 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. As the law evolved, unlawful killings were divided into murder and manslaughter based on the defendant's criminal *intent*.

In California murder has the criminal intent element of **malice aforethought**. **Manslaughter** was an unlawful killing without malice and was punished by incarceration only (no death penalty).

In modern times, most states including California define criminal homicide and its elements in *statutes*, which often are interpreted by case law. In this course we focus on the California criminal statutes.

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8.3.2: Corpus Delicti in Criminal Homicide

An essential component of *every* criminal case, including criminal homicide, is **corpus delicti**. Corpus delicti is the substance of the crime at issue. The prosecution must prove corpus delicti beyond a reasonable doubt, with evidence *other than a defendant's confession* (People v. Ochoa, 2011). The corpus delicti in a *criminal homicide* case consists of:

1. the death of a victim,
2. caused by the defendant,
3. in an unlawful manner.

Sometimes the victim's body is never discovered, which could make it more difficult for the prosecution to prove corpus delicti, but not impossible. If there is sufficient circumstantial or direct evidence, such as bloodstains, surveillance footage, or witness testimony, the prosecution can prove corpus delicti without the victim's body and can convict the defendant of criminal homicide.

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8.3.3: Feticide

Feticide is the intentional destruction of a fetus. At common law, a *human being* could not be the victim of criminal homicide unless it was born alive (Keeler v. Superior Court, 2010). The Model Penal Code takes this approach and defines human being as "a person who has been born and is alive" (Model Penal Code § 210.0 (1)). The modern trend in many jurisdictions is to include the fetus as a victim in a criminal homicide or feticide statute, excepting *abortion*. The definition of fetus is either set forth in the criminal homicide or feticide statute or created by case law.

Some states and the federal government consider an embryo a fetus from the time of conception. A few states do not consider the fetus a victim of criminal homicide or feticide until it is viable and can survive outside the womb (Ind. Code, 2010).

California defines a **fetus** as "*an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which typically occurs at seven to eight weeks after fertilization* (CalCrim 520, 2024)."

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8.3.4: Suicide

At common law, suicide was a crime. The punishment was forfeiture of the lands owned by the deceased. In modern times, most states do not criminalize suicide. However, almost all jurisdictions make it a crime to *assist* another person with their suicide, and the US Supreme Court has held these statutes constitutional (Washington v. Glucksberg, 2010).

In 2015 California passed the **End of Life Options Act** which allows for physician assisted suicide in specific circumstances as described below.

End of Life Options Act

Having been passed by the Legislature in September 2015 and signed by the Governor in October 2015, California's End of Life Options Act (AB 15) became law effective June 9, 2016. It was slightly amended in October 2021 (SB 380).

The End of Life Options Act has three main elements:

1. The law grants patients who satisfy specified criteria the legal right to request, receive, and self-ingest aid-in-dying drugs, i.e., medications whose sole purpose is to bring about the patient's death.
2. The law details a rigorous process that includes steps to be followed by the patient, at least two physicians (the patient's attending physician and an independent consulting physician, both of which are specifically defined for this law), and, possibly, a mental health specialist. The process also requires a variety of documentation including forms (to be completed by the patient and the physicians) which are to be submitted (by the attending physician) to the California Department of Public Health.
3. The law allows healthcare providers, for reasons of conscience, morality, or ethics, not to participate in any or all of the following five specified activities associated with the above-mentioned process:
    1. serving as an attending physicians as defined for the law;
    2. serving as a consulting physician as defined for the law;
    3. serving as a mental health specialist as defined for the law;
    4. prescribing, dispensing, and delivering aid-in-dying medication;
    5. being present when a patient ingests aid-in-dying medication.

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8.3.5: Key Takeaways

- 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.
- The corpus delicti components in a criminal homicide are the death of the victim, caused by the defendant, in an unlawful manner.
- California defines a **fetus** as "*an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which typically occurs at seven to eight weeks after fertilization* (CalCrim 520, 2024)."
- Suicide is not a crime however assisted suicide is with the exception being when it is done in compliance with the End of Life Options Act

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8.4: Murder

1. Define the criminal act elements required for murder.
2. Explain why criminal intent is an important element of murder.
3. Identify, describe, and compare the three types of malice aforethought.
4. Explain the deadly weapon doctrine.
5. Define death.
6. Give examples of justifiable and excusable homicides.
7. Ascertain which type of criminal homicide the defendant commits when deliberately and inadvertently transmitting AIDS.

Murder is a crime that has the elements of criminal act, criminal intent, causation, and harm. In this section, you learn the *element*s of murder. In upcoming sections, you learn the *factor*s that classify murder as first degree, felony, and second degree.

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8.4.1: Murder Act

California defines the **criminal act** element of murder as conduct that causes the victim's death (CA PC 187). The criminal act could be carried out with a weapon, a vehicle, poison, the defendant's bare hands, or an number of other ways. Like all criminal acts, the conduct must be undertaken *voluntarily* and cannot be the result of a *failure to act* unless a duty to act is created by common law or statute.

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8.4.2: Murder Intent

It is the criminal intent element that basically separates murder from manslaughter. At common law, the criminal intent element of murder was **malice aforethought**. In modern times, many states and the federal government retain the malice aforethought criminal intent (Cal. Penal Code 187, 2024).

CALCRIM No. 520 gives the following instructions to juries considering a charge of first or second degree murder:

To prove that the defendant is guilty of this crime, the People must

prove that:

[1A. The defendant committed an act that caused the death of

(another person/ [or] a fetus);]

[OR]

[1B. The defendant had a legal duty to (help/care

for/rescue/warn/maintain the property of/

other required action[s]>)_____

decedent/person to whom duty is owed> and the defendant failed to

perform that duty and that failure caused the death of (another

person/ [or] a fetus);]

[AND]

2. When the defendant (acted/ [or] failed to act), (he/she) had a state

of mind called malice aforethought(;/.)

[AND

3. (He/She) killed without lawful (excuse/ [or] justification).]

In California an exception to the criminal intent element of murder is the **felony murder rule** discussed in a later section of this chapter.

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8.4.3: The Meaning of Malice

Malice, as used in the term **malice aforethought**, is not the intent to vex or annoy. Nor is it hatred of the victim. Malice exists when the defendant desires the victim's death or is indifferent to whether the victim lives or dies. Malice is codified in PC 188 which states the following:

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with **malice aforethought**. Malice shall not be imputed to a person based solely on his or her participation in a crime.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

(Amended by Stats. 2018, Ch. 1015, Sec. 2. (SB 1437) Effective January 1, 2019.)

CALCRIM 520 (2024) describes malice as follows"

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant had express malice if (he/she) unlawfully intended to kill.

The defendant had implied malice if:

1. (He/She) intentionally (committed the act/ [or] failed to act);

2. The natural and probable consequences of the (act/ [or] failure to act) were dangerous to human life in that the (act/ [or] failure to act) involved a high degree of probability that it would result in death;

3. At the time (he/she) (acted/ [or] failed to act), (he/she) knew (his/her) (act/ [or] failure to act) was dangerous to human life;

AND

4. (He/She) deliberately (acted/ [or] failed to act) with conscious disregard for (human/ [or] fetal) life.

Malice aforethought does not require hatred or ill will toward the victim.

It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

[It is not necessary that the defendant be aware of the existence of a fetus to be guilty of murdering that fetus.]

[(An act/ [or] (A/a) failure to act) causes death if the death is the direct, natural, and probable consequence of the (act/ [or] failure to act) and the death would not have happened without the (act/ [or] failure to act).

A natural and probable consequence is one that a *reasonable person* would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

Example of Intent to Kill

Jay decides he wants to kill someone to see what it feels like. Jay drives slowly up to a crosswalk, accelerates, and then runs down an elderly lady who is crossing the street. Jay is acting with the *intent to kill*, which would be express malice.

Example of Intent to Cause Serious Bodily Injury

Jay wants to injure Robbie, a track teammate, so that he will be the best runner in the high school track meet. Jay waits for Robbie outside the locker room and when Robbie exits, Jay attacks him and stabs him several times in the knee. Unfortunately, one of Jay's stabbing wounds is in the carotid artery, and Robbie bleeds to death. Jay is acting with the *intent to cause serious bodily injury*, which would be implied malice, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

Example of Depraved Heart Intent

Jay is angry at Brittany for turning him down when he asks her to the senior prom. Jay decides to teach Brittany a lesson. He knocks her unconscious as she walks home from school and then drives her out to a deserted field and dumps her on the ground. He thereafter leaves, feeling vindicated at the thought of her walking over ten miles to the nearest telephone. Brittany does not regain consciousness and spends the entire night in the field, where temperatures drop to below freezing. Brittany dies of exposure and acute hypothermia. Jay acts with the intent of depraved heart, also called *abandoned and malignant heart*. This criminal intent is another form of implied malice, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

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8.4.4: The Meaning of Aforethought

The term *aforethought* at common law meant that the defendant planned or premeditated the killing. However, this term has lost its significance in modern times and does not modify the malice element in any way. Premeditation is a factor that can elevate murder to first-degree murder, as is discussed shortly.

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8.4.5: Inference of Intent

The **deadly weapon** doctrine creates an inference of murder intent when the defendant uses a deadly weapon (People v. Carines, 2011). A judge may instruct the jury that they can infer the defendant intended the natural and probable consequences of the criminal act, which are *death* when a deadly weapon is utilized. This basically alleviates the burden of having to prove criminal intent for murder. A deadly weapon is any instrumentality that can kill when used in a manner calculated to cause death or serious bodily injury (Acers v. United States, 2010).

Under California Law, the definition of “deadly weapon” includes firearms and “any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury (CA PC 245, 2024).”

Considerations include:

- Lethality of the object: The object has the actual or apparent ability to inflict significant harm or death;
- Intended use of the object: The object’s inherent design or modification for use as a weapon; and
- Circumstances surrounding the object’s use: Whether the defendant wielded the object as a weapon in a threatening manner and the proximity of the object to the victim.

Some examples of deadly weapons are knives, guns, broken bottles, or even bare hands if there is a discrepancy in the size of the attacker and the victim. Aside from creating an inference of intent for murder, use of a deadly weapon may also *enhance a sentence* for certain crimes.

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8.4.6: Causation Issues in Murder

There is always a causation analysis for murder. The defendant must be the **factual** and **legal cause** of a very specific harm—the victim's death. Causation issues in murder are numerous. If a state has a one or three years and a day rule, this could complicate the causation scenario when a victim's life is artificially extended. One and three- years-and-a-day rules are discussed in detail in Chapter 4 "The Elements of a Crime". In addition, *co-felon liability* could extend criminal responsibility to defendants that did not actually kill the victim, as is discussed shortly.

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8.4.7: Harm Element of Murder

As stated previously, the **harm** element of murder is a victim's death. With the advent of life-sustaining machines, jurisdictions have had to develop a definition for the term *dead*. A victim is **legally dead** when there is irreversible cessation of the entire brain, including the brain stem (Uniform Determination of Death Act, 2010).

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8.4.8: 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 Chapter 5 “Criminal Defenses”.

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 to themselves or others. This killing is intentional and purposeful with **malice aforethought**, but it is noncriminal. 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 Chapter 3, Laws of Arrest, and Chapter 5 “Criminal Defenses”. 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 Chapter 5 “Criminal Defenses.”

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8.4.9: Key Takeaways

- The criminal act element required for murder is conduct that causes the victim's death.
- The criminal intent element of murder is important because it distinguishes murder from manslaughter.
- The three types of malice aforethought are intent to kill, intent to cause serious bodily injury, and depraved heart. The three Penal Code murder mental states are purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.
- Express malice is the intent to kill the victim, or purposely, under the Penal Code. Implied malice is indifference to whether the victim lives or dies, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life under the Penal Code. Implied malice, knowingly, and recklessly includes the intent to commit serious bodily injury and depraved heart intent.
- The deadly weapon doctrine creates an inference of murder intent when the defendant uses a deadly weapon. If the trier of fact accepts the inference, the prosecution does not have the burden of proving criminal intent.
- A human being is dead when there is irreversible cessation of the entire brain, including the brain stem.
- An example of a justifiable homicide is a killing by law enforcement to prevent great bodily injury or death. An example of an excusable homicide is a killing perpetrated by a legally insane defendant.

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8.5: CA Penal Code 187 - First-Degree Murder

Study Points

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

From the PENAL CODE

Homicide PC 187:

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act that results in the death of a fetus if any of the following apply:

(1) The act complied with the former Therapeutic Abortion Act (Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code) or the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code).

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the person pregnant with the fetus or where the pregnant person's death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) It was an act or omission by the person pregnant with the fetus or was solicited, aided, abetted, or consented to by the person pregnant with the fetus.

(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

(Amended by Stats. 2023, Ch. 260, Sec. 14. (SB 345) Effective January 1, 2024.)

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.

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8.5.1: Premeditated Murder

Premeditated murder was originally and historically the predominant form of murder in any first-degree murder statute.

Five examples of when a person can be charged with first-degree murder under California law include when the party kills someone:

- by using a weapon of mass destruction;
- by lying in wait;
- by inflicting torture;
- by a willful, deliberate, and premeditated killing; or
- by committing a felony murder.

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8.5.2: Definition of Willful, Deliberate, and Premeditated

Most jurisdictions define willful as a specific intent to kill, purposely, or *express malice*. Jurisdictions differ when interpreting deliberate and **premeditated**. A minority of jurisdictions equate express malice or purposely with deliberation and premeditation, which means that the prosecution need only prove specific intent to kill for a first-degree premeditated murder conviction (Hawthorne v. State, 2010). However, this interpretation could blur the distinction between first and second-degree murder. The majority of jurisdictions have defined *deliberate* as calm and methodical, without passion or anger (People v. Anderson, 2011). *Premeditated* generally means the defendant reflected on the act or planned ahead (People v. Cole, 2011). In other words, if the defendant specifically intends to kill the victim and rationally, purposefully, takes steps that culminate in the victim's death, the defendant has committed first-degree premeditated murder.

Often it is the act itself that proves the killing was willful, deliberate, and premeditated. If the killing is carried out in a manner that indicates a strong and calculated desire to bring about the victim's death, the trier of fact can and often does conclude that the murder was premeditated (State v. Snowden, 2010).

Most jurisdictions agree that an *extended period of time* is not a requirement of premeditation (Commonwealth v. Carroll, 2010). Thus a murder can be premeditated and first degree even if it is conceived only moments before the actual killing (State v. Schrader, 2010). Some jurisdictions do not require *any* appreciable time lapse between the formation of intent and the criminal act (State v. Snowden, 2010).

Example of a Willful, Deliberate, Premeditated Murder

Imagine that Joannie and her husband Tim are in a terrible fight in the kitchen. Tim tells Joannie that he is going to get a divorce and will thereafter seek full custody of their two young children. Joannie states, "Wait here. I need to go to the bathroom. I will be right back." She walks down the hall, but goes into the *bedroom*, rather than the bathroom, and removes a handgun from the nightstand drawer. She then walks to the bathroom and flushes the toilet. Hiding the handgun in the pocket of her bathrobe, she walks back into the kitchen, removes it, and shoots Tim four times in the abdomen, killing him.

In this scenario, Joannie probably could be convicted of premeditated murder. Joannie shoots and kills Tim in a calm, methodical manner, evidencing deliberation. Her manufactured excuse and flushing of the toilet indicate planning. The act of shooting Tim four times shows that Joannie has a specific intent to kill and a strong and calculated desire to bring about Tim's death. Note that *timing* is not an issue here. Even a few minutes are enough to carry out a premeditated murder if the proper facts are present.

Example of a Spontaneous Killing

Compare the previous example with this scenario. Frank, Dillon's supervisor, calls Dillon into his office and fires him. Enraged, Dillon grabs a heavy brass paperweight from the top of Frank's desk and strikes him in the forehead, killing him instantly. In this example, Dillon acts in *anger*, not calm, cool, reflection. The act of grabbing a heavy brass paperweight appears *impulsive*, not planned. There is no evidence to indicate that Dillon knew he would be fired or knew that there was a brass paperweight on Frank's desk. In addition, the single blow to the head does not necessarily indicate that Dillon had a strong and calculated desire to *kill* Frank. Dillon's conduct may be supported by **murder intent** (most likely implied malice, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life), but there is no evidence of specific intent to kill, deliberation, or premeditation. Thus Frank's killing would probably not be first-degree premeditated murder.

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8.5.3: Murder by a Specified Means

Murder by a specified means is a specific *method* of killing that is extremely heinous. Most states list the specified means in their first-degree murder statutes. Some examples of commonly included specified means are murder by drive-by shooting, destructive device like a bomb, weapon of mass destruction, ammunition designed to puncture a bulletproof vest, poison, torture, or **lying in wait**, which is an ambush-style killing (Cal. Penal Code, 2019). Note that all the aforementioned *method*s of killing involve premeditation to a certain extent and could also probably qualify as first-degree premeditated murder.

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8.5.4: Murder Classification

There are two degrees of murder under California law. These are:

- first-degree murder, and
- second-degree murder.

The first step to convicting a defendant of murder in California is for a prosecutor to prove the following elements as listed above.

Once this is done, **Penal Code 189[a]** says that a person commits first-degree murder if the party commits any of the five types of murder listed above (for example, murder by poisoning someone or lying in wait.).

Penal Code 189[b], goes on to say that “all other kinds of murders are of the second degree.”

In addition, a large difference between the offenses is that while both degrees require a prosecutor to show that an accused acted with malice aforethought, the prosecutor does not have to show for second-degree murder that an accused acted with:

- premeditation, or
- deliberation.

Examples of acts that constitute second-degree murder include:

- shooting a gun into a crowded room and killing someone, where the shooter did not intend to kill.
- a person with multiple DUIs on their record driving drunk and causing an accident that kills someone else.
- viciously sucker-punching a smaller and inebriated person when the punch causes the person to suffer a fatal head injury.

PC 187 second-degree murder carries a penalty of 15 years to life in state prison.

Note that some aggravating factors or special circumstances may work to increase a sentence. For example, a defendant may face:

- a lifetime term in prison with no possibility of parole if he/she had a prior murder conviction on his/her criminal record,
- 25 years to life in prison if the murder victim was a peace officer, and
- life in prison with no possibility of parole if the victim was a peace officer and the defendant intended to kill the police officer or use great bodily injury on the officer.

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8.5.5: Capital Murder

"**Capital murder**" is first-degree murder punishable by either:

- capital punishment (that is the death penalty), or
- life in prison without the possibility of parole (often referred to as "LWOP").

Another term for capital murder is "first-degree murder with special circumstances."

CA Penal Code 190.2 is the California statute that explains the situations where a person can be liable for murder with special circumstances. These are aggravated forms of murder where the defendant, if convicted, can be sentenced to life in prison without the possibility of parole, or the death penalty.

In 1972, the Supreme Court of the United States ruled that it was unconstitutional for juries to impose the death penalty on a "random handful" of some defendants and not others...with no logical guidelines to determine who would be sentenced to death and who wouldn't. The Court believed that this violated the U.S. Constitution's Eighth Amendment rule against "cruel and unusual punishment" ...in the same way that "being struck by lightning is cruel and unusual." The randomness of it is what made it cruel.

California's law on special circumstances murder (also known as capital murder) exists partly to address this concern. A murder defendant can only be sentenced to death (capital punishment) if they are convicted of first-degree murder, and if the murder involved a so-called "special circumstance." The special circumstances that can elevate a murder into special circumstances murder are listed in Penal Code 190.2 PC.

Below are some examples (current as of June 2024) of what may constitute special circumstances:

- The murder was committed for financial gain.
- The victim was a peace officer, federal law enforcement officer, or firefighter.
- The victim witnessed a crime and was killed to silence them.
- The victim was a judge, prosecutor, juror, or government official killed in retaliation or to prevent them from performing their duties.
- The defendant has one or more prior murder convictions.
- The defendant is convicted of multiple murders as part of the same trial, at least one of which is first-degree murder.
- The murder was committed by a bomb or destructive device;
- The murder was to prevent arrest or escape;
- The murder was committed by lying in wait.
- The murder was committed via poison.
- The murder involved torturing the victim.
- The murder was carried out as part of a hate crime.
- The murder of a witness;
- The murder was because of race, religion, or nationality;
- The murder was in the commission of a felony;
- A murder committed in a drive-by shooting;
- A murder committed by a street gang member
- The murder was committed in the course of committing, attempting to commit, or immediately after committing specific felonies such as robbery, kidnapping, rape, or arson.

The list of special circumstances has changed over the years. Some of the items were added as a result of California voter initiatives.

Even if a jury finds that one of the special circumstances is true, that doesn't mean the defendant automatically gets the death penalty. But it DOES mean that they will be sentenced either to death OR to life in prison without the possibility of parole. A capital murder conviction results in an automatic appeal that can last for decades. It should be noted that in 2019 CA Governor Gavin Newsom put into effect a temporary moratorium on all executions in California despite overwhelming public support for the matter as evidenced by the defeat of Proposition 62 (2016) which would have repealed the death penalty. As of December 2020, the Los Angeles County District Attorney George Gascon's office no longer seeks the death penalty in special circumstances murder cases (LACDA SPECIAL DIRECTIVE 20-11). If you're convicted of special circumstances murder in that county, the default

sentence is life without parole.

The US Supreme Court has held that criminal homicide is the *only* crime against an individual that can merit the death penalty (Kennedy v. Louisiana, 2010). A discussion of crimes against the government (such as treason) that merit the federal death penalty is in Chapter 12 "*Crimes against the Government*".

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8.5.6: Key Takeaways

- California and the federal government include premeditated murder, murder by a specified means, and felony murder in their first-degree murder statutes.
- Premeditated murder is typically a purposeful killing committed after calm planning and reflection. An extensive length of time between the formation of criminal intent and the criminal act is not generally a requirement of premeditated murder.
- The criminal act can help prove that a murder was premeditated. If the killing is carried out in a manner that indicates a strong and calculated desire to bring about the victim's death, the trier of fact can conclude that the murder was premeditated.
- When the defendant commits murder with a particularly heinous method, the killing is murder by a specified means.
- First-degree murder is the highest classification of murder with the most severe sentencing options.
- California Penal Code 190.2 PC specifies special circumstances" murders which can result in the death penalty or life in prison without the possibility of parole.

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8.6: California Felony Murder Rule PC 189

The (new) felony murder law went into effect on January 1, 2019. The new law is Senate Bill 1437. SB 1437 applies retroactively, meaning some persons convicted under the old version of the felony murder rule will be eligible to petition the court for resentencing to substantially shorter sentences.

Under the California felony murder rule, a person can be held liable for murder for attempting, committing, or being a major participant in a felony crime and in so doing either:

- directly kills someone,
- aids and abets in first-degree murder with the intent to kill, or
- causes the death of an on-duty police officer.

Felony murder is also referred to as murder in the commission of a felony. The crime can lead to a life sentence in state prison.

Examples

- After Jose commits the felony of grand theft auto, he intentionally hits a witness with the car and drives over him.
- After Keilie helps a friend rob a convenience store, she holds the store owner while the friend strangles the store owner.
- Chip lights a car on fire (thereby committing the felony of arson) while he knows a person is sleeping in the back of it.

There are several possible legal defenses available if a person commits a felony murder in California. These include showing that an accused party:

- Did not commit a felony;
- Had no intent to kill; and/or,
- Was not a “major participant” in the felony.

Like non-felony murder in California, there are two degrees of felony murder; first degree and second degree. First-degree felony murder may be punished by:

- 25 years to life in California state prison;
- Life in prison without the possibility of parole (LWOP) or,
- The California death penalty.

Second-degree felony murder is punishable by imprisonment in the state prison for 15 years to life.

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8.6.1: Attempted a Felony

Attempting a felony occurs when:

1. A defendant intended to commit a certain felony; and,
2. He/she performed a direct act toward committing that crime.

If a prosecutor cannot successfully prove both elements of attempt, a defendant is innocent of an attempt charge.

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8.6.2: Participant in a Felony

Senate Bill 1437 applies to persons that

1. commit a felony,
2. attempt to commit a felony, or
3. are a major participant in a felony.

Under California law, the determination as to whether a defendant is a “major participant” in a felony murder charge depends on the facts of the case. A few factors a court might consider include:

- A defendant’s role in planning the crime;
- Whether the defendant supplied any weapons for the commission of the crime; and,
- If the defendant was present at the scene of the murder.

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8.6.3: Aiding and Abetting

Under the felony murder law, a person is guilty of felony murder even if he/she does not actually murder someone. However, in this scenario, the person is only guilty of murder if he/she “aided or abetted” in the murder.

The determination of whether or not a person aided or abetted in a murder depends on all of the facts in the case. Further, under SB 1437, a person is only guilty of murder if he/she:

1. aided or abetted in murder, and
2. aided or abetted with the intent to kill.

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8.6.4: Intent to Kill

Closely associated with the issue of aiding and abetting is the issue of “intent to kill.” Senate Bill 1437 states that a person that aids and abets in a murder can only be charged with felony murder if he/she acts with the specific intent to kill.

California law states that a person has an intent to kill when he/she acts with “malice aforethought.” A person also acts with an intent to kill if he/she kills someone and the killing is

- premeditated,
- deliberate, or
- committed willfully.

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8.7: Second-Degree Murder

Study Points

1. Compare statutory definitions of second-degree murder.
2. Ascertain two types of murder that are typically second degree.
3. Analyze second-degree murder grading.

California defines **second-degree murder** as any murder that is not first-degree murder (CA PC 187). This definition excludes murders that are premeditated or committed with a specified means. It includes *implied malice* murder, such as murder committed with the intent to inflict serious bodily injury and depraved heart murder.

California classifies second-degree murder *lower* than first-degree murder and includes less serious sentencing options. Second-degree murder is *higher* than manslaughter (discussed later in this chapter) because it has a more heinous criminal intent.

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8.7.1: Watson Murder Rule

One assignment in this class will involve a Probable Cause Declaration with a Watson Murder allegation so *pay attention*!

A **Watson Murder** is the California state criminal offense of implied malice murder while driving under the influence of drugs or alcohol.

A Watson murder under California law is a form of second-degree murder which is charged in cases where someone dies as a result of another driver's intoxicated driving.

The name Watson comes from a California appellate decision *People v. Watson* **PEOPLE V. WATSON (1981)** [30 Cal.3d 290, 179 Cal.Rptr. 43, 637 P.2d 279] which confirmed that a DUI defendant acting with implied malice can properly be charged with murder. Based on the court's ruling, you could be charged with murder if you drive while under the influence of drugs or alcohol and a somebody is killed as a result of your conduct. The Watson murder rule allows the prosecution to charge this crime (which is often charged as a vehicular manslaughter while intoxicated) as second-degree murder under California Penal Code 187. The intoxicant can be either drugs, alcohol, or a combination of the two.

The critical question in Watson murder cases is whether or not the intoxicated driver acted with **implied malice**.

If not, a Watson murder charge cannot be sustained and the intoxicated driver would likely be guilty of the lesser offense of vehicular manslaughter while intoxicated (CALCRIM 591) or gross vehicular manslaughter while intoxicated (CALCRIM 590).

Malice aforethought can be either express or implied and prosecutors will rely on evidence showing you exhibited implied malice.

What is “implied malice” in a DUI murder case?

“Implied malice” is also known as “malice aforethought.” It does not require ill will toward the victim or an intention to cause the victim’s death.

Rather, a defendant acts with implied malice when:

- He or she intentionally commits an act (in this case driving under the influence);
- The natural and probable consequences of the act are dangerous to human life;
- At the time the defendant acts he or she knows the act is dangerous to human life; and
- The defendant deliberately acts with conscious disregard for human life.

The difficult part for the prosecutor is proving that the driver acted with a “conscious disregard for human life.”

Historically, prosecutors have brought murder charges only when:

- The defendant has at least one prior conviction for driving under the influence, and
- The defendant attended California DUI school or was read a “Watson admonition” in connection with the prior offense(s).

A “Watson admonition” is a warning given to defendants convicted of driving under the influence in California. It advises that DUI is extremely dangerous to human life and that a subsequent conviction might lead to murder charges.

Watson Admonition

California Code, Vehicle Code - VEH § 23593

Current as of January 01, 2023

(a) The court shall advise a person convicted of a violation of Section 23103, as specified in Section 23103.5, or a violation of Section 23152 or 23153, as follows:

“You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of

***alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.*"**

(b) The advisory statement may be included in a plea form, if used, or the fact that the advice was given may be specified on the record.

(c) The court shall include on the abstract of the conviction or violation submitted to the department under Section 1803 or 1816, the fact that the person has been advised as required under subdivision (a).

Note: This author served over 29 years as a uniformed officer/sergeant/lieutenant working primarily the "graveyard" night shift where I was involved in the arrest of over 10,000 DUI drivers, several of which had killed an innocent person. The hardest part of my job by far was having to notify the loved ones that a relative was needlessly killed by a drunk driver. Don't drive while under the influence folks, just don't!!

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8.8: Manslaughter

Study Points

1. Compare murder and manslaughter.
2. Define voluntary manslaughter.
3. Ascertain the basis of an adequate provocation.
4. Explain the concurrence of a voluntary manslaughter killing and the heat of passion.
5. Compare voluntary and involuntary manslaughter.
6. Describe the three types of involuntary manslaughter.
7. Analyze manslaughter grading.

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8.8.1: PC 192 (2024)

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:

(a) Voluntary—upon a sudden quarrel or heat of passion.

(b) Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.

(c) Vehicular—

(1) Except as provided in subdivision (a) of Section 191.5, driving a vehicle in the commission of an *unlawful act*, not amounting to a felony, and *with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence*.

(2) Driving a vehicle in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

(3) Driving a vehicle in connection with a violation of paragraph (3) of subdivision (a) of Section 550, where the vehicular collision or vehicular accident was knowingly caused for financial gain and proximately resulted in the death of any person. This paragraph does not prevent prosecution of a defendant for the crime of murder.

(d) This section shall not be construed as making any homicide in the driving of a vehicle punishable that is not a proximate result of the commission of an unlawful act, not amounting to a felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

(e) (1) "Gross negligence," as used in this section, does not prohibit or preclude a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice, consistent with the holding of the California Supreme Court in **People v. Watson (1981)** 30 Cal.3d 290.

(2) "**Gross negligence,"** as used in this section, may include, based on the totality of the circumstances, any of the following:

(A) Participating in a sideshow pursuant to subparagraph (A) of subparagraph (2) of subdivision (i) of Section 23109 of the Vehicle Code.

(B) Engaging in a motor vehicle speed contest pursuant to subdivision (a) of Section 23109 of the Vehicle Code.

(C) Speeding over 100 miles per hour.

(f) (1) For purposes of determining sudden quarrel or heat of passion pursuant to subdivision (a), the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship. Nothing in this section shall preclude the jury from considering all relevant facts to determine whether the defendant was in fact provoked for purposes of establishing subjective provocation.

(2) For purposes of this subdivision, "gender" includes a person's gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person's gender as determined at birth.

What distinguishes murder from manslaughter is the **criminal intent element**. Manslaughter is an unlawful killing *without* malice or murder intent. The criminal act, causation, and harm elements of manslaughter and murder are fundamentally the same. Thus criminal intent is the only manslaughter offense element that is discussed in this section.

Manslaughter has two basic classifications: **voluntary** and **involuntary**. **Voluntary manslaughter** has the same criminal intent element as murder. In fact, a voluntary manslaughter killing is typically supported by express malice, specific intent to kill, or purposely. However, in a voluntary manslaughter, an emotional state called a **heat of passion** negates the murder intent. An

adequate provocation from the *victim* inspires the heat of passion.

The **adequacy** requirement is essential to any voluntary manslaughter analysis. Many defendants are provoked and thereafter kill with murder intent. Nonetheless, most provocations are not **adequate** to drop the crime from murder to manslaughter. The victim's provocation must be serious enough to goad a *reasonable person* into killing (People v. Steele, 2011). A reasonable person is a fictional and objective standard created by the trier of fact. Of course, *the defendant* must *actually* be provoked, which is a subjective standard (People v. Steele, 2011).

Example of Adequate Provocation

A traditional example of provocation that *is* adequate to reduce a crime from murder to manslaughter is an observation by one spouse of another spouse in the act of adultery (Ohio v. Shane, 2011). For example, José comes home from work early and catches his wife in bed with his best friend. He becomes so enraged that he storms over to the dresser, grabs his handgun, and shoots and kills her. Clearly, José acts with intent to kill. However, the victim *provoked* this intent with an act that could cause a *reasonable person to kill*. Thus José has probably committed voluntary manslaughter in this case, not murder.

Other Examples of Adequate Provocation

Other examples of adequate provocation are when the homicide victim batters the defendant and a killing that occurs during a mutual combat (Ohio v. Shane, 2011). Cases have generally held that *words alone* are *not* enough to constitute adequate provocation (Girouard v. State, 2011). Thus in the adequate provocation example in "Example of Adequate Provocation", if a friend told José that his wife was committing adultery, and José responded by shooting and killing his wife, this would probably be murder, not voluntary manslaughter.

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8.8.2: Concurrence of the Killing and the Heat of Passion

The second requirement of voluntary manslaughter is that the killing occur *during* a heat of passion. Defendants generally exhibit rage, shock, or fright when experiencing a heat of passion. This emotional state negates the calm, deliberate, intent to kill that supports a charge of murder. However, heat of passion mental states are typically brief in duration. Thus there cannot be a *significant time lapse* between the victim's provocation and the killing (State v. Cole, 2010). Analyze the adequate provocation in the example discussed. If José waits until the next day to shoot and kill his wife, the crime is most likely premeditated first-degree murder, *not* voluntary manslaughter.

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8.8.3: Involuntary Manslaughter

Involuntary manslaughter is an unlawful killing that completely lacks murder intent. Involuntary manslaughter is distinguishable from voluntary manslaughter, which generally includes a murder intent that has been *negated*. Involuntary manslaughter generally can be classified as **misdemeanor manslaughter**, **reckless or negligent involuntary manslaughter**, or **vehicular manslaughter**.

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8.8.4: Misdemeanor Manslaughter

Misdemeanor manslaughter, also called unlawful act manslaughter, is a criminal homicide that occurs during the commission or attempted commission of a *misdemeanor*. The Model Penal Code completely rejects misdemeanor manslaughter. There is a trend to follow the Model Penal Code's example and abolish misdemeanor manslaughter. Most states that prohibit misdemeanor manslaughter only include misdemeanors that are inherently dangerous to life in the criminal statute, excluding strict liability misdemeanors or malum prohibitum crimes (K.S.A., 2010). A minority of states and the federal government include strict liability or malum prohibitum crimes in their misdemeanor manslaughter statutes (21 O.S., 2010). In either jurisdiction, the defendant need only possess the criminal intent *for the misdemeanor* to be guilty of the killing.

Example of Misdemeanor Manslaughter

Roberta points an unloaded gun at Jennifer to scare her into breaking up with Roberta's ex-boyfriend. This crime is called brandishing a weapon and is often classified as a misdemeanor. At the sight of the gun, Jennifer suffers a heart attack and dies. Roberta has most likely committed misdemeanor manslaughter in this case. Brandishing a weapon is not always inherently dangerous to life. However, if Jennifer has a heart attack and dies because of Roberta's commission of this misdemeanor offense, Roberta still could be criminally responsible for misdemeanor manslaughter in many jurisdictions.

Example of Reckless or Negligent Involuntary Manslaughter

Steven, an off-duty sheriff's deputy, brings his shotgun into the local rifle shop to be repaired. Steven thinks that the shotgun is unloaded and hands it to the employee with the *safety off*. Unfortunately, the gun is loaded and discharges, shooting and killing the employee. In this case, Steven *should know* that at certain times the safety on his shotgun must always be on because he is a registered gun owner and a sheriff's deputy who has been trained to handle guns. However, Steven is unaware of the risk and believes 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*.

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8.8.5: Key Takeaways

- Murder is a killing supported by the criminal intent of malice or purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to life. Manslaughter is a killing supported by malice negated by a heat of passion, reckless, or negligent criminal intent.
  - Voluntary manslaughter is a killing that occurs during an adequately provoked heat of passion.
- An adequate provocation is one sufficient to goad a reasonable person into killing and that actually provokes the defendant into killing.
- A killing must occur during a heat of passion to be classified as voluntary manslaughter. If a killing occurs before the heat of passion is provoked or after the heat of passion has cooled, it probably will be classified as murder.
- Voluntary manslaughter is supported by murder intent that has been negated in an adequately provoked heat of passion. Involuntary manslaughter lacks murder intent altogether.
- The three types of involuntary manslaughter are misdemeanor manslaughter, reckless or negligent involuntary manslaughter, and vehicular manslaughter.
- Manslaughter is typically graded lower than murder. Voluntary manslaughter is typically graded higher than involuntary manslaughter. The Model Penal Code grades all manslaughters as felonies of the second degree and grades negligent homicide as a felony of the third degree.

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8.9: Summary

Homicide is the killing of one human being by another. Criminal homicide is either murder or manslaughter. Some states and the federal government also criminalize the killing of a fetus. Suicide is usually not criminal, although assisted suicide could be.

Many jurisdictions follow the common law and define murder as the killing of a victim with malice aforethought. Malice can be either a specific intent to kill, which is express malice, or the intent to do serious bodily injury, or depraved heart, which is implied malice.

Most jurisdictions divide murder into degrees of seriousness. First-degree murder is the most serious, can merit the death penalty in certain jurisdictions, and generally includes premeditated murder, murder by a specified means, and serious felony murders. Premeditated murder is typically a killing supported by specific intent to kill combined with cool reflection and planning. Murder by a specified means is killing with a specific heinous method. Felony murder is a homicide that occurs during the commission or attempted commission of a felony. Felony murder lacks murder intent; the defendant need only possess the intent required for the felony. Felony murder can be graded as first, second, or third degree, depending on the felony.

Second-degree murder is defined as any murder that is not first degree. Typically, second-degree murder intent is the intent to inflict serious bodily injury or a depraved heart intent. Second-degree murder is usually classified lower than first-degree murder but higher than manslaughter.

In California manslaughter is an unlawful killing without murder intent. Most jurisdictions divide manslaughter into voluntary and involuntary. Voluntary manslaughter is a killing that occurs during a heat of passion inspired by adequate provocation from the victim, negating murder intent. Involuntary manslaughter can be a killing that occurs during the commission or attempted commission of a misdemeanor or a reckless or negligent killing, depending on the jurisdiction. Involuntary manslaughter can also be vehicular manslaughter when the killing occurs while driving a vehicle recklessly, negligently, or under the influence of alcohol or drugs.

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9.1: Introduction

In this chapter, you learn the corpus delicti (elements) of the crime of **rape** and related sex offenses and examine criminal defenses for these crimes. As you have learned in earlier chapters, we study the possible criminal defenses in order to build a stronger case against the criminals.

A note about rape:

According to national statistics, one in six women are sexually assaulted during their lifetime. Most experts agree that rape is one of the **most egregious crimes committed**. It has a devastating impact on its victims, their families, and society as a whole. Some of you in this class may have been the victim of this crime. Some of us, this author included, have family members who have been the victim of rape and can attest to the devastation it causes. Rape is one of the most underreported crimes.

According to the **Rape, Abuse & Incest National Network** (RAINN) out of every 1,000 sexual assaults-

- 310 are reported to the police (2 out of 3 go unreported)
- 50 reports lead to an arrest
- 28 will lead to a conviction
- 25 will be incarcerated

This means 975 rapists out of 1000 will not go to jail. (RAINN.org)

The primary reason that rapes are not reported is the re-victimization by the administration of justice system. As you will learn in the online portion of this course, the victim has to tell her story multiple times which often leads to shame and psychological trauma. This author has seen this first-hand on multiple occasions. If you enter the administration of justice field, I urge you to make the effort to learn how to properly investigate this crime and locate the proper resources for the victims and those close to them.

Resources for victims of rape are located later in this chapter as well as the online content of this course.

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9.2: Chapter Learning Objectives

MLO 9-1. Analyze the corpus delicti of the following California crimes

- Penal Code 261 Rape
- Penal Code 261.5 PC Statutory Rape
- Penal Code 262 PC Spousal Rape
- Penal Code 264.1 PC (Gang) Rape in Concert
- Penal Code 266 PC | Enticing a Child to Prostitution
- Penal Code 288(b)(2) & (c)(2) Lewd and Lascivious Acts

MLO 9-2 Apply the requirements of Penal Code 290- Sex Offender Registration

MLO 9-2 Explain the provisions of Megan's Law

MLO 9-2 Locate resources for victims of sex crimes

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9.3: History of Rape and Sodomy

The word **rape** has its roots in the Latin word *rapere*, which means to steal or seize. At early common law, rape was a capital offense. The elements of rape were forcible sexual intercourse, by a man, with a woman not the spouse of the perpetrator, conducted without consent, or with consent obtained by force or threat of force (Macnamara, D., 2011). The rape prosecution required evidence of the defendant's use of force, extreme resistance by the victim, and evidence that corroborated the rape victim's testimony. The common law also recognized the crime of **sodomy**. In general, sodomy was the penetration of the male anus by a man. Sodomy was condemned and criminalized even *with consent* because of religious beliefs deeming it a crime against nature (Lawbrain.com, 2011).

In the 1970s, many changes were made to rape statutes, updating the antiquated common-law approach and increasing the chances of conviction. The most prominent changes were eliminating the marital rape exemption and the requirement of evidence to corroborate the rape victim's testimony, creating rape shield laws to protect the victim, and relaxing the necessity for the defendant's use of force or resistance by the victim (Lyon, M. R., 2011). Many jurisdictions also changed the name of rape to sexual battery, sexual assault, or unlawful sexual conduct and combined sexual offenses like rape, sodomy, and oral copulation into one statute. Although some states still have statutes that provide the death penalty for rape, the US Supreme Court has held that rape, even *child rape*, cannot be considered a **capital** offense without violating the Eighth Amendment cruel and unusual punishment clause, rendering these statutes unenforceable (Kennedy v. Louisiana, 2011).

Sodomy law has likewise been updated to make sodomy a gender-neutral offense and preclude the criminalization of consensual sexual conduct between adults. The US Supreme Court has definitively held that consensual sex between adults may be protected by a right of privacy and cannot be criminalized without a sufficient government interest (Lawrence v. Texas, 2011).

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9.4: Rape Elements

Rape is a crime that has the elements of criminal act, criminal intent, causation, and harm. Rape also has an attendant circumstance element, which is lack of consent by the victim. The following sections list the Penal Code section and jury instructions for the crime of rape. Pay close attention to what is required for consent.

Word of advice: don't have sex with persons you don't know well (as in wife or girlfriend) and get recorded (video) consent EVERY time. I've seen this go bad too many times. It's not worth it !!

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9.4.1: California Penal Code 261

(a) Rape is an act of sexual intercourse accomplished under any of the following circumstances:

(1) If a person who is not the spouse of the person committing the act is **incapable**, because of a mental disorder or developmental or physical disability, of **giving legal consent**, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent. This paragraph does not preclude the prosecution of a spouse committing the act from being prosecuted under any other paragraph of this subdivision or any other law.

(2) If it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) If a person is prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused.

(4) If a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:

- Was unconscious or asleep.
- Was not aware, knowing, perceiving, or cognizant that the act occurred.
- Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.
- Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

(5) If a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) If the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(7) If the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

- For purposes of this section, the following definitions apply:

(1) "Duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and the victim's relationship to the defendant, are factors to consider in appraising the existence of duress.

(2) "Menace" means any threat, declaration, or act that shows an intention to inflict an injury upon another.

(Amended by Stats. 2021, Ch. 626, Sec. 17. (AB 1171) Effective January 1, 2022.)

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9.4.2: Jury Instructions- CALCRIM No. 1000. Rape by Force, Fear, or Threats (Pen. Code, § 261(a)(2), (6) & (7))

The defendant is charged [in Count] with rape by force [in violation of Penal Code section 261(a)].

To prove that the defendant is guilty of this crime, **the People must**

prove that:

1. The defendant had sexual intercourse with a woman;

2. The woman did not consent to the intercourse;

AND

3. The defendant accomplished the intercourse by [force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.] [threatening to retaliate in the future against the woman or someone else when there was a reasonable possibility that the defendant would carry out the threat. A threat to retaliate is a threat to kidnap, falsely imprison, or inflict extreme pain, serious bodily injury, or death.] [threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A public official is a person employed by federal, state, or local government who has authority to incarcerate, arrest, or deport. The woman must have reasonably believed that the defendant was a public official even if he was not.]

Sexual intercourse means **any penetration, no matter how slight**, of the vagina or genitalia by the penis. [Ejaculation is not required.]

[To consent, a woman must act **freely and voluntarily and know the nature of the act**.]

[A woman who initially consents to an act of intercourse **may change her mind** during the act. If she does so, under the law, the act of intercourse is then committed without her consent if:

1. She **communicated through words or acts** to the defendant that she no longer consented to the act of intercourse;

2. 2. A **reasonable person would have understood** that her words or acts expressed her lack of consent;

AND

3. The **defendant forcibly continued the act** of intercourse despite her objection.][It is **not required that she physically resist or fight back** in order to communicate her lack of consent.]

[Evidence that the defendant and the woman (dated/were married/had been married) is not enough by itself to constitute consent.]

[Evidence that the woman (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.]

[Intercourse is accomplished by force if a person uses enough physical force to overcome the woman's will.]

[**Duress** means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do [or submit to]something that she would not do [or submit to] otherwise.

When deciding whether the act was accomplished by duress, consider all the circumstances, including the woman's age and her relationship to the defendant.]

[**Retribution** is a form of payback or revenge.]

[**Menace** means a threat, statement, or act showing an intent to injure someone.]

[Intercourse is **accomplished by fear** if the woman is actually and reasonably afraid [or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it].]

[A woman **must be alive** at the time of the sexual intercourse for the crime of rape to occur.]

[The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse [and actually and reasonably believed that she consented throughout the act of intercourse].

The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty.

New January 2006; Revised February 2013, February 2014, March 2022

Example of Rape Act

Alex and Brad play video games while Brad's sister Brandy watches. Brad tells Alex he is going to go the store and purchase some beer. While Brad is gone, Alex turns to Brandy, pulls a knife out of his pocket, and tells her to take off her pants and lie down. Brandy tells Alex, "No, I don't want to," but thereafter acquiesces, and Alex puts his penis into Brandy's vagina. Alex has probably committed the criminal act element required for rape in most jurisdictions. Although Alex did not use physical force to accomplish sexual intercourse, his *threat* of force by display of the knife is sufficient. If the situation is reversed, and Brandy pulls out the knife and orders Alex to put his penis in her vagina, many jurisdictions would also criminalize Brandy's criminal act as rape. If Alex does not use force or a threat of force, but Brandy is only nine years old, some jurisdictions still criminalize Alex's act as rape, as would the Model Penal Code.

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9.5: Rape Attendant Circumstance

The **attendant circumstance** element required for rape is ***the victim's lack of consent*** to the defendant's act. Thus victim's consent could operate as a failure of proof or affirmative defense.

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9.5.1: Proving Lack of Consent as an Attendant Circumstance

Proving lack of consent has two components. First, the victim must be legally *capable* of giving consent. If the victim is under the age of consent (see PC 261.5 **statutory rape**) or is mentally or intellectually impaired because of a permanent condition, intoxication, or drugs, the prosecution does not have to prove lack of consent in California. The second component to proving lack of consent is separating true consent from consent rendered *involuntarily*. Involuntary consent is present in two situations. First, if the victim consents to the defendant's act because of fraud or trickery—for example, when the victim is unaware of the *nature* of the act of sexual intercourse—the consent is involuntary. A victim is generally unaware of the nature of the act of sexual intercourse when a doctor shams a *medical procedure* (Iowa v. Vander Esch, 2011). This is called **fraud in the factum**. **Fraud in the inducement**, which is a fraudulent representation as to the *circumstances* accompanying the sexual conduct, does not render the consent involuntary. An example of fraud in the inducement is a defendant's false statement that the sexual intercourse will *cure* a medical condition (Boro v. Superior Court, 2011).

A more common example of involuntary consent is when the victim consents to the defendant's act because of **force** or **threat** of force. The prosecution generally proves this type of consent is involuntary by introducing evidence of the victim's *resistance*.

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9.5.2: Proving Involuntary Consent by the Victim's Resistance

Under the common law, the victim had to manifest *extreme resistance* to indicate lack of consent. In modern times, the victim does not have to fight back or otherwise endanger her life if it would be futile to do so. The victim only needs to resist to the same extent as a reasonable person under similar circumstances, which is an objective standard(CALCRIM 100).

The use of force by the defendant could eliminate *any* requirement of victim resistance to prove lack of consent. If the defendant obtains consent using a *threat* of force, rather than force, the victim does not have to resist if the victim experiences subjective fear of serious bodily injury, and a reasonable person under similar circumstances would not resist, which is an objective standard

Threat of force can be accomplished by words, weapons, or gestures. It can 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 law'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 California the law states 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 (In re John Z., 2011).

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9.5.3: The Requirement of Corroborative Evidence

At early common law, a victim's testimony was insufficient evidence to meet the burden of proving the elements of rape, including lack of consent. The victim's testimony had to be supported by additional **corroborative evidence**.

Modern jurisdictions have done away with the corroborative evidence requirement and allow the trier of fact to determine the elements of rape or lack of consent based on the victim's testimony alone (State v. Borthwick, 2011). However, statistics indicate that rape prosecutions often result in acquittal. Thus although technically the victim's testimony need not be corroborated, it is paramount that the victim *promptly report* the rape to the appropriate authorities and submit to testing and interrogation to preserve any and all forms of relevant rape evidence.

Example of Rape Attendant Circumstance

Review the example with Brandy and Alex in "Example of Rape Act". In this example, after an initial protest, Brandy lies down, takes off her pants, and allows Alex to put his penis in her vagina when he pulls out a knife. It is likely that the trier of fact will find the rape attendant circumstance in this case. Although Brandy acquiesced to Alex's demands *without resisting*, she did so after Alex took a knife out of his pocket, which is a **threat** of force. In addition, Brandy expressed her lack of consent verbally before submitting to Alex's demand. A trier of fact could determine that Brandy experienced a fear of serious bodily injury from Alex's display of the knife, and that a reasonable person under similar circumstances would give in to Alex's demands without physical resistance.

Change this example and assume that after Brad leaves, Alex asks Brandy to have sexual intercourse with him. Brandy responds, "No," but allows Alex to remove her pants and put his penis in her vagina without physically resisting. The trier of fact must make the determination of whether Alex accomplished the sexual act by force or threat of force and without Brandy's consent. If Brandy testifies that she said "No" and did not consent to Alex's act, and Alex testifies that Brandy's verbal response was insufficient to indicate lack of consent, the trier of fact must resolve this issue of fact, and it can do so based on Brandy's testimony, **uncorroborated**, in many jurisdictions. The trier of fact can use the criteria of the difference in age and size between Brandy and Alex, any gestures or words indicating force or threat, and the location and isolation of the incident, among other factors.

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9.6: Rape Intent

The criminal intent element required for rape is the **general intent** or **knowingly** to perform the rape criminal act (State v. Lile, 2011). This may include the intent to use force to accomplish the objective if the state's rape statute includes force or threat of force as a component of the criminal act.

Example of Rape Intent

Review the example with Alex and Brandy in "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.

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9.7: Rape Causation

The defendant's criminal act must be the **factual** and **legal cause** of the harm

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9.7.1: Rape Harm

The **harm** element of rape is *penetration*, no matter how slight. This precludes virginity as a defense. In addition, modern statutes do not require male ejaculation, which precludes lack of semen as a defense (Ala. Code § 13A-6-69, 2011).

Example of Rape Harm

Review the example with Alex and Brandy in "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.

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9.8: Rape Shield Laws

Rape prosecutions can be extremely stressful for the victim, especially when the defendant pursues a **consent** defense. Before the comprehensive rape reforms of the 1970s, rape defendants would proffer any evidence they could find to indicate that the victim was sexually promiscuous and prone to consenting to sexual intercourse. Fearing humiliation, many rape victims kept their rape a secret, not reporting it to law enforcement. This allowed serial rapists to escape punishment and did not serve our criminal justice goal of deterrence.

In modern times, most states protect rape victims with **rape shield laws**. Rape shield laws prohibit the admission of evidence of the victim's past sexual conduct to prove consent in a rape trial, unless the judge allows it in a pretrial **in camera** hearing, outside the presence of the jury. Rape shield laws could include the additional protections of the exclusion of evidence relating to the victim's style of dress to prove consent, the exclusion of evidence that the victim requested the defendant to wear a condom to prove consent, and the affirmation that a victim's testimony in a rape trial need not be corroborated by other evidence. Courts permit the admission of evidence proving the victim's previous consensual sex *with the defendant* because this evidence is particularly relevant to any consent defense.

> **Example of the Effect of a Rape Shield Law**
>
> Review the example with Alex and Brandy in "Example of Rape Intent". Assume that the jurisdiction in which the example takes place has a **rape shield law**. If Alex is put on trial for the rape of Brandy and he decides to pursue a consent defense, Alex would *not* be able to introduce evidence of Brandy's sexual history with *other men* unless he receives approval from a judge in an in camera hearing (just the judge and attorneys) before the trial.

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9.9: Acquaintance Rape

Rape defendants are frequently known to the victim, which may change the factual situation significantly from stranger rape. **Acquaintance rape**, also called **date rape**, is a phenomenon that could increase a victim's reluctance to report the crime and could also affect the defendant's need to use force and the victim's propensity to physically resist (The National Center for Victims of Crime, 2011). Rape statutes punish *nonforcible*, *nonconsensual* sexual conduct *as severely* as forcible rape.

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9.10: Spousal Rape

As stated previously, at early common law, a man could not rape his spouse. The policy supporting this exemption can be traced to a famous seventeenth-century jurist, Matthew Hale, who wrote, “[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract” (Hale, History of Pleas of the Crown, p. 629). During the rape reforms of the 1970s, many states including California eliminated the marital or **spousal rape** exemption,

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9.11: Laws

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9.11.1: California Penal Code 261.5 Statutory Rape

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a “minor” is a person under 18 years of age and an “adult” is a person who is 18 years of age or older.

(b) A person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) A person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) A person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

(e) (1) Notwithstanding any other provision of this section, an adult who engages in an act of sexual intercourse with a minor in violation of this section may be liable for civil penalties in the following amounts:

(A) An adult who engages in an act of unlawful sexual intercourse with a minor less than two years younger than the adult is liable for a civil penalty not to exceed two thousand dollars ($2,000).

(B) An adult who engages in an act of unlawful sexual intercourse with a minor at least two years younger than the adult is liable for a civil penalty not to exceed five thousand dollars ($5,000).

(C) An adult who engages in an act of unlawful sexual intercourse with a minor at least three years younger than the adult is liable for a civil penalty not to exceed ten thousand dollars ($10,000).

(D) An adult over 21 years of age who engages in an act of unlawful sexual intercourse with a minor under 16 years of age is liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000).

(2) The district attorney may bring actions to recover civil penalties pursuant to this subdivision. From the amounts collected for each case, an amount equal to the costs of pursuing the action shall be deposited with the treasurer of the county in which the judgment was entered, and the remainder shall be deposited in the Underage Pregnancy Prevention Fund, which is hereby created in the State Treasury. Amounts deposited in the Underage Pregnancy Prevention Fund may be used only for the purpose of preventing underage pregnancy upon appropriation by the Legislature.

(3) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars ($70) against a person who violates this section with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant’s ability to pay, and a defendant shall not be denied probation because of their inability to pay the fine permitted under this subdivision.

(f) A person convicted of violating subdivision (d) who is granted probation shall not complete their community service at a school or location where children congregate.

(Amended by Stats. 2023, Ch. 838, Sec. 1. (AB 1371) Effective January 1, 2024.)

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9.11.2: CALCRIM Jury Instructions No. 1071. Unlawful Sexual Intercourse - Minor More Than Three Years Younger (Pen. Code, § 261.5(a) & (c))

The defendant is charged [in Count] with unlawful sexual intercourse with a minor who was more than three years younger than the defendant [in violation of Penal Code section 261.5(c)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant had sexual intercourse with another person;

2. The defendant and the other person were not married to each other at the time of the intercourse;

AND

3. At the time of the intercourse, the other person was under the age of 18 and more than three years younger than the defendant.

Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]

[It is not a defense that the other person may have consented to the intercourse.][Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that the other person was age 18 or older. The People must prove beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person was at least 18 years old. If the People have not met this burden, you must find the defendant not guilty of this crime.]

This page titled 9.11.2: CALCRIM Jury Instructions No. 1071. Unlawful Sexual Intercourse - Minor More Than Three Years Younger (Pen. Code, § 261.5(a) & (c)) is shared under a CC BY-NC-SA 4.0 license and was authored, remixed, and/or curated by Mark C Fields and Carmyn A. Radetic-Fields.

9.11.3: CALCRIM No. 1072. Misdemeanor Unlawful Sexual Intercourse - Minor Within Three Years of Defendant's Age (Pen. Code, § 261.5(a) & (b))

The defendant is charged [in Count] with unlawful sexual intercourse with a minor whose age **was within three years of the defendant's age** [in violation of Penal Code section 261.5(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant had sexual intercourse with another person;

2. The defendant and the other person were not married to each other at the time of the intercourse;

AND

3. At the time of the intercourse, the other person was **under the age of 18** but not more than three years (younger/older) than the

defendant.

Sexual intercourse means any penetration, no matter how slight, of the

vagina or genitalia by the penis. [Ejaculation is not required.]

[It is not a defense that the other person may have consented to the

intercourse.]

[Under the law, a person becomes one year older as soon as the first

minute of his or her birthday has begun.]

[The defendant is not guilty of this crime if (he/she) reasonably and

actually believed that the other person was age 18 or older. The People

must prove beyond a reasonable doubt that the defendant did not

reasonably and actually believe that the other person was at least 18

years old. If the People have not met this burden, you must find the

defendant not guilty of this crime.

Statutory rape criminalizes sexual intercourse with a victim who is under the age of legal consent which is **18 years old** in California.

The **criminal act** element required for statutory rape is sexual intercourse, although other types of sexual conduct with a victim below the age of consent are also criminal.

The **harm** element of statutory rape mirrors the harm element required for rape in California

The **attendant circumstance** element required for statutory rape is an underage victim. 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.

The criminal intent element of statutory rape is **strict liability**

However, the defense of **mistake of fact** as to the victim's age is allowed in California. The mistake must be made *reasonably*, and the defendant must take *reasonable* measures to verify the victim's age. 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 (Michael M. v. Superior Court, 2011) however, statutory rape statutes are gender-neutral. This ensures that women, especially women who are older than their sexual partner, are equally subject to prosecution.

California Penal Code 288[a] defines the sex crime of oral copulation with a minor: Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of someone else. **It's illegal for any person who engages in oral copulation with anyone who is under 18 years.**

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 intent element of statutory rape, Gary can be subject to prosecution for and conviction of this offense if fifteen is under the age of legal consent. If Gary and Michelle are in a state that allows for **mistake of age** as a defense, Gary could use Michelle's presence in the nightclub as evidence that he acted *reasonably* in believing that Michelle was capable of rendering legal consent. If both Gary and Michelle used false identification to enter the nightclub, and both Gary and Michelle are under the age of legal consent, *both* could be prosecuted for and convicted of statutory rape in most jurisdictions because modern statutory rape statutes are gender-neutral.

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9.11.4: California Penal Code 264.1 Rape in Concert (aka “gang rape”)

California Penal Code 264.1 PC defines the crime commonly referred to as “gang rape.” This is where two or more people act in concert (work together) to engage in non-consensual sexual intercourse with a victim.

Rape in concert under typically happens in either of two ways:

- Personally committing rape while someone else is assisting in the rape, or
- Aiding and abetting someone else who committed forcible rape.

This is why the section is referred to as gang rape. It applies when multiple people team up together to commit rape. This includes the person actually raping someone else, and that person’s accomplices. Aiding and abetting in this crime means helping someone commit rape. Aiding and abetting occurs when a defendant:

- knows the perpetrator plans to commit the crime,
- intends to help carry out the crime, and
- actually assists, facilitates or encourages the commission of the crime, whether through words or actions.

Important factors include:

- The presence of the defendant at the scene of the crime,
- Whether the defendant is a companion of the person who directly committed the crime, and
- The defendant’s conduct before or after the offense.

Physical presence is not required to aid and abet a crime. Physical assistance is not required – instigating the commission of the crime is enough to prosecute

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9.11.5: CALCRIM No. 1001. Rape in Concert (Pen. Code, § 264.1)

The defendant[s] [ ] (is/are) charged [in Count] with committing rape by acting in concert [with] [in violation of Penal Code section 264.1].

To prove that a defendant is guilty of this crime, the People must prove that:

<***Alternative A*** - defendant **committed** rape>

[1.] [The defendant personally committed forcible rape and voluntarily acted with someone else who aided and abetted its commission(;/.)]

[OR]

<***Alternative B*** - defendant **aided and abetted**>

[(1/2).] [The defendant voluntarily aided and abetted someone else who personally committed forcible rape.]

To decide whether the defendant[s] [or] committed rape, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant[s] [or] aided and abetted rape, please refer to the separate instructions that I (will give/have given)you on aiding and abetting.

You must apply those instructions when you decide whether the People have proved rape in concert.

>[To prove the crime of rape in concert, the People do not have to prove a prearranged plan or scheme to commit rape.]

Examples of Rape in Concert

- The victim is given a “date rape” drug by one man. Once the women is impaired by the drug, multiple men have sex with her (lack of affirmative consent by the victim).
- One man holds a woman down while a second man rapes her.
- One man forces a woman to perform oral sex after another man forcibly raped her.
- Three men conduct a home invasion robbery. While two of them hold the family at gunpoint, the third person pulls the wife into the bathroom and rapes her.

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9.11.6: Common defenses for PC 264.1

According to Shouse Law (https://www.shouselaw.com/ca/defense/penal-code/264-1/) People charged with having sex in concert with someone else can raise legal defenses to fight the charge. The most common defenses that criminal defense lawyers use are:

- Lack of intent to aid and abet the crime, and
- Withdrawal.

People who initially intend to help someone commit a crime can withdraw their help. To withdraw from the commission of forcible rape, defendants must:

- notify everyone else known to be involved that they are no longer helping, and
- do everything reasonably in their power to prevent the crime from happening.
- Notifying others of withdrawal has to be done early enough in the process to prevent the commission of the crime.

Other potential defenses to rape in concert charges are:

- **False accusations**: Sometimes accusers levy false accusations after regretting a sexual act or wanting to get the accused in trouble.
- **Consent**: If the accuser in fact consented to the sex act freely and voluntarily, then no sexual assault occurred.
- No knowledge: If the defendant honestly did not know that rape was about to occur, then criminal charges cannot stand.
- Misidentification: It is not unusual for innocent people to be mistakenly picked up out of a lineup in bad lighting, especially by traumatized victims being pressured by police to pick someone.
- Mere Presence: People who are simply at the scene of a crime and did not do anything to cause the crime have not broken the law.
- Law enforcement misconduct: Examples are coercing a confession or conducting an illegal search.

Typical evidence in these cases includes eyewitness accounts, video, and medical records. The defendant's attorneys will do a thorough investigation in an attempt to impeach the accuser's credibility and unearth any motivations to lie (https://www.shouselaw.com/ca/defense/penal-code/264-1/).

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9.11.7: California Penal Code 286

California Penal Code 286 is the state's sodomy law. Sodomy is any penetration, no matter how slight, of the anus of one person by the penis of another person. Ejaculation is not required. It prohibits anal sex **without consent**, and the state must prove that the act was performed with force and aggression.

The US Supreme Court has held that statutes criminalizing sodomy between consenting adults unreasonably encroach on a right to privacy without a sufficient government interest (Lawrence v. Texas, 2011). Consensual nonforcible sodomy is criminal if it is committed in a state penitentiary or local detention facility or jail (California Penal Code § 286(c), 2024).

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9.11.8: CALCRIM No. 1030. Sodomy by Force, Fear, or Threats (Pen. Code, § 286(c)(2) & (3), (k))

The defendant is charged [in Count] with sodomy by force [in violation of Penal Code section 286].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed an act of sodomy with another person;

2. The other person did not consent to the act;

AND

3. The defendant accomplished the act:

[by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person.]

[by threatening to retaliate against someone when there was a reasonable possibility that the defendant would carry out the threat. Threat to retaliate is a threat to kidnap, unlawfully restrain or confine, or inflict extreme pain, serious bodily injury, or death.]

[by threatening to use the authority of a public office to incarcerate, arrest, or deport someone. A public official is a person employed by a government agency who has authority to incarcerate, arrest, or deport. The other person must have reasonably believed that the defendant was a public official even if (he/she) was not.]

[Sodomy is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.] In order to consent, a person must act freely and voluntarily and know the nature of the act.][Evidence that the defendant and the other person (dated/were married/had been married) is not enough by itself to constitute consent.][Evidence that the other person (requested/suggested/communicated) that the defendant use a condom or other birth control device is not enough by itself to constitute consent.][An act is accomplished by force if a person uses enough physical force to overcome the other person's will.]772

[Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to].When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and (his/her)relationship to the defendant.][Retribution is a form of payback or revenge.][Menace means a threat, statement, or act showing an intent to injure someone.][An act is accomplished by fear if the other person is actually and reasonably afraid [or he or she is actually but unreasonably afraid and the defendant knows of his or her fear and takes advantage of it].][The other person must be alive at the time of the act for the crime of sodomy to occur.][The defendant is not guilty of forcible sodomy if (he/she) actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

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9.11.9: California Penal Code 288 lewd or lascivious act

(a) Except as provided in subdivision (i), a person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years. **(NOTE: you will learn about PC 288 (a) in Chapter – Crimes Against Children)**

(b) (1) A person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.

(2) A person who is a caretaker and commits an act described in subdivision (a) upon a dependent person by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, with the intent described in subdivision (a), is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.

(c) (1) A person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

(2) A person who is a caretaker and commits an act described in subdivision (a) upon a dependent person, with the intent described in subdivision (a), is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year.

(d) In any arrest or prosecution under this section or Section 288.5, the peace officer, district attorney, and the court shall consider the needs of the child victim or dependent person and shall do whatever is necessary, within existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim or to prevent psychological harm to the dependent person victim resulting from participation in the court process.

(e) (1) Upon the conviction of a person for a violation of subdivision (a) or (b), the court may, in addition to any other penalty or fine imposed, order the defendant to pay an additional fine not to exceed ten thousand dollars ($10,000). In setting the amount of the fine, the court shall consider any relevant factors, including, but not limited to, the seriousness and gravity of the offense, the circumstances of its commission, whether the defendant derived any economic gain as a result of the crime, and the extent to which the victim suffered economic losses as a result of the crime. Every fine imposed and collected under this section shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs pursuant to Section 13837.

(2) If the court orders a fine imposed pursuant to this subdivision, the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county.

(f) For purposes of paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c), the following definitions apply:

(1) “Caretaker” means an owner, operator, administrator, employee, independent contractor, agent, or volunteer of any of the following public or private facilities when the facilities provide care for elder or dependent persons:

(A) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(B) Clinics.

(C) Home health agencies.

(D) Adult day health care centers.

(E) Secondary schools that serve dependent persons and postsecondary educational institutions that serve dependent persons

or elders.

(F) Sheltered workshops.

(G) Camps.

(H) Community care facilities, as defined by Section 1402 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code.

(I) Respite care facilities.

(J) Foster homes.

(K) Regional centers for persons with developmental disabilities.

(L) A home health agency licensed in accordance with Chapter 8 (commencing with Section 1725) of Division 2 of the Health and Safety Code.

(M) An agency that supplies in-home supportive services.

(N) Board and care facilities.

(O) Any other protective or public assistance agency that provides health services or social services to elder or dependent persons, including, but not limited to, in-home supportive services, as defined in Section 14005.14 of the Welfare and Institutions Code.

(P) Private residences.

(2) “Board and care facilities” means licensed or unlicensed facilities that provide assistance with one or more of the following activities:

(A) Bathing.

(B) Dressing.

(C) Grooming.

(D) Medication storage.

(E) Medical dispensation.

(F) Money management.

(3) “Dependent person” means a person, regardless of whether the person lives independently, who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. “Dependent person” includes a person who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(g) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) apply to the owners, operators, administrators, employees, independent contractors, agents, or volunteers working at these public or private facilities and only to the extent that the individuals personally commit, conspire, aid, abet, or facilitate any act prohibited by paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c).

(h) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) do not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person under care.

(i) (1) A person convicted of a violation of subdivision (a) shall be imprisoned in the state prison for life with the possibility of parole if the defendant personally inflicted bodily harm upon the victim.

(2) The penalty provided in this subdivision shall only apply if the fact that the defendant personally inflicted bodily harm upon the victim is pled and proved.

(3) As used in this subdivision, “bodily harm” means any substantial physical injury resulting from the use of force that is more than the force necessary to commit the offense.

(Amended by Stats. 2018, Ch. 70, Sec. 2. (AB 1934) Effective January 1, 2019.)

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9.11.10: CALCRIM No. 1060. Lewd or Lascivious Act - Dependent Person (Pen. Code, § 288(b)(2) & (c)(2))

The defendant is charged [in Count] with a lewd or lascivious act on a dependent person [by force or fear] [in violation of Penal Code section 288].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was a caretaker of a dependent person;

2. The defendant willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on a person;

[AND]

3. The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent person(;/.)

[AND

4. In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent person or someone else.]

A lewd or lascivious act **is any touching of a person** with the intent to sexually arouse the perpetrator or the other person. A lewd or lascivious act includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A lewd or lascivious act includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A caretaker is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including(a/an) ,that provides care for dependent persons or for those aged 65 or older.A dependent person is someone who has physical or mental impairments that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have been significantly diminished by age.[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or dependent person is not required.][The force used must be substantially different from or substantially greater than the force needed to accomplish the lewd and lascivious act itself.][Duress is a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to]something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the dependent person and (his/her)relationship to the defendant.][Retribution is a form of payback or revenge.][Menace means a threat, statement, or act showing an intent to injure someone.][An act is accomplished by fear if the dependent person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].][It is not a defense that the dependent person may have consented to the act.

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9.11.11: Penal Code § 285 PC – Incest

Incest is a criminal act in California. The **criminal act** element required for incest is intercourse. The **attendant circumstance** element required for incest is a victim the defendant cannot legally marry because of a family relationship.

Force is not required, and *consent* is not an attendant circumstance element of this crime and as such consent by the victim cannot operate as a defense.

If the sexual intercourse with a family member is forcible and nonconsensual, the defendant could be charged with rape. The criminal intent element required for incest is **general intent** or **knowingly**.

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9.11.12: CALCRIM No. 1180. Incest (Pen. Code, § 285)

The defendant is charged [in Count] with incest [in violation of Penal Code section 285].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant had sexual intercourse with another person;

2. When the defendant did so, (he/she) was at least 14 years old;

3. When the defendant did so, the other person was at least 14 years old;

AND

4. The defendant and the other person are related to each other as.Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.][Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.

> **Example of Incest**
>
> Jack and Dianne, brother and sister, have consensual sexual intercourse. Both Jack and Dianne 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, they could be charged with **incest** based on their *family relationship*.

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9.11.13: CA Penal Code § 290 Sex Offender Registration

Penal Code § 290 PC is a California law that requires individuals convicted of certain crimes, primarily sex offenses, to **register as sex offenders** with their local authorities. As described in the next section, California allows the public to search for 290 registrants by zip code.

Registered sex offenders are required to update their information annually with local law enforcement, within five working days before or after their birthday. Some sex offenders must update their information more often: transients must update every 30 days and sexually violent predators must update every 90 days. The California Sex Offender Registry keeps track of the next required update, and if a registered sex offender is in violation of the update requirements, this website will show the registrant as being in violation.

Certain offenders can apply to be excluded from this website pursuant to Penal Code section 290.46, subdivision (d). Offenders who successfully complete probation for an offense in which the victim was their child, stepchild, sibling, or grandchild, and which did not involve either oral copulation or penetration of the victim, may also be granted exclusion (https://www.meganslaw.ca.gov/AboutSe...ummaryOfCALaws)

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9.11.14: California Megan's Law

California's Megan's Law was enacted in 1996 (Pen. Code, § 290.46) . It mandates the California Department of Justice (CA DOJ) to notify the public about specified registered sex offenders. Megan's Law also authorizes designated law enforcement entities to notify the public when necessary to ensure the public safety based upon information available to the entity concerning that person's current risk of sexual or violent re-offense (Pen. Code, § 290) . All states in the United States now have some form of Megan's Law.

The California Sex and Arson Registry is the source of sex offender information displayed on their website. The database contains registration information provided by offenders to local law enforcement agencies. The website may indicate that some registrants are currently in violation of their registration requirements. Any information you may have on these individuals should be reported to your local law enforcement agency. (www.meganslaw.ca.gov).

By law, persons convicted of specified sex crimes are required to register as sex offenders (see PC 290.45) with a local law enforcement agency. Prior to release from prison, jail, a mental hospital, or on probation, sex offenders who are required to register are notified in writing of their duty to register. This information is then forwarded to DOJ. When a sex offender is released into the community, he or she must register within five working days at the law enforcement agency having jurisdiction over his or her residence. The registering agency forwards the registration information to DOJ.

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9.12: Resources for Victims of Sexual Assault

Most local police/sheriff's departments have resources for victims of sexual assault. There are also national resources including the RAINN

Los Angeles County Sexual Assault Response Team Program

The Sexual Assault Response Team (SART) provides compassionate, comprehensive and culturally sensitive treatment for sexual assault victims through collaboration between the hospital, law enforcement agencies, forensic nurse specialists and sexual assault counseling advocates. SART's, operating costs are funded through hospitals, local law enforcement agencies, county resources, and generous community donors. Services are provided at no cost to the victim.

SART's goal is to counter the experience of sexual assault with a sensitive and competent multidisciplinary response, to support efforts to restore wellbeing to the victim, and to bring responsible person(s) to justice.

RAINN (Rape, Abuse & Incest National Network)

RAINN (Rape, Abuse & Incest National Network) is the nation's largest anti-sexual violence organization. RAINN created and operates the National Sexual Assault Hotline (800.656.HOPE, online.rainn.org y rainn.org/es) in partnership with more than 1,000 local sexual assault service providers across the country and operates the DoD Safe Helpline for the Department of Defense. RAINN also carries out programs to prevent sexual violence, help survivors, and ensure that perpetrators are brought to justice.

RAINN is a leader in providing comprehensive sexual assault trainings for professionals and volunteers nationwide. Building off of an in-depth training program for RAINN's support specialists, we provide training services for companies and organizations. As subject matter experts, RAINN offers several trainings that engage, educate, and prepare adult learners to support survivors of sexual assault. Training modules include, but are not limited to: Sexual Assault 101, Understanding Trauma Responses, and Basics of Crisis Intervention.

RAINN's educational programs are grounded in research on trauma, as well as best- and promising- practices in the field of adult education, and pulls from extensive experience providing services to victims. Engaging in-person trainings, seminars, and independent practices employ interactive scenarios and real-world applications, incorporating best practices, evidence-based approaches, and strength-based perspectives.

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9.13: End of Chapter Study Notes

- In common-law rape was historically classified as a capital offense, did not include rape of a spouse, required extreme resistance by the victim, and required evidence to corroborate a victim's testimony. Modern California statutes do not make rape a capital offense, criminalizes spousal rape, and does not require resistance by the victim or evidence to corroborate the victim's testimony.
- The criminal act element required for rape is sexual penetration accomplished with force or threat of force in many jurisdictions.
- The attendant circumstance element required for rape is lack of consent by the victim.
- The victim does not need to resist if the defendant uses force. If the victim is faced with a threat of force rather than force, the victim need not resist if she has a subjective fear of serious bodily injury and this fear is reasonable under the circumstances.
- A victim's testimony does not need to be corroborated by other evidence to convict a defendant of rape.
- In California the criminal intent element required for the rape attendant circumstance is strict liability, which does not allow for the mistake of fact defense.
- The harm element required for rape is penetration, no matter how slight. Ejaculation is not a requirement for rape.
- Rape shield laws generally preclude the admission of evidence of the victim's past sexual conduct in a rape trial, unless it is allowed by a judge at an in-camera hearing. Rape shield laws also preclude the admission of evidence of the victim's style of dress and the victim's request that the defendant wear a condom to prove victim consent. Some rape shield laws provide that the victim's testimony need not be corroborated by other evidence to convict the defendant of rape.
- Acquaintance rape often goes unreported and does not necessarily include use of force by the defendant or resistance by the victim.
- Spousal rape requires the same elements for spousal rape as for rape and classify spousal rape the same as other rapes.
- Statutory rape is sexual intercourse with a victim who is under the age of legal consent which is 18-years-old in California. 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. The criminal intent element required for statutory rape is strict liability.
- 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. 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.
- Incest is sexual intercourse between family members who cannot legally marry.
- California provides for sex offender registration and notification to the public that a convicted sex offender lives in their area.
- Local and national resources are available for victims of sexual assault.

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10: CRIMES AGAINST PERSONS AND PROPERTY

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10.1: Chapter Learning Objectives

By the end of this module you will be able to articulate the corpus delicti of and write a Probable Cause Declaration for the crimes of

- PC 240 Simple Assault
- PC 245 [a][1] Assault with a Deadly Weapon
- PC 242 & 243 Battery
- PC 243 [b] Battery Against a Police Officer
- PC 203 Mayhem
- PC 422 Criminal Threats
- PC 273.5 Domestic Violence
- PC 646.9 Stalking
- PC 207(A) Kidnapping
- PC 236 False Imprisonment
- PC 484/488/487 Theft
- PC 518 Extortion
- PC 459 Burglary
- PC 211 Robbery
- PC 503 Embezzlement
- PC 537[a] Defrauding an innkeeper
- PC 496 Receiving Stolen Property
- PC 602 Trespassing
- PC Arson
- PC Malicious Mischief

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10.2: Assault and Battery

Assault and **battery** are two crimes that are often prosecuted together, yet they are separate offenses with different elements. This section reviews the elements of both crimes, including potential defenses.

Study Points

1. Analyze the corpus delicti of the crimes of assault and battery
2. Define the elements of attempted assault and battery.
3. Define the elements of threatened battery and assault.

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10.2.1: California Penal Code § 240 PC – Simple Assault

California Penal Code § 240 prohibits **assault**, which is the **unlawful attempt – along with the present ability – to cause a violent injury to another person**. Simple assault is a misdemeanor punishable by up to 6 months in jail and up to $1,000, though the penalties can be doubled if the victim was an on-duty peace officer.

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10.2.2: CALCRIM No. 915. Simple Assault (Pen. Code, § 240)

The defendant is charged [in Count] with assault [in violation of Penal Code section 240].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant did an act that by its nature would directly and probably result in the application of force to a person;

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

[AND]

4. When the defendant acted, (he/she) had the present ability to apply force to a person(;/.)

[AND5. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, **hurt someone else**, or gain any advantage.

The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if itis done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching **does not have to cause pain or injury of any kind**.

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

[The People are not required to prove that the defendant actually touched someone.]

The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by the defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[,and if so, what kind of assault it was].

[Voluntary intoxication is not a defense to assault.]

Example of Assault

The **criminal act** element required for assault is conduct that causes the victim apprehension of immediate harmful or offensive physical contact. For example, Simone orders a cola drink at a fast food restaurant but instead receives a root beer. Simone loses their temper and throws the full drink at the face of the clerk. The clerk moves and the cup misses her head.

In general, *words* are *not enough* to constitute the criminal act element required for assault (Clark v. Commonwealth, 2011). In addition, a threat of future harm or a conditional threat is not sufficient (Clark v. Commonwealth, 2011). This means the victim must *reasonably believe* that the defendant can effectuate the intended physical harmful contact (Commonwelath v. Porro, 2011). Thus the victim's lack of awareness of the defendant's criminal act could operate as a failure of proof or affirmative defense in many jurisdictions.

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10.2.3: Assault on a Law Enforcement Officer or Emergency Personnel

You face heightened penalties if you assault someone who is engaged in the performance of their duties as a

- Peace officer (police or other law enforcement),
- Firefighter,
- Emergency medical technician (EMT) or paramedic,
- Lifeguard,
- Process server,
- Traffic officer,
- Code enforcement officer,
- Animal control officer,
- Search and rescue member, or
- Doctor or nurse providing emergency medical care.

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10.2.4: The Difference Between an Assault and a Battery

Assault is an action that may inflict physical harm or unwanted touching on someone else. In contrast, Penal Code 242 battery (explained in the next section) is the actual infliction of force or violence on someone else. As San Bernardino criminal defense attorney Michael Scafiddi from Shouse Law explains:

“The easiest way to explain the difference between assault and battery is this: an assault doesn’t necessarily involve any actual physical contact, whereas a battery does. Put another way, an assault is like an ‘attempted battery,’ and a battery is like a ‘completed assault.’”

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10.2.5: Possible Defenses to Assault

There was no "**present ability**" to complete the crime. Just because the alleged victim was frightened does not mean you had the ability to hurt them. Using the drink throwing scenario above, change the circumstances to Simone leaves the restaurant before realizing they have received the wrong order. She turns and throws the drink at the window and there was no way they could have hit the cashier with the drink.

Claims of self-defense/defense of others by the perpetrator when all of the following are true:

- They reasonably believed that their or someone else was in imminent danger of suffering bodily injury or being touched unlawfully;
- They reasonably believed that the immediate use of force was necessary to defend against that danger; and
- They used **no more force than was reasonably necessary** to defend against that danger.

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10.2.6: California Penal Code § 242 Simple Battery

Battery is any willful and unlawful use of force or violence upon the person of another.

Battery is a crime that has the elements of criminal act, criminal intent, attendant circumstance, causation, and harm as is discussed in the sections that follow.

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10.2.7: CALCRIM No. 960. Simple Battery (Pen. Code, § 242)

The defendant is charged with battery [in violation of Penal Code section242].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully [and unlawfully] touched in a harmful or offensive manner(;/.)

AND

2. The defendant did not act (in self-defense/ [or] in defense of someone else/ [or] while reasonably disciplining a child).]

Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [The touching can be done indirectly by causing an object [or someone else] to touch the other person.]

The **criminal act** element required for battery is an unlawful touching. This criminal act element is what distinguishes assault from battery, although an individual can be convicted of both crimes. The defendant can touch the victim with an instrumentality, like hitting the victim with a thrown object, such as a cell phone or full fountain drink. The defendant can also touch the victim with a vehicle, knife, or a substance, such as spitting on the victim or spraying the victim with a hose. Using the prior assault example where Simone loses their temper and throws the full drink at the face of the clerk. Suppose the clerk does not move in time and is struck by the drink- this becomes a battery. The criminal intent element required for battery is purposeful or knowing touching. The harm requirement for battery is harmful or offensive contact. If the contact results in injury the crime is classified Aggravated Battery (CA PC 243[a]). The severity of the injury can elevate the penalty, as discussed in later sections including Mayhem.

The **attendant circumstance** element required for battery in California is that the touching occur without the victim's *consent*. Thus victim's consent can operate as a **failure of proof** or **affirmative defense** in some factual situations.

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10.2.8: Possible Defenses to the Crime of Battery

Consent Defense

Recall from Chapter 5 “Criminal Defenses, Part 1” the example where Allen tackles Brett during a high school football game, causing Brett to suffer a severe injury. Although Allen intentionally touched Brett, and the result is serious bodily injury, Brett **consented** to the touching by voluntarily participating in a sporting event where physical contact is *frequent*. Thus the attendant circumstance element for battery is absent and Allen is probably not subject to prosecution for this offense.

Justification and Excuse Defenses to Battery

In addition to consent, there are also **justification** and **excuse** defenses to battery that Chapter 5 “Criminal Defenses” discusses in detail. To summarize and review, the justification defenses to battery are self-defense, defense of property and habitation, and the lawful apprehension of criminals. An excuse defense to battery that explores is the insanity defense. One other excuse defense to battery is the *reasonable discipline* of a child by a parent that is generally regulated by statute and varies from state to state (Kidjacked.com, 2011).

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10.2.9: CALCRIM No. 945. Battery Against Peace Officer (Pen. Code, §§ 242, 243(b), (c)(2))

The defendant is charged [in Count ___] with battery against a peace officer [in violation of Penal Code section 243].

To prove that the defendant is guilty of this crime, the People must prove that:

1. was a peace officer performing the duties of (a/an) ;

2. The defendant willfully [and unlawfully] touched in a harmful or offensive manner;

[AND]

3. When the defendant acted, (he/she) knew, or reasonably should have known, that was a peace officer who was performing (his/her) duties(;/.)

felony battery against a peace officer.>

AND

4. suffered injury as a result of the touching(;/.)]

AND

5. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

[The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough.

The touching does not have to cause pain or injury of any kind.]

[An injury is any physical injury that requires professional medical treatment. The question whether an injury requires such treatment cannot be answered simply by deciding whether or not a person sought or received treatment. You may consider those facts, but you must decide this question based on the nature, extent, and seriousness of the injury itself.]

[The touching can be done indirectly by causing an object [or someone else] to touch the other person.][A person who is employed as a police officer by is a peace officer.][A person employed by is a peace officer if .]

[The duties of a include.][It does not matter whether was actually on duty at the time.][A is also performing the duties of a peace officer if (he/she) is in a police uniform and performing the duties required of (him/her) as a peace officer and, at the same time, is working in a private capacity as apart-time or casual private security guard or (patrolman/patrolwoman).

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10.2.10: Penal Code § 245(a)(1) Assault with Deadly Weapon (ADW)

Penal Code § 245(a)(1) PC (assault with a deadly weapon) is defined as attacking or attempting to attack another person **with a weapon capable of causing death or great bodily injury**. Prosecutors can charge this offense as a misdemeanor or a felony, carrying a maximum sentence of up to 4 years in jail or prison. Examples of ADW include trying to stab someone with a broken bottle, throwing a tire iron at someone in a fight, or ordering your trained dog to attack a person.

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10.2.11: CALCRIM No. 875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)-(4), (b))

The defendant is charged [in Count] with assault with (force likely to produce great bodily injury/a deadly weapon other than a firearm/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) [in violation of Penal Code section 245].

To prove that the defendant is guilty of this crime, the People must prove that:

[1. The defendant did an act with (a deadly weapon other than a firearm/a firearm/a semiautomatic firearm/a machine gun/an assault weapon/a .50 BMG rifle) that by its nature would directly and probably result in the application of force to a person;]

[1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and1B. The force used was likely to produce great bodily injury;]

2. The defendant did that act willfully;

3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone;

[AND]

4. When the defendant acted, (he/she) had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon other than a firearm/with a firearm/with a semiautomatic firearm/with a machine gun/with an assault weapon/with a .50BMG rifle) to a person(;/.)

[AND

5. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.[The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if itis done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.][The touching can be done indirectly by causing an object [or someone else] to touch the other person.][The People are not required to prove that the defendant actually touched someone.]The People are not required to prove that the defendant actually intended to use force against someone when (he/she) acted.

No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault[,and if so, what kind of assault it was].[Voluntary intoxication is not a defense to assault.]

[**Great bodily injury means significant or substantial physical injury**. It is an injury that is greater than minor or moderate harm.]

[A **deadly weapon** other than a firearm **is any object, instrument, or weapon [that is inherently deadly or one] that is used in such a way that it is capable of causing and likely to cause death or great bodily injury**.]

[An object is inherently deadly if it is deadly or dangerous in the ordinary use for which it was designed.]

[In deciding whether an object is a deadly weapon, **consider all the surrounding circumstances**.]

(truncated to remove references to firearms)

This page titled 10.2.11: CALCRIM No. 875. Assault With Deadly Weapon or Force Likely to Produce Great Bodily Injury (Pen. Code, §§ 240, 245(a)(1)-(4), (b)) is shared under a CC BY-NC-SA 4.0 license and was authored, remixed, and/or curated by Mark C Fields and Carmyn A. Radetic-Fields.

10.2.12: Defenses to ADW

Some defenses to ADW include:

- you acted in lawful self-defense,
- the object was not a lethal weapon,
- your actions were not willful, and/or
- you were falsely accused.

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10.2.13: California PC 203 Mayhem

A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes **permanent disability** or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole.

CALCRIM No. 801. Mayhem (Pen. Code, § 203)

The defendant is charged [in Count] with mayhem [in violation of Penal Code section 203].

To prove that the defendant is guilty of mayhem, the People must prove that the defendant unlawfully and maliciously:

[1. Removed a part of someone's body(;/.)]

[OR]

[2. Disabled or made useless a part of someone's body and the disability was more than slight or temporary(;/.)]

[OR]

[3. Permanently disfigured someone(;/.)]

[OR]

[4. Cut or disabled someone's tongue(;/.)]

[OR]

[5. Slit someone's (nose[,]/ear[,]/ [or] lip) (;/.)]

[OR]

[6. Put out someone's eye or injured someone's eye in a way that so significantly reduced (his/her) ability to see that the eye was useless for the purpose of ordinary sight.]

Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure someone else.[A disfiguring injury may be permanent even if it can be repaired by medical procedures.

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10.2.14: California PC 422 Criminal Threats

Any person who willfully **threatens** to commit a crime **which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat**, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

CALCRIM No. 1300. Criminal Threat (Pen. Code, § 422)

The defendant is charged [in Count] with having made a criminal threat [in violation of Penal Code section 422].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to ;

2. The defendant made the threat (orally/in writing/by electronic communication device);

3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to];

4. Under the circumstances, the threat was so clear, immediate, unconditional, and specific that it communicated to a serious intention and the immediate prospect that the threat would be carried out;

5. The threat actually caused to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];[AND]6. 's fear was reasonable under the circumstances.

Someone commits an act willfully when he or she does it willingly or on purpose.

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances. Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory.

[An immediate ability to carry out the threat is not required.][An electronic communication device includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.][Immediate family means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

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10.2.15: Common Defenses to PC 422

The Shouse Law Group (shouselaw.com) explains the following defenses to this crime

The threat was not immediate

- We raise this defense whenever the purported victim could have no reasonable sense of when the alleged threat might be carried out.

Example: An inmate tells one of the deputies that he's going to kill him. This is probably not a criminal threat because there is no sense of immediacy or any reason for the deputy to assume that the inmate has the ability to carry out the threat.

The threat was vague or ambiguous

- Criminal threats do not have to specify a time or precise manner of execution. Still, we find the vagueness defense useful whenever the alleged threat is so ambiguous that its meaning is unclear.

Example: A high school student "got in the teacher's face" and stated that he was "going to get him." The court reasoned that the defendant's statement was nothing more than a vague threat of retaliation without prospect of execution and therefore not a criminal threat.

The victim was not afraid

- If the alleged victim does not fear your threat either because they believe that it is a joke or that you are incapable of executing it, then there is no criminal threats violation – period.

In many cases, we can find eyewitnesses who can attest to the alleged victim's lack of fear. There may also be surveillance video showing how the victim did not appear afraid.

The victim's fear was not sustained

- For a criminal threats charge to stand, the alleged victim's fear must be more than momentary or fleeting. Or if the alleged victim's fear was prolonged, charges should still be dismissed if the fear was a clear overreaction.

Here again we would rely on eyewitnesses and surveillance video. We would also ask the jurors to rely on their common sense when determining what happened.

The threat (or alleged victim's fear) was unreasonable

- If the recipient of the threat does not feel threatened – or if they do, but that fear is unreasonable – you should not be convicted of making criminal threats.

In these cases, we ask the jurors to put themselves in the alleged victim's shoes and argue that no reasonable person would take the threat seriously. We highlight the context surrounding the alleged threat to show that it was baseless.

The threat was protected as free speech

- California's criminal threats law does not apply to constitutionally protected speech. This law only targets individuals who try to instill fear in others, not those who engage in "mere angry utterances or ranting soliloquies, however violent."

Example: An inmate told a jail psychotherapist that he was thinking about how he was going to kill his girlfriend once he was released. The court held that PC 422 was not enacted to punish emotional outbursts and that the inmate's threats were part of the therapy intended only for the therapist's ears and, as such, are protected.

This is a defense where context is everything. As long as we can show that your words are protected based on where, how, and to whom you said them, criminal threat charges should not apply.32

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10.2.16: Key Takeaways

- The criminal act element required for battery is an unlawful touching.
- The criminal intent element required for battery can be specific intent or purposely
- The attendant circumstance element required for battery is lack of consent by the victim.
- The harm element of battery is physical contact. **No physical injury is required**
- Attempted battery assault is an attempt crime that does not require the elements of causation or harm. Threatened battery assault requires causation and harm; the victim must experience reasonable fear of imminent physical contact.
- Attempted battery is an assault requires the criminal act of substantial steps toward commission of the crime and requires present ability to commit the crime.

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10.3: Domestic Violence and Stalking

Study Points

1. Identify the individuals covered by domestic violence statutes.
2. Identify some of the special features of domestic violence statutes.
3. Define the criminal act element required for stalking.
4. Define the criminal intent element required for stalking, and compare various statutory approaches to stalking criminal intent.
5. Define the harm element required for stalking, and compare various statutory approaches to ascertaining harm.
6. Analyze stalking grading.

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10.3.1: Domestic Violence

Domestic violence and **stalking** are modern crimes that respond to societal problems that have escalated in recent years. Domestic violence statutes are drafted to address issues that are prevalent in crimes between family members or individuals living in the same household. Stalking generally punishes conduct that is a *precursor* to assault, battery, or other crimes against the person, as is explored in the section on “Domestic Violence and Stalking”.

Domestic violence statutes generally focus on criminal conduct that occurs between **family** members. Although family cruelty or interfamily criminal behavior is not a new phenomenon, enforcement of criminal statutes against family members can be challenging because of dependence, fear, and other issues that are particular to the family unit. In addition, historical evidence indicates that law enforcement can be reluctant to get involved in *family disputes* and often fails to adequately *protect* victims who are trapped in the same residence as the defendant. Specific enforcement measures that are crafted to apply to defendants and victims who are family members are an innovative statutory approach that many jurisdictions are beginning to adopt.

In general, domestic violence statutes target crimes against the person, for example, assault, battery, sex offenses, kidnapping, and criminal homicide The purpose of many domestic violence statutes is *equal* enforcement and treatment of crimes between family members and *maximum protection* for the domestic violence victim (RCW § 10.99.010, 2011). Domestic violence statutes focus on individuals related by blood or marriage, individuals who share a child, ex-spouses and ex- lovers, and individuals who reside together.

Domestic violence statutes commonly contain the following provisions:

- Protection of the victim by no-contact orders and nondisclosure of the victim’s residence address
- Duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims
- Ability to arrest domestic violence offenders with or without a warrant
- Ability of law enforcement to remove firearms owned by a suspect

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10.3.2: California Penal Code § 273.5 – “Corporal Injury” to a Spouse or Cohabitant (Domestic Violence)

Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment.

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10.3.2.1: CALCRIM No. 840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition (Pen. Code, § 273.5(a))

The defendant is charged [in Count] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child/someone with whom (he/she) had, or previously had, an engagement or dating relationship that resulted in a traumatic condition [in violation of Penal Code section 273.5(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully [and unlawfully] inflicted a physical injury on (his/her) ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child)/someone with whom (he/she) had, or previously had, an engagement or dating relationship);

[AND]

2. The injury inflicted by the defendant resulted in a traumatic condition.

[AND

3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act willfully when he or she does it willingly or on purpose.

A traumatic condition is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

The term cohabitants means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship.

Factors that may determine whether people are cohabiting include, but are not limited to,

(1) sexual relations between the parties while sharing the same residence,

(2) sharing of income or expenses,

(3) joint use or ownership of property,

(4) the parties' holding themselves out as (spouses/domestic partners),

(5) the continuity of the relationship, and

(6) the length of the relationship.]

[The term dating relationship means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement [independent of financial considerations].]

[A person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each

person for significant periods.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under law to be the natural father. is presumed under law to be the natural father of .]

[A traumatic condition is the result of an injury if:

1. The traumatic condition was the natural and probable consequence of the injury;

2. The injury was a direct and substantial factor in causing the condition;

AND

3. The condition would not have happened without the injury. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.]

This page titled 10.3.2.1: CALCRIM No. 840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition (Pen. Code, § 273.5(a)) is shared under a CC BY-NC-SA 4.0 license and was authored, remixed, and/or curated by Mark C Fields and Carmyn A. Radetic-Fields.

10.3.2.2: Possible Legal defenses to PC 273.5

Legal defenses to criminal charges of inflicting corporal injury often include taking the position that:

- You acted in self-defense or defense of another person,
- Injury to the accuser was accidental, or
- You were falsely accused - common in domestic abuse cases).

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10.3.2.3: Consequences of a conviction of PC 273.5

A domestic violence conviction carries additional consequences such as:

- Being subject to a domestic violence restraining order,
- Loss of the right to own a firearm,
- The potential loss of a professional license such as your California Commission on Peace Officer Standards and Training POST Certificate. **California now has a decertification process for Peace Officers and DV will end your career.**

Effective January 1, 2019, the loss of gun rights will be a lifetime prohibition regardless of whether the conviction is for a felony or a misdemeanor conviction.

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10.3.3: Penal Code § 646.9 Stalking

California was the first state to enact a stalking law (Penal Code § 646.9) in 1990, in response to the high-profile murder of a young actress named Rebecca Schaeffer whose attacker stalked her for two years. Now *all states* and the federal government have stalking laws (18 U.S.C. § 2261A, 2011). Although statutes criminalizing stalking are gender- neutral, in reality, most stalking victims are women, and most stalking defendants are men.

Before the states enacted stalking laws, a victim who was threatened and harassed but not assaulted had no remedy except to go to court and obtain a **restraining order**. A restraining order is a court order mandating that the defendant neither contact nor come within a certain distance of the victim. If the defendant violated the restraining order, law enforcement could arrest him or her. Until a restraining order was in place, however, the defendant was free to continue frightening the victim. Restraining orders typically take some time to obtain. The victim must contact and employ an attorney and also set up a 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.

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10.3.3.1: California Penal Code § 646.9

(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

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10.3.3.2: CALCRIM No. 1301. Stalking (Pen. Code, § 646.9(a), (e)-(h))

The defendant is charged [in Count] with stalking [in violation of Penal Code section 646.9].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully and maliciously harassed or willfully, maliciously, and repeatedly followed another person;

AND

2. The defendant made a **credible threat** with the intent to place the other person in reasonable fear for (his/her) safety [or for the safety of (his/her) immediate family]

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10.3.4: Stalking Act

The **criminal act** element required for stalking includes *any course of conduct* that **credibly** threatens the victim's safety. In general, credible threat means the defendant has the **apparent ability** to effectuate the harm threatened. The stalking criminal act is unique among criminal acts in that it must occur on *more than one* occasion or repeatedly. 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.

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 "Example of a Case Lacking Stalking Act" 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.

Elliot's conduct could constitute the criminal act element required for stalking. In this example, Elliot has *followed* Lisa and *approached* her, which is a repeated course of conduct. On two occasions Elliot threatened Lisa: once by telling her he will "make her pay" and again by carving a death threat into her front door. Keep in mind that Elliot's threat to Lisa's safety must be *credible*. Thus if Elliot is unable to actually harm Lisa for any reason, the trier of fact could find that he does not have the **apparent ability** to carry out his threat, and he could not be convicted of stalking.

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10.3.5: Stalking Intent

The defendant must commit the criminal act *willfully or maliciously* (Cal. Penal Code § 646.9, 2023). This indicates a specific intent or purposeful conduct. However, in states that require the victim to experience harm, a different criminal intent could support the harm offense element.

Example of Stalking Intent

Review the stalking act example in "Example of Stalking Act". In the majority of states, Elliot must make the threatening statement and carve the threatening message into Lisa's front door **willfully** or **maliciously**. Elliot must act with the specific intent or purposely to **cause** Lisa to suffer the stalking harm, which is *fear* for bodily safety, the safety of family members, or fear of damage to Lisa's property.

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10.3.6: Key Takeaways

- The criminal act element required for stalking is repeatedly engaging in a course of conduct that poses a credible threat to the victim's safety, including following, harassing, approaching, or pursuing the victim.
- The criminal intent supporting the stalking criminal act is specific intent or purposely.
- Individuals covered by domestic violence statutes are relatives by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together.
- Some special features of domestic violence statutes are special training for law enforcement in domestic issues, protection of the victim by no-contact orders and nondisclosure of the victim's residence address, the duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims, the ability to arrest domestic violence offenders with or without a warrant, special factors to consider in the sentencing of domestic violence defendants, and peace officer immunity for enforcement of domestic violence provisions

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10.4: Kidnapping and False Imprisonment

Study Points

- Define the corpus delicti of the crime of kidnapping.
- Analyze the corpus delicti of the crime of false imprisonment
- Compare and contrast false imprisonment with kidnapping.
- Identify potential defenses to kidnapping and false imprisonment.

Kidnapping and **false imprisonment** are crimes that involve physical restraint and intrude on the liberty interests of victims. In ancient times, kidnapping was used to remove members of royalty from the kingdom for ransom or to implement the overthrow of the existing monarchy. In the United States, high-profile kidnapping cases, such as the Lindbergh baby kidnapping in the 1930s, and the frequency with which organized crime participated in kidnapping led many states to impose the harshest penalties for this offense: the death penalty or life in prison without the possibility of parole.

In modern times, kidnapping is still a serious **felony**, although the US Supreme Court has held that capital punishment for any crime against an individual other than criminal homicide is unconstitutional. False imprisonment is generally a **lesser included offense** of kidnapping.

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10.4.1: Kidnapping Elements

In most jurisdictions, kidnapping has the elements of criminal act, criminal intent, causation, harm, and an attendant circumstance.

CALIFORNIA PENAL CODE § 207(A) – KIDNAPPING

(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

(b) Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

(c) Every person who forcibly, or by any other means of instilling fear, takes or holds, detains, or arrests any person, with a design to take the person out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell that person into slavery or involuntary servitude, or otherwise to employ that person for his or her own use, or to the use of another, without the free will and consent of that persuaded person, is guilty of kidnapping.

(d) Every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where that act is committed, and brings, sends, or conveys that person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

(e) For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.

(f) Subdivisions (a) to (d), inclusive, do not apply to any of the following:

- To any person who steals, takes, entices away, detains, conceals, or harbors any child under the age of 14 years, if that act is taken to protect the child from danger of imminent harm.
- To any person acting under Section 834 or 837.

(Amended by Stats. 2003, Ch. 23, Sec. 1. Effective January 1, 2004.)

Thus Penal Code Section 207(a) makes it illegal to take someone, by means of force or fear, into any other California county, or any other state, or country. Taking someone to a place inside the same county is also illegal. In fact, simply detaining or arresting someone without having the right also qualifies as kidnapping under this Section.

Kidnapping under §207(a) is punishable by a term of up to eight years in a state prison, a fine of up to $10,000, or both imprisonment and a fine. In addition, since Kidnapping is considered a “serious felony,” conviction is counted as a “strike” on your criminal record.

The **criminal act** element required for kidnapping is twofold. First, the defendant must **steal or take, or hold, detains or arrest** the victim. Second the defendant must **carry the person** (move the victim), which is called **asportation**. One common issue with the kidnapping criminal act is how far the victim must be moved. In California the movement can be slight, as long as it is not incidental to the commission of a separate offense (People v. Dominguez, 2011).

Example of a Case Lacking Kidnapping Act

Joseph breaks into Abby's home and sees Abby sitting on the couch. A picture window in front of the couch puts Abby in full view of the street and sidewalk. To avoid detection, Joseph grabs Abby off the living room couch and drags her into the bedroom to rape her. Joseph has probably *not* committed the criminal act element required for kidnapping. Joseph forcibly confined Abby when he grabbed her. However, his movement of Abby from the couch to the bedroom appears incidental to the crime of rape, which may not be sufficient to constitute kidnapping asportation.

Example of Kidnapping Intent

Review the example in "Example of a Case Lacking Kidnapping Act" with Joseph and Abby. Change this example so that Joseph drags Abby to his car, stuffs her into the trunk, and then drives fifteen miles to a deserted field where he thereafter removes her from the trunk and rapes her. Joseph probably has the criminal intent required for kidnapping in most jurisdictions. Joseph committed the criminal act of forcible confinement and asportation with the purpose of raping Abby, which is **specific intent** or **purposely** to "commit a separate offense." Thus if the other elements of kidnapping are present, Joseph can most likely be charged with and convicted of kidnapping, along with the crime of rape.

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10.4.2: Kidnapping Harm

The **harm** element required for kidnapping is *confinement* and *asportation*.

Kidnapping Attendant Circumstance

The **attendant circumstance** element required for kidnapping is that the confinement or asportation occur against the victim's will or *without* the victim's **consent**. Thus consent could function as a **failure of proof** or **affirmative defense** to kidnapping.

> **Example of a Case Lacking Kidnapping Attendant Circumstance**
>
> Thomas sees Shawna hitchhiking on the side of a busy freeway at night. Thomas pulls over, rolls down the window, and asks Shawna if she wants a ride. Shawna says, "sure," and climbs into Thomas's vehicle. Thomas drives away with Shawna in the front seat. Thomas has not committed kidnapping in this case. Although Thomas confined and moved Shawna in his vehicle, the facts do not indicate that he has the specific intent to harm her. In addition, Shawna *consented* to the confinement and asportation. Thus the **attendant circumstance** element for kidnapping is also absent and Thomas's conduct may be perfectly legal.

> **Example of Kidnapping Attendant Circumstance**
>
> Change the example given in "Example of a Case Lacking Kidnapping Attendant Circumstance" so that after fifty miles of driving, Shawna asks Thomas to pull over and let her out. Thomas refuses, threatens to harm Shawna if she tries to escape, and continues to drive another twenty miles with Shawna in the front seat. If Thomas acted with the proper kidnapping intent, Thomas might have committed kidnapping in this case. Although Shawna's original entrance into Thomas's vehicle and her asportation for the first fifty miles was *consensual*, once Shawna requested that Thomas pull over and let her out, the confinement or asportation was against Shawna's will and *without her consent*. If the trier of fact determines that twenty miles is far enough to constitute sufficient asportation for kidnapping, Thomas could be charged with or convicted of this offense.

The Kann California Law Group (kannlawoffice.com) provides these common defenses against a charge of Kidnapping:

You Didn't Move A Substantial Distance

- Example: Defendant Dee gets into a heated argument with Victim Valerie, her sister, while inside Dee's enclosed 12' x 12' garage. Dee backs Valerie across the floor and into a chair while shouting at Valerie. Valerie, terrified, escapes and calls police as soon as Dee turns her back. She reports Dee for Kidnapping. Dee is arrested and charged under PC §207(a). Should Dee be convicted of the charge?
- Conclusion: Dee moved Valerie across the garage floor and into a seat while expressing her anger. This could be construed by a jury or judge as using force to move Valerie. That Valerie, who was frightened while arguing with Dee, fled the room and reported a crime establishes that Valerie didn't consent to being moved. It also stands to reason that Dee knew Valerie didn't consent to being moved, since Valerie was backed into a chair. These are elements of the offense. But backing someone across the floor of an average-sized residential garage isn't likely enough movement to satisfy the "movement" element of the charge. Dee she should be freed because she didn't move Valerie a substantial distance.

The Other Person Consented to Moving

- Example: Defendant Dean runs into his fifteen-year-old daughter, Victim Verna, on a day when she's in Ex-Wife's custody. Ex-Wife left Verna at the mall. Dean invites Verna to go with him to the beach. Verna accepts. Dean drives. But Ex-Wife only hears that Verna left with Dean after she goes to pick up Verna and, panicked, ends up asking mall security what happened. Ex-Wife assumes Dean somehow forced Verna to leave and reports him. Dean is arrested and charged under §207(a). Should Dean be convicted?

- Conclusion: Dean, at minimum, took Verna from one place inside a California county to another place inside the same county. This is an element of Kidnapping. He also moved Verna by driving her to the beach. But Verna was Dean's daughter, a fact which suggests strongly that there might be consent to traveling with Dean - and Verna, as the facts make clear, actually freely consented to going with her father. Thus Dean should be acquitted because the other person consented to moving.

You Weren't the Actual Kidnapper

- Example: Girlfriend drives boyfriend Defendant Danny across county lines to pick up Victim Van, Girlfriend's five-year-old son, from Ex-Husband. Girlfriend has custody of Van for the day. They take Van to an amusement park and Girlfriend drives them all back to Ex-Husband's house at the end of the day. But, just as they arrive at the house, Girlfriend announces that she's "not letting Van go back with him" and drives away at top speed. Danny is horrified. He tries to convince her to turn back but Girlfriend will hear none of it. Ex-Husband witnesses the abduction and has both Girlfriend and Danny arrested for Kidnapping under CPC §207(a). Danny insists that, even though he was present, he had nothing to do with the crime. Is Danny guilty?
- Conclusion: Girlfriend took Van using force (i.e., the force necessary to take Van from Ex-Husband, who had the legal right to custody of Van at the end of the day). Van, who was only five, didn't consent to being moved. Nor could Van have stopped his adult mother from driving the car. Van's mother would've known these things. These facts establish the prima facie elements of a Kidnapping charge – but against Girlfriend, not Danny. Danny was actually as much a kidnapping victim as Van. Neither Van nor Danny consented to being moved; Girlfriend moved them because she wanted to take Van. Danny tried to get her to turn around and failed. Danny simply did not aid or abet Girlfriend or conspire to commit the crime. While Girlfriend is guilty, Danny should be acquitted because he wasn't the actual kidnapper.

The Evidence Is Insufficient

- Example: Defendant Dickie is accused by Ex-Husband of taking their daughter, fourteen-year-old Victim Vanya, to a park for the day without his permission. Ex-Husband has custody of Vanya and insists that Dickie kidnapped Vanya. But Vanya will not testify to this. Then Ex-Husband tries to find an eyewitness who can establish that Dickie and Vanya were together on the day in question. He fails in the effort. Ex-Husband finally goes as far as seeking photographic evidence that Dickie was with Vanya by paying for a copy of store camera footage recorded near Dickie's home on that day. Still he finds no proof. But Ex-Husband has Dickie arrested and charged for Kidnapping under §207(a) anyway because he feels certain that Dickie illegally took Vanya. Dickie insists that he's innocent. Should he be acquitted or convicted?
- Conclusion: The principal element of the crime of Kidnapping is moving a person. Absent proof of actual movement it's impossible to be convicted, just as it's impossible to be convicted of Murder without an actual human death. Turning to the facts, Ex-Husband failed in every meaningful way to generate proof that Dickie kidnapped Vanya. Vanya would not testify that she went with Dickie. No one witnessed the pair together. The facts refer to no photographic or related evidence proving that Dickie was illegally with Vanya. Thus there's no objective means of establishing the act for which Dickie would be punished. To do this would serve as a serious violation of Dickie's constitutional rights. Therefore, since the court must find for the defendant whenever any element of a crime can't be established in any charge, Dickie must be acquitted. The evidence is insufficient that the crime was committed.

You Had the Legal Right To Move The Person

- Example: Defendant Dominguez, who lives in a city plagued by a recent string of homicides, is washing his car one evening when he hears a shout and the pounding of feet. He looks up to find Victim Vladimir running in his direction. A small group of Neighbors appears, running, almost immediately after that. One of the Neighbors yells "That guy just murdered an old lady!" as she points at Vladimir.[11] Hearing this, Dominguez hides behind his opened car door and waits for Vladimir to pass, at which point he tackles Vladimir and holds Vladimir's hands behind Vladimir's back until he can push Vladimir into the back seat of his car. Dominguez drives the female Neighbor who made the accusation and Vladimir to the police station. The Neighbor presses Murder charges against Vladimir - while Vladimir charges Dominguez with Kidnapping under CPC §207(a). Dominguez says he had the right to arrest Vladimir; Vladimir says Dominguez, who's not police, had no right to take him anywhere. Which man is correct?
- Conclusion: While Vladimir is correct, in that Dominguez, who's not a police officer, has no formal arrest power, Dominguez is permitted as a citizen to arrest Vladimir under these circumstances. Penal Code §837,[12] an exception to §207(a),[13] permits a non-officer to arrest someone when a felony crime has in fact been committed and the citizen performing the arrest has reasonable cause to believe that a crime occurred. (Citizens mustn't use lethal force unless it's necessary in self-defense or defense of another person.) Dominguez tackled Vladimir after observing Vladimir running from a group of people, one of whom identified Vladimir as the recent killer of an elderly woman. These facts could reasonably support believing that Vladimir had committed a felony. Dominguez also lived in a community in which a number of people had been killed recently, a fact which could reasonably suggest at the time that a homicide had actually occurred. Dominguez then took Vladimir directly to the police station, meaning that he didn't exceed the scope of his limited arrest privilege by taking a

detour to satisfy his own interests or amusement; he moved Vladimir as far as was needed to submit Vladimir to police custody. Dominguez is, therefore, correct. He is not guilty because he had the legal right to move Vladimir.

The Accusation Is False

- Example: Defendant Denise is at work when law enforcement arrives and arrests her for kidnapping her daughter, Victim Veronica, an hour prior. But Denise has been at work the last several hours and her co-workers can attest to the fact. She immediately suspects that Ex-Husband lied to police in an effort to get custody of Veronica. (Denise is correct; Veronica was later found to have been in class at Elementary School the whole time, exactly as she should've been. This was surely his most desperate scheme of all.) Denise pleads innocence after being charged under §207(a). Should she be convicted on these facts?
- Conclusion: Denise, as the facts make clear, was at work when the alleged crime occurred. She has witnesses who can confirm it. Her daughter was also discovered where she was expected to be – unmoved, in other words. Thus she didn't take Veronica. But, most important of all, the facts make it clear that Ex-Husband simply created a story in an effort to pry Veronica from Denise's custody. Denise, therefore, should not be convicted of Kidnapping under CPC §207(a) because the accusation is false.

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10.4.2.1: Kidnapping Attendant Circumstance

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10.4.3: Related Offenses to Kidnapping

Note: The crimes below are described as “related” because they're frequently charged with CPC §207(a) and/or have common elements that the prosecutor must prove beyond a reasonable doubt.

The California Penal Code contains several offenses related to Kidnapping: Kidnapping During Carjacking (CPC §209.5(a)), Kidnapping For Ransom, Reward Or Extortion (CPC §209(a)), Posing As A Kidnapper (CPC §210), Taking A Hostage [False Imprisonment] (CPC §210.5), Felony False Imprisonment (CPC §236), Child Abduction Without Right To Custody (CPC §278), Child Abduction By Depriving Right To Custody Or Visitation (CPC §278.5(a)), and Kidnapping For Child Molestation (CPC §207(b)).

California Penal Code § 236 – False Imprisonment

California Penal Code § 236 PC defines false imprisonment as unlawfully restraining, detaining, or confining a person against his or her will. The crime can be charged as either a misdemeanor or felony and is punishable by up to three years in jail.

It is a lesser included offense of kidnapping. This means that the crime of false imprisonment is missing one or two of the kidnapping elements. Often, false imprisonment functions as a **partial defense** to kidnapping because of the less serious sentencing options. False imprisonment does not require movement and has a lower level of intent.

CALCRIM No. 1240. Felony False Imprisonment (Pen. Code, §§ 236, 237)

The defendant is charged [in Count] with false imprisonment by violence or menace [in violation of Penal Code section 237(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant intentionally [and unlawfully] (restrained[,]/ [or]confined[,]/ [or] detained) someone [or caused that person to be(restrained[,]/ [or] confined[,]/ [or] detained)] by violence or menace;

AND

2. The defendant made the other person stay or go somewhere against that person’s will.

Violence means using physical force that is greater than the force reasonably necessary to restrain someone. Menace means a verbal or physical threat of harm [, including use of a deadly weapon].

The threat of harm may be express or implied. [An act is done against a person’s will if that person does not consent to the act. In order to consent, a person must act freely and voluntarily and know the nature of the act.]

[False imprisonment does not require that the person restrained be confined in jail or prison.]

> **Example of False Imprisonment**
>
> Review the case example given in “Example of a Case Lacking Kidnapping Attendant Circumstance”. Change the facts so that after fifty miles of driving, Shawna asks Thomas to pull over and let her out. Thomas pulls over but thereafter locks all the doors and refuses to let Shawna out for twenty minutes, in spite of her begging and pleading for him to unlock the doors. In this case, Thomas may have committed false imprisonment. Although Shawna’s entrance into Thomas’s vehicle was *consensual*, when Thomas confined Shawna to his vehicle by locking the doors, he deprived her of her liberty *against her will*. Thomas did not move Shawna without her consent because he pulled over and stopped the vehicle at her request. However, asportation is *not required* for false imprisonment. Although Thomas’s actions do not indicate specific intent or purposely

to injure Shawna, commit a separate offense, or seek ransom, often **general intent** or **knowingly** to commit the criminal act is sufficient for false imprisonment. Thus these facts indicate the lower-level crime of false imprisonment rather than kidnapping, and Thomas may be charged with and convicted of this offense.

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10.4.4: Potential Defenses to Kidnapping and False Imprisonment

As stated previously, consent is a potential **failure of proof** or **affirmative defense** to kidnapping and false imprisonment in some jurisdictions. Another potential defense is **lawful authority** to execute the kidnapping or false imprisonment. Thus when a law enforcement officer or a citizen lawfully arrests a defendant, he or she is not committing kidnapping or false imprisonment. By the same token, if an arrest is executed *unlawfully*, it *might be* kidnapping, false imprisonment, or another related offense.

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10.4.5: Key Takeaways

- The criminal act element required for kidnapping is confinement and asportation of the victim.
- The criminal intent element required for kidnapping is the specific intent or purposely to commit the criminal act.
- The harm element required for kidnapping is confinement and asportation of the victim.
- The attendant circumstance element required for kidnapping is lack of victim consent.
- False imprisonment is often a lesser included offense of kidnapping, missing the asportation element, and requiring general intent or knowing commission of the criminal act.
- Two potential defenses to kidnapping and false imprisonment are victim consent and a lawful arrest by a law enforcement officer or citizen.

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10.5: Theft Crimes

This section examines the following crimes

- PC 484/488/487 Theft
- PC 518 Extortion
- PC 459 Burglary
- PC 211 Robbery
- PC 503 Embezzlement
- PC 537[a] Defrauding an innkeeper
- PC 496 Receiving Stolen Property

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10.5.1: Extortion

All states and the federal government criminalize **extortion**, which is also called **blackmail**. Extortion is typically nonviolent, but the elements of extortion are very similar to **robbery** which is discussed later in this chapter. California divides **Extortion** by threat, force, or letter.

California Penal Code § 518 Extortion

(a) Extortion is the obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.

(b) For purposes of this chapter, "consideration" means anything of value, including sexual conduct as defined in subdivision (b) of Section 311.3, or an image of an intimate body part as defined in subparagraph (C) of paragraph (4) of subdivision (j) of Section 647.

(c) Notwithstanding subdivision (a), this section does not apply to a person under 18 years of age who has obtained consideration consisting of sexual conduct or an image of an intimate body part.

CALCRIM No. 1830. Extortion by Threat or Force (Pen. Code, §§ 518, 519)

The defendant is charged [in Count] with **extortion** by (threat/[or] force) [in violation of Penal Code section 518].

To prove that the defendant is guilty of this crime, the People must prove that:

[1. The defendant (threatened to unlawfully injure/ [or] used force against) (another person or a third person/ [or] the property of another person or a third person);]

[1. The defendant threatened to accuse another person[, or that person's relative or family member,] of a crime;]

[1. The defendant threatened to expose a secret about another person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with a (disgrace[,]/ [or]crime[,]/ [or] deformity)];]

2. When (making the threat/ [or] using force), the defendant intended to use that (fear/ [or] force) to obtain the other person's consent (to give the defendant money [or property]/ [or] to give the defendant anything of value [that involves (sexual conduct/[or] an image of an intimate body part)]/ [or] to do an official act);

3. As a result of the (threat/ [or] use of force), the other person consented (to give the defendant money [or property]/ [or] to give the defendant anything of value [that involves (sexual conduct/[or] an image of an intimate body part)]/ [or] to do an official act);

AND

4. As a result of the (threat/ [or] use of force), the other person then(gave the defendant money [or property]/ [or] gave the defendant anything of value [that involves (sexual conduct/ [or] an image of an intimate body part)]/ [or] did an official act).The term consent has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear

The (threat/use of force) must be the controlling reason that the other person consented.

If the person consented because of some other controlling reason, the defendant is not guilty of extortion.[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The threat may involve harm to be inflicted by the defendant or by someone else.]

[An official act is an act that a person does in his or her official capacity, using the authority of his or her public office.][A secret is a fact that:

1. Is unknown to the general public or to someone who might be interested in knowing the fact;

AND

2. Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (give the defendant money [or property]/ [or] give the defendant anything of value[that involves (sexual conduct/ [or] an image of an intimate body part)]/ [or] do an official act) to prevent the fact from being revealed.]

[Sexual conduct means any of the following:[• Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals(;/.)][• Penetration of the vagina or rectum by any object(;/.)][• Masturbation for the purpose of sexual stimulation of the viewer(;/.)]

[• Sadomasochistic abuse for the purpose of sexual stimulation of the viewer(;/.)]

[• Exhibition of the genitals or the pubic or rectal area of any person for the purpose of sexual stimulation of the viewer(;/.)][• Defecation or urination for the purpose of sexual stimulation of the viewer.]

[An intimate body part means any portion of the genitals, the anus, and, in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or clearly visible through clothing.]

Examples of Extortion

- breaking into a home and taking the owner's jewelry after threatening to break the owner's leg.
- threatening to expose a public official's extramarital affair if they do not vote "yes" on a certain proposal.
- receiving cash from a car owner after threatening to commit the offense of carjacking.

Possible Defenses to Extortion

Common defenses include you showing that:

- you did not use force or make a threat,
- you were falsely accused, and/or
- the victim did not perform the act that they consented to do.

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10.5.2: Theft (Larceny)

The FBI's Uniform Crime Reporting (UCR) Program defines larceny-theft as the unlawful taking, carrying, leading, or riding away of property from the possession or constructive possession of another. Examples are thefts of bicycles, thefts of motor vehicle parts and accessories, shoplifting, pocket-picking, or the stealing of any property or article that is not taken by force and violence or by fraud. Attempted larcenies are included in offense totals. Embezzlement, confidence games, forgery, check fraud, etc., are excluded (https://ucr.fbi.gov/) . California has multiple theft law including PC 484, Petty Theft, PC 487, Grand Theft (including Grand Theft Auto), PC 459 Burglary, 459.5, Shoplifting, and Vehicle Code 10851, Auto Theft to name a few. These crimes will be covered in the following sections.

California Penal Code 484(et. al) – Petty Theft

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

(b) (1) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and that property has a value greater than one thousand dollars ($1,000) and is not a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 10 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(2) Except as provided in Section 10855 of the Vehicle Code, where a person has leased or rented the personal property of another person pursuant to a written contract, and where the property has a value no greater than one thousand dollars ($1,000), or where the property is a commonly used household item, intent to commit theft by fraud shall be rebuttably presumed if the person fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented.

(c) Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental property at the expiration of the lease or rental agreement, and no written demand for the return of the leased or rented property shall be required.

(d) The presumptions created by subdivisions (b) and (c) are presumptions affecting the burden of producing evidence.

(e) Within 30 days after the lease or rental agreement has expired, the owner shall make written demand for return of the property so leased or rented. Notice addressed and mailed to the lessee or renter at the address given at the time of the making of the lease or rental agreement and to any other known address shall constitute proper demand. Where the owner fails to make such written demand the presumption created by subdivision (b) shall not apply.

(Amended by Stats. 2000, Ch. 176, Sec. 1. Effective January 1, 2001.)

CALCRIM No. 1800. Theft by Larceny (Pen. Code, § 484)

The defendant is charged [in Count] with [grand/petty] theft [by larceny] [in violation of Penal Code section 484].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant took possession of property owned by someone else;

2. The defendant took the property without the owner's [or owner's agent's] consent;

3. When the defendant took the property (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's [or owner's agent's] possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property);

AND

4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief.[The taking of property can include its consumption or the use of utilities.][An agent is someone to whom the owner has given complete or partial authority and control over the owner's property.][For petty theft, the property taken can be of any value, no matter how slight.

Petty Theft

Petty theft, per PC 484 and PC 488, is the unlawful taking of property worth $950 or less. A prosecutor must prove five elements in order to convict you under California law:

- you took possession of property owned by someone else,
- the property is valued at $950 or less,
- you took the property without the owner's consent,
- when you took the property, you intended to deprive the owner of it permanently, and
- you moved the property, even a small distance, and kept it for any period of time, however brief.

Petty theft is a misdemeanor charge punishable by

- probation,
- fines,
- restitution and
- up to 6 months in county jail.

If the value of the stolen property exceeds $950.00, then the more serious crime of grand theft can be charged.

Examples

- Borrowing a neighbor's $500 chain saw and purposefully not returning it
- Taking a $200 pair of shoes and putting it into the box of a lower priced pair, then proceeding to the self-checkout line and paying the lower price*
- Taking a bottle of whiskey from a shipment of belonging to your employer*

These crimes might also be charged as burglary (PC 459) if you entered the store with the intent to commit theft as described later in this chapter.

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10.5.3: California Penal Code §459.5(a) – Shoplifting

This crime was created in 2014 by the California voters by way of Proposition 47. Prior to Prop 47 the monetary threshold was lower ($450) and repeated thefts would result in felony charges (PC 488[repealed]).

459.5. (a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.

(b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.

(Added November 4, 2014, by initiative Proposition 47, Sec. 5.)

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10.5.4: Robbery

Robbery was the first common-law theft crime. The criminalization of robbery was a natural progression from other common-law crimes against the person because robbery always involves force, violence, or threat and could pose a risk of injury or death to the robbery victim, defendant, or other innocent bystanders. Recall from Chapter 9 "Criminal Homicide" that robbery is generally a serious felony that is included in most felony murder statutes as a predicate felony for **first-degree** felony murder. When robbery does not result in death, it is typically graded more severely than theft under a consolidated theft statute. Robbery grading is discussed shortly.

The elements of robbery are very similar to the elements of **larceny** and **extortion**. For the purpose of brevity, only the elements of robbery that are distinguishable from larceny and extortion are analyzed in depth. Robbery has the elements of criminal act, attendant circumstances, criminal intent, causation, and harm, as is explored in Section 11.2 "Extortion, Robbery, and Receiving Stolen Property". It is the criminal act element that primarily distinguishes robbery from larceny and extortion. The **criminal act** element required for robbery is a taking of personal property by **force** or **threat** of force (Ind. Code § 35-42-5-1, 2011). Force is generally physical force. The force can be slight, but it must be more than what is required to gain control over and move the property (S.W. v. State, 2011). Many jurisdictions require force *during* the taking, which includes the use of force to prevent the victim from reclaiming the property, or during escape (State v. Handburgh, 2011). The Model Penal Code requires force or threat "in the course of committing a theft" and defines this as occurring in "an attempt to commit theft or in flight after the attempt or commission" (Model Penal Code § 222.1(1)). Threat for robbery is a threat to inflict *imminent* force (Ala. Code § 13A-8-43, 2011).

While larceny and extortion also require a taking, the defendant typically accomplishes the larceny taking by stealth, or a false representation of fact. In extortion, the defendant accomplishes the taking by a threat of *future* harm that may or may not involve *force*.

Example of Robbery Act

Review the example given in "Example of Extortion Act" with Rodney and Lindsey. In this example, Rodney threatened to expose Lindsey's drug trafficking if she didn't pay him fifteen thousand dollars. Change the example so that Rodney tells Lindsey he will kill her if she doesn't write him a check for fifteen thousand dollars. Rodney exemplifies his threat by pointing to a bulge in his front jacket pocket that appears to be a weapon. In this scenario, Rodney has most likely committed the criminal act element required for **robbery**, *not* **extortion**. Rodney's threat is a threat of *immediate force*. Compare this threat to Rodney's threat to expose Lindsey's drug trafficking, which is a threat of *future* harm that relates to Lindsey's *arrest* for a crime, rather than force.

Example of a Case Lacking Robbery Act

Peter, a jewelry thief, notices that Cheryl is wearing a diamond ring. Peter walks up to Cheryl and asks her if she wants him to read her palm. Cheryl shrugs her shoulders and says, "Sure! What have I got to lose?" While Peter does an elaborate palm reading, he surreptitiously slips Cheryl's diamond ring off her finger and into his pocket. Peter has probably *not* committed the criminal act element required for robbery in this case. Although Peter used a certain amount of physical force to remove Cheryl's ring, he did not use any force *beyond* what was required to gain control over Cheryl's property and move it into his possession. Thus Peter has probably committed the criminal act element required for **larceny** theft, *not* **robbery**, and is subject to less severe sentencing for this lower-level offense.

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10.5.4.1: Robbery Attendant Circumstances

Another difference between robbery and larceny or extortion is the **attendant circumstances** requirement(s).

Robbery requires the same attendant circumstance required for both larceny and extortion—that the property taken belongs to another. It also has the same attendant circumstance as larceny—that the defendant accomplish the taking against the victim's will and without consent. However, robbery has one additional attendant circumstance, which is that the property be taken **from the victim's person** or **presence** (Cal. Penal Code § 211). The property does not need to be in the actual physical possession of the victim, as long as it is under the victim's *control* (Jones v. State, 2011). Thus if the victim could have prevented the taking if not for the force, violence, or threat posed by the defendant, this attendant circumstance is present (Jones v. State, 2011).

Example of Robbery Attendant Circumstances

Review the example given in "Example of Robbery Act" with Rodney and Lindsey. In this example, Rodney tells Lindsey he will kill her if she doesn't write him a check for fifteen thousand dollars. Change this example so that Rodney knows Lindsey has recently withdrawn fifteen thousand dollars in cash from the bank. Rodney demands the cash, tells Lindsey he will kill her if she doesn't give it to him, and gestures toward a bulge in his front jacket pocket that appears to be a weapon. Lindsey tells Rodney, "The money is in my purse, but if you take it, you will be ruining my life!" and points to her purse, which is on the kitchen table a few feet away. Rodney walks over to the table, opens Lindsey's purse, and removes a large envelope stuffed with bills. In this scenario, the attendant circumstances for robbery appear to be present. Rodney took the property of another without consent. Although the money was not on Lindsey's person, it was in her **presence** and subject to her **control**. If Rodney had not threatened Lindsey's life, she could have *prevented* the taking. Thus Rodney has most likely committed robbery and is subject to prosecution for and conviction of this offense.

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10.5.4.2: Robbery Intent

The criminal intent element required for robbery is the same as the criminal intent element required for larceny and extortion in many jurisdictions. The defendant must have the **specific intent** or **purposely** to commit the criminal act and to deprive the victim of the property *permanently* (Metheny v. State, 2011). Some jurisdictions do not require the intent to permanently deprive the victim of property and include *temporary* takings in the robbery statute (Fla. Stat. Ann. § 812.13, 2011).

Example of Robbery Intent

Review the example with Rodney and Lindsey in "Example of a Case Lacking Extortion Intent". In this example, Rodney demands a loan from Lindsey in the amount of fifteen thousand dollars and threatens to expose her drug trafficking activities if she doesn't comply. Change this example so that Rodney tells Lindsey to loan him fifteen thousand dollars or he will kill her, gesturing at a bulge in his front jacket pocket that appears to be a weapon. In a jurisdiction that requires the criminal intent to **permanently** deprive the victim of property for robbery, Rodney does not have the appropriate criminal intent. In a jurisdiction that allows for the intent t**temporarily** deprive the victim of property for robbery, Rodney has the appropriate criminal intent and may be charged with and convicted of this offense.

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10.5.4.3: Robbery Causation and Harm

The criminal act supported by the criminal intent must be the **factual** and **legal cause** of the robbery **harm**, which is the same as the harm requirement for larceny and extortion: the property must be transferred to the defendant (Oklahoma Uniform Jury Instructions No. CR 4-141, 2011). In some jurisdictions, *no* transfer of property needs to take place, and the crime is complete when the defendant employs the force or threat with the appropriate criminal intent (Williams v. State, 2011).

Example of Robbery Harm

Review the example with Rodney and Lindsey in "Example of Robbery Attendant Circumstances". In this example, Rodney threatens to kill Lindsey if she does not give him fifteen thousand dollars out of her purse and gestures to a bulge in his front jacket pocket that appears to be a weapon. Change this example so that Lindsey leaps off of the couch and tackles Rodney after his threat. She reaches into his pocket and determines that Rodney's "gun" is a plastic water pistol. Rodney manages to get out from under Lindsey and escapes. If Rodney and Lindsey are in a jurisdiction that requires a transfer of property for the harm element of robbery, Rodney has probably only committed *attempted* robbery because Rodney did not get the chance to take the money out of Lindsey's purse. If Rodney and Lindsey are in a jurisdiction that does *not* require a transfer of property for the harm element of robbery, Rodney may be subject to prosecution for and conviction of this offense.

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10.5.4.4: Robbery Grading

As stated previously, robbery is generally **graded** as a serious felony that can serve as the predicate felony for first-degree felony murder (Cal. Penal Code § 189, 2011) and a strike in states that have three strikes statutes (Cal. Penal Code § 1192.7, 2011). Robbery grading is aggravated by the use of a weapon or when the defendant inflicts serious bodily injury (Tex. Penal Code § 29.03, 2011). The Model Penal Code grades robbery as a felony of the second degree, unless the actor attempts to kill anyone or purposely inflicts or attempts to inflict serious bodily injury, in which case it is graded as a felony of the first degree (Model Penal Code § 222.1(2)).

> ****In some jurisdictions, the victim does not need to transfer the property to the defendant.**

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10.5.5: Receiving Stolen Property

All jurisdictions criminalize **receiving stolen property**, to deter theft and to break up organized criminal enterprises that benefit from stealing and selling stolen goods. Receiving stolen property criminal statutes often are targeted at pawnbrokers or **fences** who regularly buy and sell property that is the subject of one of the theft crimes discussed in the preceding sections. As stated, the Model Penal Code includes receiving stolen property in its consolidated theft offense (Model Penal Code §§ 223.1, 223.6). Receiving stolen property has the elements of criminal act, criminal intent, attendant circumstances, causation, and harm, as is explored in "Receiving Stolen Property".

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10.5.5.1: Receiving Stolen Property Act

The **criminal act** element required for receiving stolen property in many jurisdictions is receiving, retaining, disposing of (Ala. Code § 13A-8-16, 2011), selling (Cal. Penal Code § 496, 2011), trafficking in (Fla. Stat. Ann.

§ 812.019, 2011), buying, or aiding in concealment (Mass. Gen. Laws ch. 266 § 60) of stolen personal property. The Model Penal Code defines the criminal act element as receiving, retaining, or disposing of stolen movable property (Model Penal Code § 223.6(1)). The criminal act does not generally require the defendant to be in actual **physical possession** of the property, as long as the defendant retains *control* over the item(s) (Ga. Code § 16-8-7, 2011). This would be a constructive possession. The Model Penal Code defines receiving as "acquiring possession, control or title, or lending on the security of the property" (Model Penal Code § 223.6(1)). Note that the criminal act element of receiving stolen property includes both **buying** and **selling**. Thus dealers that regularly purchase and then sell stolen items can be prosecuted for both of these acts under the same statute.

Example of Receiving Stolen Property Act

Chanel, a fence who deals in stolen designer perfume, arranges a sale between one of her thieves, Burt, and a regular customer, Sandra. Chanel directs Burt to drop off a shipment of one crate of the stolen perfume at Chanel's storage facility and gives Burt the key. Chanel pays Burt five thousand dollars for the perfume delivery. Chanel thereafter accepts a payment of ten thousand dollars from Sandra and gives Sandra another key with instructions to pick up the perfume the next day after it has been delivered. Chanel could probably be charged with and convicted of receiving stolen property in most jurisdictions. Although Chanel did not ever acquire actual *possession* of the stolen designer perfume, Chanel had *control* over the property or constructive possession through her storage facility. Chanel's acts of **buying** the perfume for five thousand dollars and then **selling** it for ten thousand dollars both would be criminalized under *one* statute in many jurisdictions. Thus Chanel could be prosecuted for *both* acts as separate charges of receiving stolen property.

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10.5.5.2: Receiving Stolen Property Intent

The criminal intent element required for receiving stolen property has two parts. First, the defendant must have the intent to commit the criminal act, 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. This means that the defendant must have **actual knowledge** that the property is stolen (Mass. Gen. Laws ch. 266 § 60, 2011), or the defendant must be aware or should be aware of a **risk** that the property is stolen (Ala. Code § 13A-8-16(a), 2011). The Model Penal Code requires the defendant to purposely commit the act *knowing* that the property is stolen or *believing* that the property has *probably* been stolen (Model Penal Code § 223.6(1)). The Model Penal Code also provides a **presumption** of knowledge or belief when the defendant is a **dealer**, which is defined as a "person in the business of buying or selling goods including a pawnbroker," and has been found in possession or control of property stolen from two or more persons on more than one occasion, or has received stolen property in another transaction within the year preceding the transaction charged, or acquires the property for consideration far below its reasonable value (Model Penal Code § 223.6(2)). Many state statutes have a similar provision (Ala. Code § 13A-8-16, 2011).

The second aspect of criminal intent for receiving stolen property is the defendant's **specific intent** or **purposeful** desire to deprive the victim of the property *permanently*, which is required in some jurisdictions (Hawaii Criminal Jury Instructions No. 10.00, 10.20, 2011). This creates a **failure of proof** or **affirmative defense** that the defendant received and retained the stolen property with the intent to *return* it to the true owner (Ga. Code § 16-8-7(a), 2011). The Model Penal Code also provides a defense if "the property is received, retained, or disposed of with purpose to restore it to the owner" (Model Penal Code § 223.6(1)).

Example of Receiving Stolen Property Intent

Chip's iPod breaks, so he decides to go to the local electronics store and buy a new one. As he is approaching the store, Heather saunters over from a nearby alley and asks him if he wants to buy a brand new iPod for ten dollars. Suspicious of the price, Chip asks Heather to see the iPod. She hands it to him, and he notices that the box looks like it has been tampered with and a price tag removed. He shrugs, takes ten dollars out of his wallet, and hands it to Heather in exchange for the iPod. In jurisdictions that require **actual knowledge** that the property is stolen, Chip probably does not have the appropriate criminal intent for receiving stolen property because he did not know Heather and had no way of knowing if Heather was selling him stolen property. In jurisdictions that require **awareness of a risk** that the property is stolen, Chip may have the appropriate criminal intent because he knew the price was too low and noticed that the box had been tampered with to remove evidence of an actual price or vendor.

Change the example so that Chip is a pawnshop broker, and Heather brings the iPod into his shop to pawn for the price of ten dollars. In many jurisdictions, if Chip accepts the iPod to pawn, this creates a **presumption** of receiving stolen property criminal intent. Chip is considered a dealer, and in many jurisdictions, dealers who acquire property for consideration that they *know* is *far below* the reasonable value are subject to this type of presumption.

Change the example again so that Chip notices the following message written on the back of the iPod box: "This iPod is the property of Eugene Schumaker." Chip is Eugene Schumaker's friend, so he pays Heather the ten dollars to purchase the iPod so he can return it to Eugene. In many jurisdictions and under the Model Penal Code, Chip can use his intent to return the stolen property to its true owner as a **failure of proof** or **affirmative defense** to receiving stolen property.

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10.5.5.3: Retaining Stolen Property

If **retaining** is the criminal act element described in the receiving stolen property statute, a defendant can still be convicted of receiving stolen property if he or she originally receives the property *without* the appropriate criminal intent, but later keeps the property *after* discovering it is stolen (Connecticut Criminal Jury Instructions §§53a-119(8), 2011).

> **Example of Retaining Stolen Property**
>
> Review the example with Chip and Heather in "Example of Receiving Stolen Property Intent". Change this example so that Chip is not a dealer and is offered the iPod for one hundred dollars, which is fairly close to its actual value. Chip purchases the iPod from Heather and thereafter drives home. When he gets home, he begins to open the box and notices the message stating that the iPod is the property of Eugene Schumaker. Chip thinks about it for a minute, continues to open the box, and then retains the iPod for the next six months. If Chip is in a state that defines the criminal act element for receiving stolen property as **retains**, then Chip most likely committed the criminal act with the appropriate criminal intent (knowledge that the property is stolen) and may be subject to prosecution for and conviction of this offense.

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10.5.5.4: 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".

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 (Ala. Code § 13A-8-16, 2011). If the defendant does not actually gain or transfer control of the property, only *attempted* receiving stolen property can be charged.

Receiving Stolen Property Grading

Receiving stolen property is **graded** as a felony-misdemeanor (Cal. Penal Code § 496, 2011) or as a misdemeanor if the stolen property is of low value and a felony if the stolen property is of high value (Ga. Code § 16-8-12, 2011).

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10.5.6: Key Takeaways

- The criminal act element required for extortion is typically a theft of property accomplished by a threat to cause future harm to the victim.
- The criminal intent element required for extortion is typically the specific intent or purposely to unlawfully deprive the victim of property permanently. However, in some jurisdictions, it is the general intent or knowingly to perform the criminal act.
- 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 as restitution or indemnification for harm done by the secret or crime.
- The attendant circumstances of extortion are that the property belongs to another and that the victim consents to transferring the property to the defendant based on fear inspired by the defendant's threat.
- The harm element required for extortion is that the defendant obtains the property of another.
- Extortion is graded as a felony in most jurisdictions.
- 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.

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10.6: Crimes Against Property

Learning Objectives

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.

Define the elements of criminal mischief, and analyze criminal mischief grading

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10.6.1: 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 almost *any 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".

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10.6.1.1: 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 (Mass. Gen. Laws ch. 266 § 14, 2011). Some jurisdictions and the Model Penal Code only require entering (Model Penal Code § 221.1). Other jurisdictions include **remaining** in the criminal act element (Fla. Stat. Ann. § 810.02(b)).

When criminal breaking is required, generally *any* physical force used to enter the burglarized area is sufficient—even pushing open a closed door (Commonwealth v. Hallums, 2011). **Entry** is generally partial or complete intrusion of either the defendant, the defendant's body part, or a tool or instrument (People v. Nible, 2011). In some jurisdictions, the entry must be *unauthorized* (State v. Hall, 2011), while in others, it could be *lawful* (People v. Nunley, 2011). 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 (State v. Allen, 2011).

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.

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10.6.1.2: 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 **purposely** to commit a felony (Mass. Gen. Laws ch. 266 § 14, 2011), any crime (Connecticut Criminal Jury Instructions §53a-102, 2011), or a felony, grand, or petty theft once inside the burglarized area (Cal. Penal Code § 459, 2011). The Model Penal Code describes the criminal intent element as "purpose to commit a crime therein" (Model Penal Code § 221.1(1)).

Example of a Case Lacking Burglary Intent

Hans dares 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 "Criminal Trespass".

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10.6.1.3: 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 (Oklahoma Uniform Jury Instructions No. CR 5-13, 2011). However, modern jurisdictions have eliminated the requirement that the property belong to another (Cal. Penal Code § 459, 2011) 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 (Iowa Code § 713.1, 2011), or require it to be a dwelling (Connecticut Criminal Jury Instructions §53a-102, 2011), and require a vehicle to be *locked* (Cal. Penal Code § 459, 2011). A few jurisdictions also retain the common-law attendant circumstance that the burglary take place at nighttime (Mass. Gen. Laws ch. 266 § 15, 2011). Structure or building generally includes a house, room, apartment, shop, barn, or even a tent (Cal. Penal Code § 459, 2011). The Model Penal Code expressly excludes *abandoned* structures or buildings (Model Penal Code § 221.1(1)). A dwelling is a building used for lodging at night (Connecticut Criminal Jury Instructions § 53a-102, 2011). Occupied means that the structure or building can be used for business or for lodging at night and does not necessarily require the actual presence of a person or victim when the criminal act takes place (Iowa Code § 702.12). Nighttime means the time after sunset and before sunrise when it is too dark to clearly see a defendant's face (State v. Reavis, 2011).

Example of Burglary Attendant Circumstances

Susan breaks down a door and steps inside a building with the intent to commit arson, a felony, once inside. If the building is an empty child's tiny plastic playhouse, the attendant circumstance that the structure be **occupied** or a **dwelling** is lacking. If it is twelve noon, the attendant circumstance that the criminal act takes place at **nighttime** is lacking. If it is pitch black outside and 10 p.m. and the building is Susan's ex-boyfriend's residence, then Susan has most likely committed burglary and may be subject to prosecution for and conviction of this offense.

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10.6.1.4: Burglary Grading

Burglary is typically divided into degrees (Iowa Code §§ 713.3, 713.5, 713.6A, 2011). First-degree burglary is generally a serious felony that can serve as the predicate felony for first-degree felony murder (Cal. Penal Code § 189, 2011) and a strike in states that have three strikes statutes (Cal. Penal Code § 1192.7, 2011). Factors that can elevate burglary grading are the use or possession of a weapon, the entry into a residence, dwelling, or building where people are present, the commission of burglary at nighttime, or the infliction of injury or death (Mass. Gen. Laws ch. 266 § 14, 2011). Second- and third-degree burglary generally are still felonies, although less serious than first-degree burglary (Ala. Code § 13A-7-7, 2011). The Model Penal Code grades burglary as a felony of the second degree if perpetrated in the dwelling of another at night, or if the actor purposely, knowingly, or recklessly inflicts or attempts to inflict bodily injury or is armed with explosives or a deadly weapon. Otherwise, the Model Penal Code grades burglary as a felony of the third degree (Model Penal Code § 221.1(2)).

Keep in mind that a defendant can be prosecuted for burglary even if the felony or crime intended after entry *never takes place*. In addition, if the defendant actually commits the felony or crime after entry, the defendant can be prosecuted for *both* burglary and the completed crime without violating the protection against double jeopardy in the Fifth Amendment to the federal Constitution. The Model Penal Code states that a "person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry...unless the additional offense constitutes a felony of the first or second degree" (Model Penal Code § 221.1(3)).

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10.6.2: Criminal Trespass

As stated previously, **criminal trespass** is generally charged when one or more of the attendant circumstances of burglary are lacking or when the criminal intent is less heinous. Typically, criminal trespass is an unauthorized (**attendant circumstance**) entry or remaining (**criminal act**) into a building, occupied structure, or place as to which notice against trespassing is given, owned by another (**attendant circumstance**), with **general intent** or **knowingly** that the entry was unauthorized (criminal intent) (18 Pa. C.S. § 3503, 2011). The Model Penal Code states that it is criminal trespass when the defendant "knowing that he is not licensed or privileged to do so...enters or surreptitiously remains in any building or occupied structure...or any place as to which notice against trespass is given" (Model Penal Code § 221.2). Criminal trespass is generally **graded** as a less serious felony than burglary or is graded as a misdemeanor if the trespass is into a place, rather than a building or occupied structure (18 Pa. C.S. § 3503, 2011). The Model Penal Code grades criminal trespass as a misdemeanor if it is committed in a dwelling at night; otherwise, it is graded as a petty misdemeanor or a violation (Model Penal Code § 221.2).

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10.6.3: Arson

Arson is one of the most destructive crimes in the United States, costing billions of dollars per year in lost or damaged homes, businesses, and real property. Many jurisdictions punish arson as a high-level felony that could merit a punishment of life in prison and mandatory registration requirements similar to serious sex offenses (730 ILCS 148 § 10, 2011).

At early common law, arson was primarily a crime against **habitation**, rather than a crime against property. The elements of arson at common law were the malicious or intentional burning of a dwelling owned by another. Modern statutes criminalize burning almost *anything*, including the defendant's own property in many instances.

Arson is a crime that has the elements of criminal act, criminal intent, attendant circumstances, causation, and harm, as is explored in "Arson".

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10.6.4: Criminal Mischief

Criminal mischief prohibits damaging or destroying property, tampering with property, or deception or threat that leads to a loss of property. Although criminal mischief may be a felony in many jurisdictions, it is generally a less serious felony than arson, either because the defendant inflicts damage to property in a safer manner or because the criminal intent is less heinous. The **criminal act** element required for criminal mischief is damaging (Ala. Code § 13A-7-21, 2011), destroying, interfering with (Or. Rev. Stat. § 164.365, 2011), or tampering with (Alaska Stat. § 11.46.480, 2011) property. The criminal intent element required for criminal mischief varies, depending on the jurisdiction and the degree of the offense. The criminal intent could be **specific intent** or **purposely**, **general intent** or **knowingly**, **reckless**, or **negligent** (18 Pa.C.S. § 3304, 2011). The **attendant circumstances** required for criminal mischief are typically committing the criminal act against the property of another (or property that is government owned) without victim consent or with no right or authorization (Alaska Stat. § 11.46.475, 2011). The **harm** element required for criminal mischief is damage, destruction, or interference to property by fire, explosive, flood, or some other method, or interference with electricity, water, oil or gas (Alaska Stat. § 11.46.475, 2011), or loss of property or money by deception such as causing the victim to purchase a worthless product (18 Pa.C.S. § 3304, 2011). As stated previously, criminal mischief is often a *less serious* felony than arson and could also be graded as a gross misdemeanor or misdemeanor (18 Pa.C.S. § 3304, 2011). Factors that could elevate **grading** of criminal mischief are the extent of the property damage and the severity of the defendant's criminal intent (18 Pa.C.S. § 3304, 2011). The Model Penal Code criminalizes criminal mischief when the defendant purposely, recklessly, or negligently damages tangible property of another by fire, explosives, or other dangerous means, purposely or recklessly tampers with tangible property of another so as to endanger person or property, or purposely or recklessly causes another to suffer pecuniary loss by deception or threat. The Model Penal Code grades criminal mischief as a felony of the third degree, misdemeanor, petty misdemeanor, or violation, depending on the extent of the damage or the criminal intent (Model Penal Code § 220.3).

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10.6.5: Key Takeaways

- Burglary generally includes the attendant circumstances that the area entered is a structure, building, or vehicle belonging to another, or an occupied building or structure, or a dwelling. Modern jurisdictions have eliminated the requirement that the property belong to another and prohibit the defendant from burglarizing his or her own property. Some jurisdictions require a vehicle to be locked, and a few jurisdictions require the burglary to take place at nighttime.
- The criminal act element required for burglary is breaking and entering, just entering, or remaining.
- The criminal intent element required for burglary is typically the general intent or knowingly to commit the criminal act and the specific intent or purposely to commit a felony, any crime, or a felony, petty, or grand theft once inside the burglarized area.
- Burglary is typically graded as a felony that is divided into degrees. First-degree burglary is often a strike in jurisdictions that have three strikes statutes and a predicate felony for first-degree felony murder.
- Typically, criminal trespass is an unauthorized (attendant circumstance) entry or remaining (criminal act) into a building, occupied structure, or place as to which notice against trespassing is given, owned by another (attendant circumstance) with general intent or knowingly that the entry was unauthorized (criminal intent). Criminal trespass is generally graded as a felony, albeit a less serious felony than burglary, or a misdemeanor if the area trespassed is a place rather than an occupied building or structure.
- The criminal act element required for arson is starting a fire, burning, or damaging with fire or explosives specified real or personal property.
- The criminal intent element required for arson is the general intent or knowingly to commit the criminal act in many jurisdictions.
- Arson statutes can specify the attendant circumstance that the defendant burns a specific type of property, such as a dwelling or other real or personal property. In most jurisdictions, if the defendant burns his or her own property, the defendant must act with the specific intent or purposely to defraud, typically an insurance carrier.
- The harm element required for arson is burning, charring, damage, or, in the most extreme cases, smoke damage.
- Arson is typically graded as a felony that is divided into degrees. First-degree arson is often a strike in jurisdictions that have three strikes statutes and a predicate felony for first-degree felony murder. Arson could also carry a registration requirement like serious sex offenses.
- The elements of criminal mischief are damaging or destroying property, tampering with property, or deception or threat that leads to a loss of property (criminal act and harm) with specific intent or purposely, general intent or knowingly, recklessly, or negligently. Although criminal mischief may be a felony in many jurisdictions, it is generally a less serious felony than arson and in some jurisdictions it is graded as a gross misdemeanor or misdemeanor.

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10.6.6: Arson (1)

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10.6.6.1: Arson Act

The **criminal act** element required for arson is typically setting fire to or burning real or personal property specified in the arson statute (Cal. Penal Code § 451, 2011). This could include buildings, structures, land, and vehicles (Tex. Penal Code § 28.02, 2011). Some states define the criminal act element as “damaging” the specified property by fire or explosives (Ga. Code tit. 16 § 16-7-60, 2011). The Model Penal Code describes the criminal act element as starting a fire or causing an explosion (Model Penal Code § 220.1(1). The **type** or **value** of the property the defendant burns or damages can enhance grading. Grading is discussed shortly.

Example of Arson Act

Clark and Manny are bored and decide to light a fire in the woods near their houses. The grass is damp from a recent rain, so the fire does not spread and burns only a small circle of grass. Clark and Manny give up and walk home. Clark and Manny have probably committed the criminal act element required for arson in most jurisdictions. Although a large destructive fire was not set by Clark and Manny, the two did burn or damage real property and start a fire, which satisfies the criminal act requirement in most jurisdictions and under the Model Penal Code.

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10.6.6.2: Arson Intent

The criminal intent element required for arson in many jurisdictions is the **general intent** or **knowingly** to commit the criminal act (Ga. Code tit. 16 § 16-7-60). Thus the defendant only needs the intent to burn or damage property specified in the arson statute; the defendant does not have to intend to burn a *specific* structure or personal property, even if that is the end result (People v. Atkins, 2011). The Model Penal Code requires starting a fire or causing an explosion "with the purpose of destroying a building or occupied structure of another; or destroying or damaging any property...to collect insurance for such loss" (Model Penal Code § 220.1(1)).

Example of Arson Intent

Review the example with Clark and Manny in "Example of Arson Act". Change this example so that Clark and Manny leave the area and a tiny spark from the fire they set begins to ignite. After a few hours, a large and powerful fire starts and burns thousands of acres in the forest. Clark and Manny most likely have the criminal intent element required for arson in many jurisdictions. Although Clark and Manny did not necessarily *want* to burn thousands of acres of forest land, they did **intentionally** or **knowingly** start a fire in the forest, which is all that many modern arson statutes require. Thus even though Clark and Manny did not intend the end result, Clark and Manny are probably subject to prosecution for and conviction of arson for their conduct.

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10.6.04: Arson

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10.6.3.3: Arson Attendant Circumstances

In most jurisdictions, arson must burn a specific type of property. Although this can be interpreted as an attendant circumstance, it is also a function of **grading**. Thus first-degree arson may focus on arson of a dwelling (Vt. Stat. Ann. tit. 13 § 502, 2011), while second-degree arson focuses on arson of other property (Vt. Stat. Ann. tit 13 § 503, 2011). Many jurisdictions do *not* require the attendant circumstance that property "belongs to another," and therefore the defendant can burn his or her own property and still be guilty of arson. However, the defendant must generally burn his or her property with the **specific intent** or **purposely** to *defraud* for the burning to constitute arson (Ga. Code tit. 16 § 16-7-62, 2011). The Model Penal Code requires "destroying or damaging any property, whether his own or another's, to collect insurance for such loss" (Model Penal Code § 220.1(b)).

Example of a Case Lacking Arson Intent for Burning the Defendant's Property

Tim decides he wants to get rid of all the reminders of his ex-girlfriend. Tim piles all the photographs, gifts, and clothing items that are connected to his relationship with his ex into his fireplace and burns them. In this scenario, Tim probably does *not* have the criminal intent element required for arson in most jurisdictions. Although Tim burned or damaged property, the property belongs to *Tim*, not another. Thus Tim must burn the property with the **specific intent** or **purposely** to defraud—most likely an insurance carrier. Tim burned his own property with only **general intent** or **knowingly**, so Tim may not be charged with and convicted of arson in most jurisdictions.

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10.6.3.4: Arson Causation

The criminal act must be the **factual** and **legal cause** of arson harm, which "Example of Arson Causation" defines. As stated previously, the defendant does not have to *intend* to burn a specific structure or personal property, even if that is the end result in many jurisdictions. However, there must be a causation analysis in every arson case because arson is a crime that requires a bad result or harm. Thus the arson **harm** must be *reasonably foreseeable* at the time the defendant commits the criminal act with the accompanying criminal intent.

Example of Arson Causation

Review the example with Clark and Manny in "Example of Arson Intent". In this example, Clark and Manny try to light a fire in the forest, but the grass is too damp, so they give up and leave the area. Hours later, a spark from their fire ignites, burning thousands of acres. Clark and Manny could be the **factual** and **legal cause** of this harm in many jurisdictions. Even though the grass was damp and difficult to burn, a trier of fact could find that it is reasonably foreseeable when lighting a fire in the forest that the fire could turn into a massive and destructive blaze. Thus Clark and Manny's act accompanied by the general intent or knowingly to burn **caused** significant harm, and Clark and Manny may be subject to prosecution for arson in this case.

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10.6.3.5: Arson Harm

The **harm** element required for arson is burning, charring, or damage to the property specified in the arson statute. Damage could be damage to even a small part (California Criminal Jury Instructions No. 1515, 2011), and in the most extreme cases, even smoke damage without burning or charring is sufficient (Ursulita v. State, 2011). The Model Penal Code only requires starting a fire or causing an explosion with the appropriate criminal intent, regardless of whether damage to real or personal property ensues (Model Penal Code § 220.1(1)). Some states follow the Model Penal Code approach (Tex. Penal Code § 28.02, 2011).

Example of Arson Harm

Review the example with Clark and Manny in "Example of Arson Act". In this example, Clark and Manny started a fire in the woods that burned a small circle of dead grass. This **damage** is probably sufficient to constitute the harm for arson in most jurisdictions. Although the value of the damaged forest land is not *excessive*, excessive damage is not typically a requirement under modern arson statutes—*any* damage is enough. Thus Clark and Manny may be subject to a prosecution for and conviction of this offense in most jurisdictions.

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10.6.3.6: Arson Grading

Arson is typically divided into degrees (Ga. Code tit. 16 § 16-7-60, 2011), or simple and aggravated (Cal. Penal Code § 451.5, 2011). Factors that can elevate **grading** are the burning or damage of another's dwelling (Ga. Code tit. 16 § 16-7-60, 2011), bodily injury or death (Connecticut Criminal Jury Instructions § 53a-111, 2011), extensive property damage, or damage to property of high value (Cal. Penal Code § 451.5, 2011). As stated previously, arson is a serious felony that can result in a sentence of life in prison and mandatory registration requirements similar to serious sex offenses (730 ILCS § 10, 2011). Arson is also generally a strike in states that have three strikes statutes (Cal. Penal Code § 1192.7, 2011) and a predicate felony for first-degree felony murder (Cal. Penal Code § 189, 2010). Many jurisdictions grade even simple arson or second or third-degree arson as a felony (Cal. Penal Code § 451, 2011). The Model Penal Code grades arson as a felony of the second degree (Model Penal Code § 220.1).

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10.7: Summary

Crimes against property include theft, crimes connected to theft, and crimes that invade or damage property. Modern jurisdictions criminalize several forms of theft under consolidated theft statutes that 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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11: CRIMES AGAINST THE PUBLIC AND GOVERNMENT

The state has not only a right to "maintain a decent society" but an obligation to do so. In the public nuisance context, the community's right to security and protection must be reconciled with the individual's right to expressive and associative freedom. Reconciliation begins with the acknowledgment that the interests of the community are not invariably less important than the freedom of individuals.

—*People v. Acuna*, cited in "Civil Responses to Gang Activity"

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11.1: Quality-of-Life Crimes

Learning Objectives

1. Define the criminal act element required for disorderly conduct.
2. Define the criminal intent element required for disorderly conduct.
3. Define the attendant circumstance required for disorderly conduct.
4. Identify potential constitutional challenges to disorderly conduct statutes.
5. Analyze disorderly conduct grading.
6. Identify potential constitutional challenges to vagrancy statutes.
7. Identify potential constitutional challenges to loitering statutes.
8. Define the elements of loitering, and analyze loitering grading.
9. Compare sit-lie laws to loitering statutes.

Crimes against the public include offenses that affect the quality of life, group violence such as gang activity, and vice crimes. Because quality-of-life crimes are often based on *moral* or *value* judgments, these offenses tend to target the poor and downtrodden. If the conduct prohibited involves an individual's **status** in society, **assembling**, or **speech**, the First and Fourteenth Amendments require a narrowly tailored statute supported by a compelling government interest. This creates a conflict between legislators trying to ensure peace and tranquility for citizens and judges upholding the many individual protections included in the Bill of Rights.

The quality-of-life offenses discussed are disorderly conduct, vagrancy, and loitering. Upcoming sections analyze crimes involving group activity, such as unlawful assembly and riot, along with the ever-growing problem of criminal gangs, and novel criminal and civil responses. The final section of this chapter discusses common vice crimes, including possession, sale, and use of controlled substances and prostitution.

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11.1.1: Disorderly Conduct

Disorderly conduct, also called **disturbing the peace**, criminalizes conduct that negatively impacts the quality of life for citizens in any given city, county, or state. Although disorderly conduct is typically a low-level offense, the enforcement of disorderly conduct statutes is important to preserve citizens' ability to live, work, and travel in safety and comfort. Disorderly conduct has the elements of criminal act, criminal intent, and an attendant circumstance, as is explored in "Disorderly Conduct".

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11.1.1.1: Disorderly Conduct Act

Three **criminal acts** generally are identified in any disorderly conduct statute. The defendant must either (1) make a loud and unreasonable noise, obscene utterance, or gesture, (2) engage in fighting or threatening, or state fighting words, or (3) create a hazardous condition by an act that does not serve a legitimate purpose (18 Pa. C. S. § 5503, 2011). The Model Penal Code defines disorderly conduct as engaging in fighting or threatening or violent tumultuous behavior, making unreasonable noise or an offensively course utterance, gesture, or display, addressing abusive language to any person present, or creating a hazardous or physically offensive condition by an act that serves no legitimate purpose (Model Penal Code § 250.2). When the criminal act is a loud and unreasonable noise, the quality of the noise is judged in the *setting* where the noise occurred. A noise made in an extremely quiet area can be softer than a noise made in a loud and busy area like a city street during peak hours (Haw. Rev. Stat. § 711-1101(2), 2011). The term "hazardous condition" generally refers to a situation that is dangerous and poses a risk of injury to others in the vicinity of the defendant's conduct (Wolfe v. State, 2011).

Example of Disorderly Conduct Act

David and Daniel leave a party in a quiet neighborhood at three in the morning. Both are inebriated. After walking a couple of blocks and telling stories, they begin singing loudly with their arms wrapped around each other. David stumbles and trips Daniel, who falls heavily to the sidewalk. Daniel gets up and starts screaming and swearing at David, challenging him to fight. David yells back, "Bring it on!" David pushes Daniel, he pushes back, and they begin punching and kicking. In this instance, David and Daniel have probably committed *three* separate disorderly conduct offenses. When David and Daniel began singing at three in the morning on a quiet street, they made a loud and unreasonable noise. When they challenged each other to fight, they uttered threats or stated fighting words. When they engaged in a fistfight, they committed fighting, or created a hazardous condition. Thus David and Daniel are most likely subject to a prosecution for and conviction of three counts of disorderly conduct in many jurisdictions.

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11.1.1.2: Disorderly Conduct Intent

The criminal intent element required for disorderly conduct in many jurisdictions is the **specific intent** or **purposely** to cause public inconvenience, annoyance, or alarm, or the **reckless** intent to cause a *risk* thereof (Ala. Code § 13A-11-7, 2011). The Model Penal Code has the same criminal intent requirement (Model Penal Code § 250.2(1)).

Example of Disorderly Conduct Intent

Review the example given in "Example of Disorderly Conduct Act" with David and Daniel. David and Daniel may not have had the **specific intent** to cause public inconvenience, annoyance, or alarm; however, their behavior in a quiet neighborhood late at night displays the **reckless** intent to cause a risk of such inconvenience, annoyance, or alarm. Although David and Daniel are inebriated, recall from Chapter 6 "Criminal Defenses, Part 2" that intoxication is *not* generally a defense to a reckless intent crime. Thus a trier of fact could find that David and Daniel have the appropriate criminal intent for disorderly conduct, and they may both be subject to conviction of this offense.

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11.1.1.3: Disorderly Conduct Attendant Circumstance

In many jurisdictions, disorderly conduct requires the **attendant circumstance** that the conduct occur in a public place (Tex. Penal Code § 42.01, 2011). This goes along with the purposeful or reckless intent to inconvenience, annoy, or alarm the public, or create a risk thereof. The Model Penal Code defines public as "affecting or likely to affect persons in a place to which the public or a substantial group has access...highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood" (Model Penal Code § 250.2).

Example of Disorderly Conduct Attendant Circumstance

Review the example in "Example of Disorderly Conduct Act" with David and Daniel. David and Daniel commit their acts of loud and unreasonable noise, threats, fighting words, fighting, and creating a hazardous condition on a **sidewalk** in a **neighborhood**. Thus in jurisdictions that require the disorderly conduct attendant circumstance of a public place, David and Daniel may be subject to prosecution for and conviction of this offense. If David and Daniel committed exactly the same acts in a private residence located on fifty acres with no neighbors for miles, the attendant circumstance for disorderly conduct would be *lacking*, along with the *criminal intent* to annoy, inconvenience, or alarm the public.

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11.1.1.4: Potential Constitutional Challenges to Disorderly Conduct Statutes

Because disorderly conduct statutes often criminalize **obscene gestures** and **words**, **threats**, and **fighting words**, they are subject to constitutional challenges under the First and Fourteenth Amendments. However, not all speech is protected under the First Amendment. As Chapter 3 "Constitutional Protections" discusses in detail, it 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** (Colten v. Kentucky, 2011).

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 unlikely 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 Chapter 3 "Constitutional Protections".

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11.1.1.5: Disorderly Conduct Grading

As stated previously, disorderly conduct is a low-level offense that is typically **graded** as a misdemeanor (N.C. Gen. Stat. § 14-132). The Model Penal Code grades disorderly conduct as a petty misdemeanor if the defendant's purpose is to cause substantial harm or serious inconvenience or if the defendant persists with his or her conduct after a warning. Otherwise, the Model Penal Code grades disorderly conduct as a violation (Model Penal Code § 250.2(2)).

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11.1.2: Vagrancy and Loitering

Although the government technically does not have an interest in punishing individuals for who they are, such as an impoverished person or a transient, the public perception of law enforcement is often affected by the presence of so-called vagrants and panhandlers in any given area. Thus virtually every jurisdiction has statutes punishing either **vagrancy** or **loitering**. However, these statutes are subject to constitutional attack if they are **void for vagueness**, **overbroad**, or target **status**.

Historically, vagrancy statutes were broadly drafted to allow law enforcement considerable discretion in arresting the unemployed, gamblers, drug addicts, alcoholics, and those who frequented houses of prostitution or other locations of ill repute. In a sense, vagrancy statutes attempted to incapacitate individuals *before* they engaged in criminal activity, to ensure the safety and security of any given area.

In 1972, the US Supreme Court struck down a Florida vagrancy statute in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The Court held that the statute, which prohibited night walking, living off one's spouse, and frequenting bars or liquor stores was void for vagueness and violated the due process clause in the Fourteenth Amendment. Thereafter, many states repealed or modified vagrancy statutes in lieu of more precisely drafted statutes prohibiting specific criminal conduct such as loitering. The Model Penal Code prohibits public drunkenness and drug incapacitation (Model Penal Code § 250.5) and loitering or prowling (Model Penal Code

§ 250.6). To summarize US Supreme Court precedent refining loitering statutes: it is unconstitutional to target those who are unemployed (Edwards v. California, 2011) or to enact a statute that is vague, such as a statute that criminalizes loitering in an area "with no apparent purpose," (City of Chicago v. Morales, 2011) or without the ability to provide law enforcement with "credible and reliable identification" (Kolender v. Lawson, 2011).

In a jurisdiction that criminalizes loitering, the **criminal act** element is typically loitering, wandering, or remaining, with the **specific intent** or **purposely** to gamble, beg, or engage in prostitution (Ala. Code § 13A-11-9, 2011). An **attendant circumstance** could specify the location where the conduct takes place, such as a school or transportation facility (Ariz. Rev. Stat. § 13-2905, 2011). Another common attendant circumstance is being masked in a public place while loitering, with an exception for defendants going to a masquerade party or participating in a public parade (Ala. Code § 13A-11-9, 2011). The Model Penal Code prohibits loitering or prowling in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity (Model Penal Code § 250.6). Loitering is generally **graded** as a misdemeanor (Ariz. Rev. Stat. § 13-2905, 2011) or a violation (Ala. Code § 13A-11-9, 2011). The Model Penal Code grades loitering as a violation (Model Penal Code § 250.6).

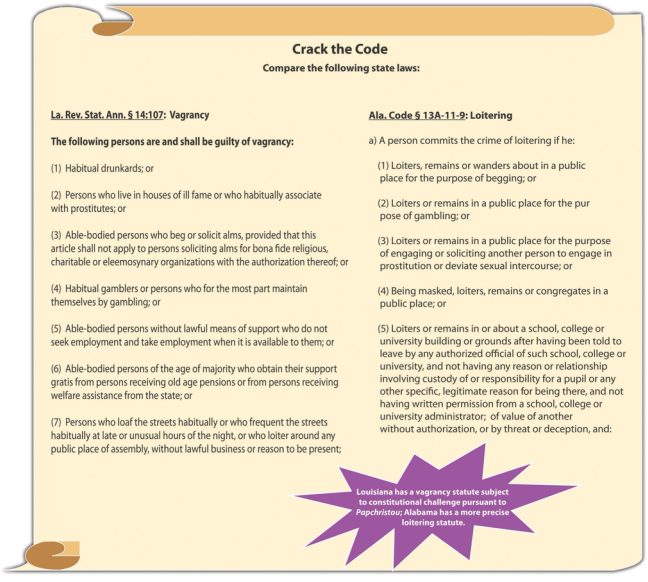


Figure 11.1.2.1: Crack the Code

Many jurisdictions also criminalize **panhandling** or **begging**. Panhandling statutes essentially criminalize speech, so they must be

narrowly tailored to avoid successful constitutional challenges based on the First Amendment, void for vagueness, or overbreadth. Constitutional panhandling statutes generally proscribe aggressive conduct (Gresham v. Peterson, 2011) or conduct that blocks public access or the normal flow of traffic.

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11.1.3: Sit-Lie Laws

One modern statutory approach to preventing homeless individuals and transients from congregating in cities and affecting the quality of life or the prosperity of businesses and tourism are **sit-lie laws**. Sit-lie laws prohibit sitting or lying on public streets and sidewalks and thereby encourage individuals to move about, rather than block access to businesses, roadways, or transportation facilities. If precisely drafted, sit-lie laws could resemble constitutional **loitering** statutes, substituting sitting or lying down for the criminal act of loitering, wandering, or remaining. However, these statutes are susceptible to the same 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 (Knight, H., 2011). 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 (Jones v. City of Los Angeles, 2011). 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 (Davis, M., 2011).

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 (San Francisco Police Code § 16.8, 2011). The first offense is an infraction, and the second offense is a misdemeanor (San Francisco Police Code § 16.8, 2011). 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.

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

- Loitering
- Panhandling
- Sit-Lie

Table 11.1.3.1 Comparing Disorderly Conduct, Loitering, and Sit-Lie Laws

Crime	**Criminal Act**	**Criminal Intent**	**Attendant Circumstance**
Disorderly conduct	Unreasonable noise, obscene utterance or gesture, fighting, threats, fighting words, creating a hazardous condition	Specific or purposely or recklessly to disturb the public or create a risk thereof	Act takes place in public
Loitering	Loitering, wandering, remaining	Specific or purposely to beg, gamble, solicit prostitution	Act takes place near a school, transportation facility: the defendant is masked
Sit-lie law	Sitting or lying down	Strict liability*	Act takes place between certain times of day, in public, on a sidewalk, or on a street
***Exceptions for medical emergencies, people who have disabilities, protests**			

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11.1.4: Key Takeaways

- The criminal act element required for disorderly conduct is either when the defendant (1) makes a loud and unreasonable noise, obscene utterance, or gesture, (2) engages in fighting or threatening, or states fighting words, or (3) creates a hazardous condition by an act that does not serve a legitimate purpose.
- The criminal intent element required for disorderly conduct in many jurisdictions is the specific intent or purposely to cause public inconvenience, annoyance, or alarm, or the reckless intent to cause a risk thereof.
- The disorderly conduct attendant circumstance is that the conduct occurs in a public place.
- Disorderly conduct statutes can be constitutionally challenged under the First or Fourteenth Amendments as void for vagueness or overbroad.
- Disorderly conduct is typically graded as a misdemeanor.
- Vagrancy statutes are subject to constitutional challenges if they are void for vagueness, overbroad, or target status.
- Loitering statutes are subject to constitutional challenges if they target the unemployed or are void for vagueness.
- The loitering criminal act element is typically loitering, wandering, or remaining, with the specific intent or purposely to gamble, beg, or engage in prostitution. An attendant circumstance could specify the location the conduct takes place, such as a school or transportation facility. Another common attendant circumstance is being masked in a public place while loitering, with an exception for defendants going to a masquerade party or participating in a public parade. Loitering is typically graded as a misdemeanor or a violation.
- Sit-lie laws typically prohibit sitting or lying on a public sidewalk or street, instead of loitering, wandering, or remaining like loitering statutes.

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11.1.5: Exercises

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=16147172189959232373&q= People+v.+Hoffstead&hl=en&as_sdt=2,5.

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11.2: Crimes Targeting Group Conduct

Learning Objectives

1. Define the elements of unlawful assembly and failure to disperse.
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.

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11.2.1: 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 (Ala. Code § 13A-11-5, 2011) or meeting (Fla. Stat. Ann. § 870.02, 2011) (**criminal act**) of a group, with the **specific intent** or **purposely** to commit a breach of the peace, some other unlawful act (Fla. Stat. Ann. § 870.02, 2011), or riot (Ala. Code § 13A-11-5, 2011). 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 (Mass. Gen. Laws ch. 269 § 1, 2011) (Model Penal Code § 250.1(2)). The criminal intent element for failure to disperse is **general intent** or **knowingly** (N.J. Stat. § 2C:33-1, 2011) (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** (Cal. Penal Code § 407, 2011), **three** (Fla. Stat. Ann. § 870.02, 2011), or **five** (N.J. Stat. § 2C:33-1, 2011). 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 losers what it’s like to fear for your life!” He marches angrily over to the park, and the other neighbors follow. Buck begins chanting, “How would you like to be aborted?” and the other neighbors join in. The individuals in the pro-choice group stand their ground, and the decibel of the chanting increases. Buck and his neighbors form a ring around the group and move in closer, almost touching the individuals and their signs. A park ranger hears the noise, walks over to Buck and his neighbors, and tells them to “move along.” Buck spits at the ranger’s feet and starts up the chant again. The other neighbors laugh and join him.

In this scenario, Buck and his neighbors have most likely committed unlawful assembly and failure to disperse in many jurisdictions. Buck and his neighbors number six, which generally meets the minimum unlawful assembly and failure to disperse attendant circumstance requirement. When Buck and his neighbors go to the park in a group, they are assembling. Their chant, “How would you like to be aborted?” is directed at a pro-choice group, so it is evident that Buck and his neighbors have the specific intent or purposely to cause a breach of the peace. In addition, the increasing decibel of the chanting and the neighbors’ close proximity to the pro-choice group indicates an intent to intimidate, threaten, and possibly commit an unlawful act such as false imprisonment, assault, battery, or riot. When the park ranger, who is most likely a peace officer, tells Buck and his neighbors to “move along,” he is ordering them to disperse. Buck’s response in spitting at the ranger’s feet and starting up the chant again is probably a failure to disperse committed with general intent or knowingly. Thus Buck and his neighbors may be subject to prosecution for and conviction of *both* of these offenses in many jurisdictions.

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11.2.1.1: Potential Constitutional Challenges to Unlawful Assembly and Failure to Disperse Statutes

The offenses of unlawful assembly and failure to disperse target conduct that, if *peaceful*, is protected by the First Amendment. Therefore, similar to disorderly conduct offenses, statutes proscribing this type of conduct are subject to strict scrutiny, must be narrowly tailored, and must be supported by a compelling government interest, or they are vulnerable to attack under the **First Amendment** (People v. Sanchez, 2011) or as **void for vagueness** and **overbroad**.



Figure 11.2.1.1.1: Potential Constitutional Challenges to Unlawful Assembly and Failure to Disperse Statutes

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11.2.1.2: Unlawful Assembly and Failure to Disperse Grading

Unlawful assembly and failure to disperse are generally **graded** as misdemeanors (Ala. Code § 13A-11-5, 2011). The Model Penal Code grades failure to disperse as a misdemeanor (Model Penal Code § 250.1(2)).

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11.2.1.3: Riot

Riot can be the result of an unlawful assembly that escalates, an **incitement to riot** (discussed in Chapter 3 "Constitutional Protections"), or can occur spontaneously without any planning or predicate activity. The **criminal act** element required for riot in many jurisdictions is group commission of an unlawful act of violence or a lawful act in a violent and tumultuous manner (Ga. Code tit. 16 § 16-11-30, 2011). The Model Penal Code criminalizes riot when a group participates in a course of disorderly conduct (Model Penal Code § 250.1). The criminal intent element for riot varies, depending on the jurisdiction. Some jurisdictions and the Model Penal Code require **specific intent** or **purposely** to commit or facilitate a felony or misdemeanor, or to prevent or coerce official action, or **general intent** or **knowledge** that anyone plans to use a firearm or deadly weapon (N.J. Stat. § 2C:33-1, 2011) (Model Penal Code § 250.1). Others make riot a **strict liability** offense (Cal. Penal Code § 404, 2011; Ga. Code tit. 16 § 16-11-30). In many jurisdictions, riot also has the requirement that the defendant(s) be the **factual** and **legal cause** of **harm**, which is public terror and alarm or a risk thereof (Ala. Code § 13A-11-3, 2011).

Jurisdictions vary as to the **attendant circumstance** for riot, which is the size of the group. Some common group minimums are **two** (Ga. Code tit. 16 § 16-11-30, 2011), **five** (N.J. Stat. § 2C:33-1, 2011), and **six** (Ala. Code § 13A-11-3, 2011). The Model Penal Code requires **three** or more persons (Model Penal Code § 250.1). Riot is **graded** as a misdemeanor (Ala. Code § 13A-11-3, 2011), or a felony if a firearm is used (Va. Code Ann. § 18.2-405, 2011) or there is property damage or physical injury to an individual other than the defendants (N.Y. Penal § 240.06, 2011). The Model Penal Code grades riot as a felony of the third degree (Model Penal Code § 250.1).

Example of Riot

Review the example with Buck and his neighbors in "Example of Unlawful Assembly and Failure to Disperse". Assume that after the park ranger orders Buck and his neighbors to disperse, Buck spits at the ranger's feet, continues chanting, and thereafter becomes so enraged that he grabs a sign out of one of the pro- choice individual's hands and begins beating him over the head with it. The other neighbors follow suit and within minutes they are all wielding signs and hitting the pro-choice individuals with them. In this scenario, Buck and his neighbors have most likely committed riot. Buck and his neighbors number six, which meets the minimum group requirement in many riot statutes. Buck and his neighbors have also *assaulted* and *battered* some of the pro-choice individuals, which are unlawful acts of violence. The statement made by Buck about showing the pro- choice group what it means to fear for your life indicates a specific intent or purposely to commit a felony or misdemeanor, which is the intent requirement in many jurisdictions. If the riot statute in Buck's state requires factual and legal causation and the harm of public terror and alarm, the beating constitutes the causation and harm requirement. Thus Buck and his neighbors' conduct probably falls within the parameters of most riot statutes, and Buck and his neighbors may be subject to prosecution for and conviction of this offense in many jurisdictions.

Potential Constitutional Challenges to Riot Statutes

Because statutes criminalizing riot include the requirement of *force* or *violence*, they do not target protected conduct under the First Amendment and are not as prone to a constitutional challenge. Of course, any criminal statute must be precisely drafted so that it is not void for vagueness. However, riot statutes are not generally subject to strict scrutiny because the First Amendment does not include forceful or violent expression within the definition of speech.

Rodney King Riots Video

KTLA News, April 30, 1992, 6:50 p.m., King Riots

News clips of the riots that occurred subsequent to the Rodney King trial are shown in this video:

" href="http://www.youtube.com/watch?v=B6S-wTidqVs" class="replaced-iframe" onclick="return replaceIframe(this)">(click to see video)

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11.2.1.4: Criminal Gangs

Many jurisdictions have statutes, both criminal and civil, that address the ongoing dilemma of criminal gangs.

However, gang activity remains a problem in major cities and even smaller, rural areas. Criminal gangs can create a stigma that attaches to a location, affecting property values and residents' attitudes about the effectiveness of law enforcement and the justice system in general. Commentators and legislators differ as to the most effective remedies for the gang problem, leading to a plethora of diverse statutory responses.

What follows is a discussion of modern statutes targeting gang activity and the potential constitutional challenges.

Criminal Gang Definitions

It is important for a jurisdiction's gang statute to define **criminal gang** and **criminal gang member** precisely, to avoid constitutional challenges under the First Amendment or void for vagueness and overbreadth. This is because gang membership involves assembly, which, if *peaceful,* is protected under the First Amendment.

Federal law defines a criminal street gang as an ongoing group, club, organization, or association of **five** or more that has as one of its primary purposes the commission of specific criminal offenses or activities that affect interstate or foreign commerce (18 U.S.C. 521(a), 2011). Federal law defines a gang member as someone who participates in a criminal street gang with the **general intent** or **knowledge** that its members engage in a continuing series of specified crimes, or an individual who **intends to promote** or **further** the felonious activities of the criminal street gang (18 U.S.C. 521(d), 2011). One representative state statutory definition of criminal gang is a group of **three** or more persons who have in common a name, identifying sign, symbol, tattoo, style of dress, or use of hand signs and who have committed or attempted to commit specified crimes for the benefit of the group (Alaska Stat. § 11.81.900, 2011). Criminal gang member could be statutorily defined as any person who engages in a pattern of criminal gang activity and who meets two or more of the following criteria: (1) admits to gang membership; (2) is identified as a gang member; (3) resides in or frequents a particular gang's area and adopts its style of dress, use of hand signs, or tattoos; (3) associates with known gang members; or (4) has been arrested more than once in the company of identified gang members for offenses consistent with gang activity (Idaho Code Ann. § 18-8502(2), 2011).

Example of Criminal Gang Definitions

The North Side Boys are a group of **fifty-five** members who have a special **tattoo**, wear the **colors** black and white daily, and pride themselves on their **illegal** controlled substances distribution. Mike decides he wants to be a North Side Boy. Mike participates in a special initiation process that includes selling a specified quantity of an illegal controlled substance in a certain location over a period of two weeks. After Mike completes the initiation, he gets the North Side Boys' tattoo, wears the North Side Boys' colors daily, and spends all his time with the North Side Boys, hanging out and also contributing to their illegal activities. The North Side Boys probably meets the criteria for a **criminal gang**, and Mike is most likely a **criminal gang member** under many modern statutes. The North Side Boys has an identifiable tattoo and style of dress and furthers a criminal activity, which is the distribution of illegal controlled substances. Mike can be identified as a gang member by other North Side Boys members, frequents the North Side Boys' gang area, and adopts the gang's style of dress and tattoos along with furthering its criminal enterprise. Thus the North Side Boys and Mike fit the definition of criminal gang and gang member in many jurisdictions, and Mike may be subject to prosecution for and conviction of criminal gang activity if he commits crimes at the direction of or in furtherance of the gang, as is analyzed in "Criminal Gang Activity".

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11.2.1.4.1: Criminal Gang Activity

States generally criminalize gang participation (Ohio Rev. Code Ann. § 2923.42, 2011), *enhance* the *penalty* for a crime when it is committed in furtherance of a gang (Fla. Stat. Ann. § 874.04, 2011), or **both** (Cal. Penal Code § 186.22). If a state enacts a **gang participation statute**, the **criminal act** element is generally described as actively participating in a criminal gang and promoting, furthering, or assisting in any felony, with the **general intent** or **knowingly** that members of the gang engage in a pattern of criminal gang activity (Del. Code Ann. tit. 11 § 616, 2011). Gang participation is generally **graded** as a felony (Del. Code Ann. tit. 11 § 616, 2011). **Gang enhancement statutes** enhance the defendant's sentence for actually committing a misdemeanor or felony with the **specific intent** or **purposely** to benefit, promote, or further the interests of the criminal gang (Fla. Stat. Ann. § 874.04, 2011). Some jurisdictions only provide gang enhancement for the commission of a felony (Del. Code. Ann. tit. 11 § 616, 2011).

Example of Criminal Gang Activity

Review the example with Mike and the North Side Boys given in "Example of Criminal Gang Definitions". Assume that Mike resumes selling illegal controlled substances *at the behest* of the North Side Boys after his initiation and is arrested. If the state where Mike sells illegal controlled substances has a gang participation statute and grades the crime of sale of illegal controlled substances as a felony, Mike could be prosecuted for and convicted of this crime. He furthered and assisted in the North Side Boys' sale of illegal controlled substances with the general intent or knowingly that members of the North Side Boys engaged in this pattern of criminal gang activity. If the state also has a gang enhancement statute, Mike could have his sentence for sale of illegal controlled substances *enhanced* because he committed the sale of illegal controlled substances in furtherance of the criminal gang. In either situation, Mike will be punished *more severely* for the sale of illegal controlled substances than an individual defendant who sells illegal controlled substances on his or her own, rather than at the direction or in furtherance of a criminal gang.

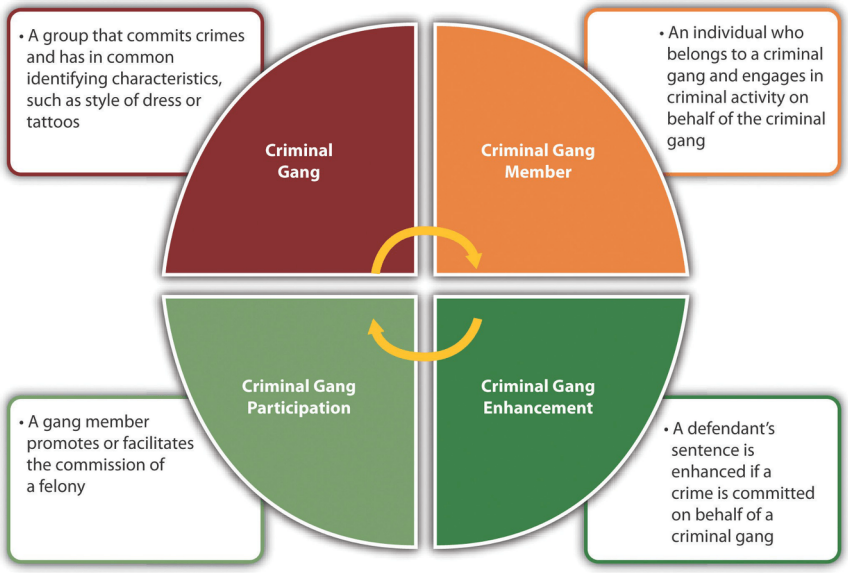


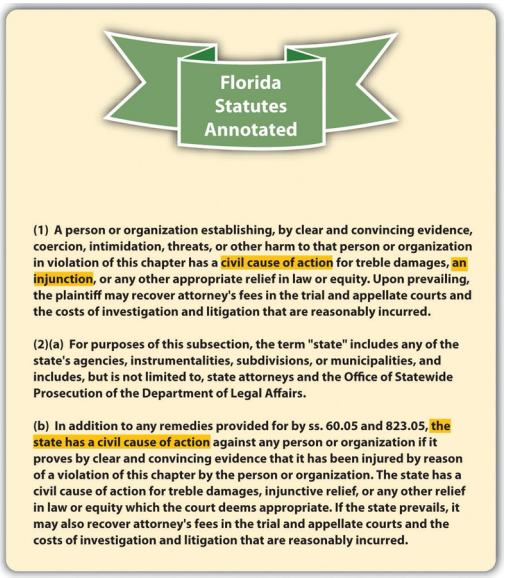
Figure 11.2.1.4.1.1: Diagram of Typical Modern Gang Statutes

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11.2.1.4.2: Civil Responses to Gang Activity

As stated previously, the problem of criminal gangs is challenging and has proven resistant to criminal remedies. Thus many jurisdictions have also enacted **civil gang control statutes**, along with resorting to the remedy of **civil gang injunctions** to try to curb the multitude of harms that gangs inflict.

Civil gang control statutes generally provide for damages, often enhanced, for coercion, intimidation, threats, or other harm caused by a gang or gang member (Fla. Stat. Ann. § 874.06, 2011). A common provision of civil gang control statutes is the ability of a resident *or state agency* to sue as a plaintiff (Fla. Stat. Ann. § 874.06, 2011).


Florida Statutes Annotated

(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.

(b) 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.

Figure 11.2.1.4.2.1: Example of a Civil Gang Control Statute

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 (Tex. Penal Code § 125.065, 2011). A state agency or an individual resident can typically make a motion requesting a CGI (Tex. Penal Code § 125.064, 2011). 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 (People v. Acuna, 2011). 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 (Shiner, M., 2011). Violation of a CGI could constitute the crime of **contempt**, resulting in fines or incarceration (Tex. Penal Code § 125.066, 2011).

Example of Civil Responses to Gang Activity

Review the example with Mike and the North Side Boys in "Example of Criminal Gang Definitions". Mike and the North Side Boys are subject to a criminal prosecution for gang **participation** for their sale of illegal controlled substances. They also are subject to gang *enhancements* for any felony committed at the direction or in furtherance of the North Side Boys. In addition, if the state where Mike and the North Side Boys are located has statutes providing **civil** remedies and **CGI**s, both Mike and the North Side Boys members are subject to a civil suit for damages if they coerce, intimidate, or injure another. They also are subject to an injunction constraining their ability to meet, associate, wear black and white, flash gang hand signs, or loiter in certain areas. If a CGI is in place, and Mike or the North Side Boys violate it, a potential exists for criminal charges of **contempt**, leading to fines or incarceration.

Colton Gang Injunction

News Story of the Colton Civil Gang Injunction

The civil gang injunction in Colton, California, is discussed in this video:

" href="http://www.youtube.com/watch?v=qBwETbSEoKs" class="replaced-iframe" onclick="return replaceIframe(this)">(click to see video)

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11.2.1.4.3: Potential Constitutional Challenges to Gang Statutes

Gang activity and gang association require assembly, which, if *peaceful*, is protected by the First Amendment. Thus statutes proscribing gang conduct are subject to attack under the **First Amendment** or **void for vagueness** and **overbreadth**. CGIs have the same constitutional concerns as criminal gang activity statutes because their violation can lead to a criminal prosecution for contempt (People v. Acuna, 2011).

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the US Supreme Court struck down Chicago's Gang Congregation Ordinance as void for vagueness. The ordinance prohibited criminal street gang members from "loitering in public." The term *loitering* was defined as remaining in any one place with *no apparent purpose*. When a Chicago law enforcement officer observed a gang member loitering, he was obligated to order the gang member to disperse, and if the gang member refused, the gang member was subject to arrest for violating the ordinance. The Court held that the ordinance did not give the public notice of what was criminal, as required by the due process clause of the Fourteenth Amendment, and allowed too much discretion to law enforcement to unevenly enforce its provisions.

Under *Morales*, modern statutes targeting gang activity and association must precisely define criminal conduct, avoid vague terms such as "no apparent purpose," and ensure that First Amendment protected activity is not included within the statute's reach. CGIs should support a significant government interest, be narrowly tailored to avoid constitutionally protected activity, and be buttressed by evidence that the CGI is the least restrictive means to carry out the interest stated (Shiner, M., 2011).

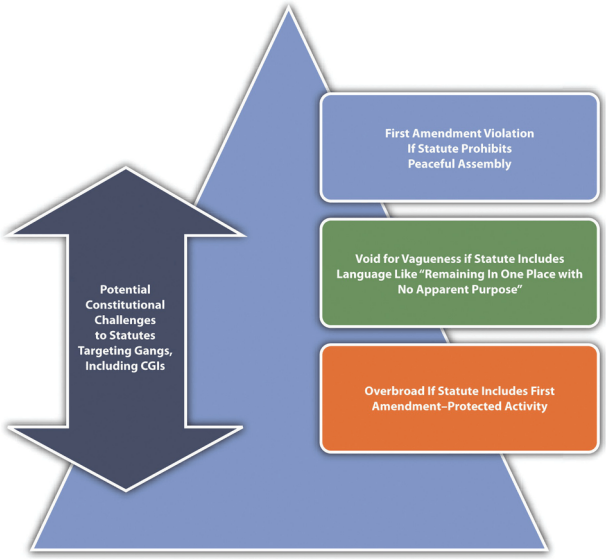


Figure 11.2.1.4.3.1: Potential Constitutional Challenges to Statutes Targeting Gangs

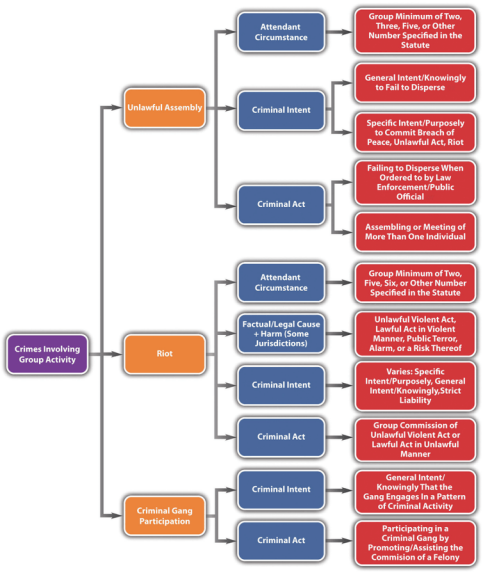


Figure 11.2.1.4.3.2: Diagram of Crimes Involving Group Activity

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11.2.1.5: Criminal Gangs (1)

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11.2.2.04: Criminal Gangs

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11.2.1.4.1: Criminal Gang Definitions

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11.2.2: Key Takeaways

- The elements of unlawful assembly are the assembling or meeting of a group (criminal act) with the specific intent or purposely to commit breach of the peace, some other unlawful act, or riot. Some jurisdictions punish the failure to disperse (criminal act) with general intent or knowingly when a peace officer or public servant orders a group likely to cause substantial harm, serious annoyance, or alarm to do so. Jurisdictions vary as to 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 the specific intent or purposely to promote or further a criminal gang. Some states only provide gang enhancement statutes for the commission of a felony.
- Civil responses to the gang problem include civil gang control statutes that allow plaintiffs, including state agencies, to sue for enhanced damages for threats, intimidation, or physical injury caused by a gang or gang member and civil gang injunctions (CGIs) that prohibit gang members from associating or congregating in certain areas frequented by criminal gangs.
- Statutes targeting gangs can be constitutionally challenged under the First Amendment or as void for vagueness or overbroad.

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11.2.3: Exercises

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

1. A law enforcement officer arrests a group of individuals for standing outside a Jewish temple with signs that indicate a disbelief in the holocaust. The officer tells the individuals that he is arresting them for unlawful assembly. What are some potential constitutional problems with this arrest?
2. Read *Ortiz v. NYS Parole in Bronx*, 586 F.3d 149 (2009). In *Ortiz*, the defendant was found guilty of several counts of riot under New York's first-degree riot statute for conduct that occurred *after* he left the scene of the riot. Did the US Court of Appeals for the Second Circuit uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/ scholar_case?case=2710893752280724993&q=%22riot+statute%22&hl=en&as_sdt=2,5&as_ylo=2002.
3. Read *People v. Englebrecht*, 88 Cal. App. 4th 1236 (2001). Did the California Court of Appeal hold that the defendant, an alleged gang member, had the right to a jury trial on the issue of his gang membership for the purpose of a civil gang injunction? The case is available at this link: http://scholar.google.com/scholar_case?case=4494307043005652 85&q=unconstitutional+%22civil+gang+injunction%22&hl=en&as_sdt=2,5&as_ylo=1997.

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11.3: Vice Crimes

Learning Objectives

1. Identify the sources of federal and state drug laws.
2. Describe a drug schedule.
3. Analyze various drug crimes and their grading.
4. Identify two modern trends in state drug crimes statutes.
5. Identify a potential constitutional challenge to a state's medical marijuana statute.
6. Analyze prostitution, pimping, and pandering and their grading.

Vice crimes offend the sensibilities, yet are often *victimless* and *harmless*, other than harm done to the defendant or society in general. "Drug Crimes" explores drug crimes, including manufacture or cultivation, possession, sale, and under the influence offenses. Upcoming sections analyze prostitution, pimping, and pandering. In the final section, various vice statutes are available for review, including statutes criminalizing gambling and conduct involving alcohol.

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11.3.1: Drug Crimes

All states and the federal government criminalize the **manufacture** or **cultivation**, **possession**, **sale**, and **use** of specified drugs. Many modern statutes focus on **rehabilitation** for *nonviolent* drug offenders, rather than incarceration, because this has proven effective in reducing recidivism and freeing up jails and prisons for defendants who pose a greater security risk to society. In addition, marijuana, a drug that has demonstrated valid therapeutic qualities, has been legalized by many states for **medicinal** purposes, which poses interesting constitutional questions, as is discussed in "Modernization of Drug Crimes Statutes".

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11.3.1.1: 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** (21 U.S.C. § 801, 2011). The states follow one of the three versions of the Uniform Controlled Substances Act (Uniform Controlled Substances Act, 2011), 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** (21 U.S.C. § 812, 2011). 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 (Minn. Stat. Ann. § 152.02, 2011).

Example of a Drug Schedule

The North Carolina drug schedule is located in N.C. Gen. Stat. § 90-89-90-94 (N.C. Gen. Stat. § 90-89-90-94, 2011). 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.

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11.3.1.2: 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 (Robinson v. California, 2011). 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 (Ala. Code § 13A-12-217, 2011), with a more severe penalty for the accompanying use of a firearm or the furtherance of a clandestine laboratory operation (Ala. Code § 13A-12-218, 2011). **Cultivation of marijuana**, which must be done with **general intent** or **knowingly**, can be a misdemeanor or a felony, depending on the quantity cultivated (Ohio Rev. Code Ann. § 2925.04, 2011).

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 (Ohio Rev. Code Ann. § 2925.11, 2011). 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 the drug is within the defendant's control (Connecticut Jury Instructions No. 2.11-1, 2010). Constructive possession can be *joint*, meaning between two or more (Connecticut Jury Instructions No. 2.11-1, 2010). Simple possession typically must be with **general intent** or **knowingly**, while possession for the purpose of distribution or sale must be with **specific intent** or **purposely** (People v. Parra, 2011). In many states, possession of marijuana is graded lower than possession of other scheduled drugs—even as low as an *infraction* if the quantity is less than one ounce (Cal. Health and Safety Code § 11357(b), 2011).

The **sale**, **distribution**, or **trafficking** of scheduled drugs is generally a felony, with more severe penalties for drugs in a higher schedule (N.C. Gen. Stat. § 90-95, 2011), the sale of larger quantities (Ala. Code § 13A-12-231, 2011), a sale by an adult to a minor (Ala. Code § 13A-12-215, 2011), or a sale near school grounds (Ala. Code § 13A-12-250, 2011).

Scheduled drug **use**, also designated as being **under the influence of a controlled substance**, is typically a misdemeanor with more severe penalties for habitual offenders (Cal. Health and Safety Code § 11550, 2011).

Example of Drug Crimes

Charlene decides she wants to make some extra money by growing and selling marijuana. Charlene acquires some marijuana seeds and plants a marijuana garden in her backyard. Once her plants are ready for harvest, Charlene harvests some buds, weighs and packages them, and then puts some of the packages into her backpack and walks to a street corner known for drug sales. After she arrives at the street corner, Rick drives up, rolls down his window, and asks Charlene if she knows where he can "score." Charlene replies, "I have some pot if that is what you are looking for." Rick responds affirmatively, so Charlene gets into Rick's car and they drive to a local park. Rick insists on trying the marijuana before he buys it. Charlene takes out a joint, and Rick and Charlene smoke it. Thereafter, Rick buys one of Charlene's packages that weighs half an ounce and drops Charlene off back at the street corner.

In this example, Charlene has probably committed *every* drug crime discussed in "Federal and State Drug Crimes". When Charlene planted the marijuana garden, she committed cultivation of a scheduled drug. Harvesting and packaging the marijuana is possession for sale. Smoking the marijuana with Rick is use, or under the influence of a controlled substance. Selling Rick a half-ounce of marijuana is drug sale, distribution, or trafficking. Rick has also probably committed two drug offenses. Smoking the marijuana with Charlene is use, or under the influence of a controlled substance. When Rick took the package of marijuana from Charlene, he committed possession (which may be an infraction in some states because he bought less than an ounce). Thus, in this example, Charlene and Rick may be subject to prosecution for and conviction of the stated drug offenses in most jurisdictions.

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11.3.1.3: 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 (Ariz. Rev. Stat. § 13-3422, 2011). Common offenses for drug courts are simple possession and use of drugs listed in a jurisdiction's drug schedule (Ariz. Rev. Stat. § 13-3422, 2011). Typically, the drug court offender must participate in a rehabilitation program that includes counseling and detoxification within a specified time period (Tex. Penal Code § 469.001, 2011). 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 (Ariz. Rev. Stat. § 13-3422, 2011).

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 (Procon.org, 2011). 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 (Alaska Stat. §§ 17.37.010-17.37.070, 2011). In some states, limited cultivation is also permissible (Cal. Health and Safety Code §§ 11362.7-11362.83, 2011).

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 (21 U.S.C. § 812, 2011). 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 (Gonzales v. Raich, 2011) and has rejected a medical necessity exception for the possession and use of marijuana (U.S. v. Oakland Cannavis Buyer's Cooperative, 2011).

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 Remy leaves the distribution center, Donny, a drug dealer standing nearby, asks Remy if she would like to buy some cocaine. Remy agrees and buys a gram of cocaine from Donny. Unfortunately for Remy, Donny is a federal Drug Enforcement Agent who thereafter arrests Remy for possession of marijuana and cocaine.

In this example, the federal government can most likely prosecute Remy for possession of both *marijuana and cocaine*, even though her state legalizes marijuana for medical use and Remy has complied with the requirements of the state medical marijuana statute. The US Supreme Court has held that the federal government may criminalize the possession of small amounts of marijuana, and there is no federal medical necessity exemption. Thus Remy may be subject to prosecution for and conviction of both of these offenses under **federal law**. Remy's state also can prosecute Remy for possession of cocaine. Remy's state has a drug court program, so Remy may be qualified to go through drug court for the possession of cocaine charge and may face only probation and rehabilitation for this offense rather than incarceration.

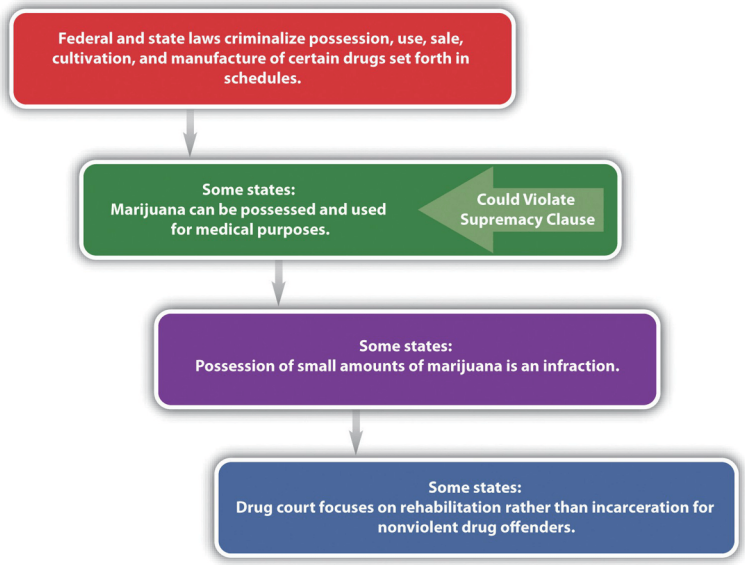


Figure 11.3.1.3.1: Diagram of Modern Drug Crimes Statutes

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11.3.2: Crimes Involving Prostitution

Every state except Nevada criminalizes **prostitution**. In Nevada, legal prostitution must follow specific guidelines and can occur only in a licensed house of prostitution (N.R.S. 201.354, 2011).

The **criminal act** element required for prostitution varies, depending on the jurisdiction. In many states, prostitution is offering, agreeing, or engaging (N.Y. Penal Law § 230.00, 2011) in sexual conduct for money (N.Y. Penal Law § 230.00, 2011), property, or anything of value (720 ILCS § 5/11-14, 2011). Agreeing and engaging are both considered prostitution, so the prostitute and the prostitute's *client* could be prosecuted for and convicted of prostitution in most jurisdictions. The Model Penal Code criminalizes loitering in or within view of any public place for the purpose of being hired to engage in sexual activity and an inmate of a house of prostitution engaging in sexual activity as a business (Model Penal Code § 251.1(1)). The sexual conduct or sexual activity specified in statutes criminalizing prostitution generally includes sexual penetration, touching, or fondling sexual organs for sexual gratification (720 ILCS § 5/11-14, 2011). The Model Penal Code includes homosexual and deviate activity (Model Penal Code § 251.1).

The criminal intent element required for prostitution is either **strict liability** (N.Y. Penal Law § 230.00, 2011) or **general intent** or **knowingly** in most jurisdictions (N.M. Stat. § 30-9-2, 2011). The Model Penal Code requires **purposeful intent** if the defendant is loitering to engage in prostitution or **strict liability** if an inmate in a house of prostitution engages in prostitution as a business (Model Penal Code § 251.1). Prostitution is typically **graded** as a misdemeanor, with sentencing enhancements for habitual offenders, prostitution that occurs near a school (720 ILCS § 5/11-14, 2011), or clients who patronize juvenile prostitutes (N.Y. Penal Law § 230.06, 2011). The Model Penal Code grades prostitution as a petty misdemeanor (Model Penal Code § 251.1(1)).

Two crimes associated with prostitution are **pimping** and **pandering**. Although the elements of these offenses vary depending on the jurisdiction, in general, the **criminal act** element required for pimping is receiving anything of value from a prostitute with the **general intent** or **knowingly** that it was earned by prostitution (720 ILCS § 5/ 11-19, 2011). Pimping is generally **graded** as a misdemeanor (720 ILCS § 5/11-19, 2011) or felony (N.M. Stat. § 30-9-4.1, 2011), with sentencing enhancements if intimidation or force is used to compel an act of prostitution (N.Y. Penal Law § 230.33, 2011) or if the prostitute is a juvenile (N.Y. Penal Law § 230.32, 2011).

Pandering is generally procuring another (**criminal act**) with the **specific intent** or **purposely** to commit an act of prostitution (Cal. Penal Code § 266 i, 2011). Pandering is typically **graded** as a felony, with sentencing enhancement if the pandering occurs near a school (720 ILCS § 5/11-16, 2011). The Model Penal Code criminalizes a broad spectrum of conduct as promoting prostitution, including encouraging and inducing another purposely to become or remain a prostitute (Model Penal Code § 251.1(2) (c)). The Model Penal Code grades these acts of promoting prostitution as felonies of the third degree (Model Penal Code § 251.1(3) (a)).

Example of Crimes Involving Prostitution

Daniel approaches Penelope, a sixteen-year-old, as she wanders down the sidewalk. Daniel asks Penelope if she would like to earn a little extra cash. Penelope responds affirmatively, and Daniel asks her if she will have sexual intercourse with John (who is an adult) for one hundred and fifty dollars. Penelope eagerly agrees. Daniel walks Penelope over to the entrance of a motel where John is waiting. John and Penelope enter the motel, and John rents a room where they engage in sexual intercourse. Afterward, John pays Penelope the one hundred and fifty dollars. As Penelope leaves the motel, Daniel swiftly walks over, grabs Penelope by the wrist, and demands the one hundred and fifty dollars. Penelope protests, but Daniel twists her arm behind her back, and she grudgingly hands him the money. Daniel removes twenty dollars, hands it to Penelope, and informs her that it is her "share," and if she wants more, she needs to engage in another act of sexual intercourse.

In this example, Penelope and John have probably committed prostitution, and Daniel has most likely committed pimping and pandering in many jurisdictions. When Penelope has sexual intercourse with John for one hundred and fifty dollars, she is engaging in sexual conduct for money with general intent or knowingly, which constitutes prostitution in most jurisdictions. When John has sexual intercourse with Penelope and thereafter pays her one hundred and fifty dollars, he is engaging in sexual conduct for money with general intent or knowingly, which is also generally criminal prostitution. Penelope is a juvenile, so John's sentence may be **enhanced** and more severe than Penelope's. When Daniel procures John and Penelope for the purpose of committing prostitution, he is most likely committing pandering. When Daniel takes money from Penelope with the

general intent or knowingly that it was earned by prostitution, he is probably committing pimping. The use of *force* to obtain the money and Penelope's *age* could **enhance** Daniel's sentence for both crimes in many jurisdictions. Thus Penelope, John, and Daniel may be subject to prosecution for and conviction of the stated crimes of prostitution, pimping, and pandering in most jurisdictions.

Prostitution Video

"The Yard Blues": A Reality of Drugs and Prostitution A prostitute's life is described in this video:

" href="http://www.youtube.com/watch?v=Hspx7mTyDcU" class="replaced-iframe" onclick="returnreplaceIframe(this)">(click to see video)

Eliot Spitzer Video

New York Governor Eliot Spitzer Resigns after Sex Scandal

This video shows former New York Governor Spitzer resigning after being exposed for his connection with a prostitution ring (Hakim, D., Rashbaum, W. K., 2011):

" href="http://www.youtube.com/watch?v=Ilwe8Y-6dsw" class="replaced-iframe" onclick="return replaceIframe(this)">(click to see video)

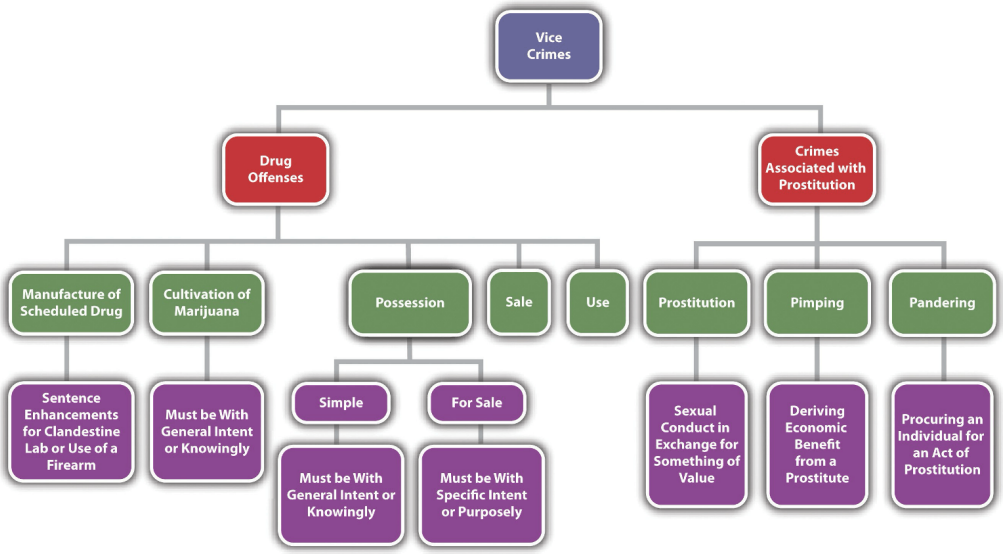


Figure 11.3.2.1: Diagram of Vice Crimes

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11.3.3: Various Vice Statutes

Most states criminalize **gambling** (18 Pa. C.S. § 5513, 2011), **drunkenness in public** (Cal. Penal Code § 647(f), 2011), and **driving while under the influence** (Or. Rev. Stat. § 813.010, 2011). Review the representative state statutes in the Notes for the elements of these vice crimes.

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11.3.4: Key Takeaways

- 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. The states follow one of the three versions of the Uniform Controlled Substances Act, 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 schedules. The schedules generally focus on the harmful or addictive qualities of the drug, with Schedule I drugs being the most harmful or addictive, and the remaining schedules reflecting less harmful or addictive drugs, including drugs that are legal with a prescription.
- In most jurisdictions, the manufacture of scheduled drugs is a felony, and cultivation of marijuana, which must be done with general intent or knowingly, can be a misdemeanor or a felony, depending on the quantity cultivated. Possession of scheduled drugs is typically graded based on the quantity, schedule classification, and whether or not the possession is for sale, with penalties ranging from a misdemeanor for simple possession to a serious felony for possession with intent to sell. Possession of less than an ounce of marijuana is graded lower than possession of other scheduled drugs in many jurisdictions. Sale, distribution, or trafficking of scheduled drugs is generally graded as a felony, with sentencing enhancements for drugs in a higher schedule, the sale of larger quantities, a sale by an adult to a minor, or a sale near school grounds. Scheduled drug use is typically a misdemeanor with more severe penalties for habitual offenders.
- Two modern trends in state drug crimes statutes are the emphasis on rehabilitation for nonviolent drug offenders, which drug courts provide through sentencing, and the legalization of marijuana for medical use in sixteen states and the District of Columbia.
- Technically, a state's legalization of marijuana for medical use violates the Supremacy Clause because federal law classifies marijuana as a Schedule I drug and does not allow its possession, sale, or use for any purpose.
- Prostitution is generally offering, agreeing, or engaging in sexual conduct for money or anything of value (criminal act), with general intent or knowingly, or strict liability. Prostitution is typically graded as a misdemeanor, with sentencing enhancements for habitual offenders, prostitution that occurs near a school, or clients who patronize juvenile prostitutes. Pimping is generally receiving anything of value from a prostitute (criminal act), with general intent or knowingly that it was earned by prostitution in many jurisdictions, and is typically graded as a misdemeanor or felony, with sentencing enhancements if intimidation or force is used to compel an act of prostitution or if the prostitute is a juvenile. Pandering is generally procuring another (criminal act) with specific intent or purposely to commit an act of prostitution and is typically graded as a felony with sentencing enhancement if the pandering takes place near a school.

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11.3.5: Exercises

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

1. Anita lives in a state that permits the possession and use of marijuana for medical reasons. Anita obtains some marijuana and uses it to treat her medical condition, carefully following her state's statutory requirements. Has Anita committed a crime(s)?
2. Read *Poindexter v. State*, 153 S.W. 3d 402 (2005). In *Poindexter*, the defendant purchased cocaine from a confidential informant inside his house. After the defendant left, a subsequent law enforcement search uncovered the cocaine inside a tin breath mints can hidden in the ceiling of the master bedroom closet. The defendant was convicted at trial, but the appellate court reversed, based on the fact that another individual was seen on the premises, so there was *insufficient* proof of the defendant's possession. Did the Court of Criminal Appeals of Texas affirm the court's reversal? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=10968287895213637721&q=possession+of+drugs+roommate+control+%22joint+possession%22&hl=en&as_sdt=2,5&as_ylo=2002.
3. Read *People v. Watson*, No. 90962 (Ohio 2120 2009). In *Watson*, the defendant was convicted of compelling prostitution. The defendant appealed on the grounds that the proper interpretation of compelling prostitution under the Ohio statute requires force, duress, or coercion and the defendant merely arranged it so that the prostitute had no money for shelter, clothes, and food if she did not continually commit prostitution. Did the Court of Appeals of Ohio uphold the defendant's conviction? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=5203798681398361958&q=prostitution+client+acquitted+%22convicted+of+prostitution+%22&hl=en&as_sdt=2,5&as_ylo=2002.

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N.R.S. 201.354, accessed April 18, 2011, http://law.onecle.com/nevada/crimes/201.354.html.

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11.4: Crimes Against the Public Material

Summary

States have an interest in protecting the quality of life of citizens, and therefore prohibit crimes against the public. Most jurisdictions criminalize disorderly conduct, which is making a loud and unreasonable noise, obscene utterance or gesture, fighting, threatening or stating fighting words, or creating a hazardous condition in public, with the specific intent or purposely or reckless intent to cause public inconvenience and alarm or a risk thereof. Disorderly conduct statutes target speech, so they are subject to constitutional challenges under the First and Fourteenth Amendments. Disorderly conduct is typically graded as a misdemeanor. Unconstitutionally vague statutes criminalizing vagrancy have been supplanted by precisely drafted statutes criminalizing loitering, which is loitering, wandering, or remaining with specific intent or purposely to gamble, beg, or commit prostitution in a specified area. Loitering is typically graded as a misdemeanor or a violation. Panhandling or begging is also criminal in many jurisdictions, and panhandling statutes should be narrowly tailored to target aggressive conduct or conduct that blocks public access or the normal flow of traffic. Sit-lie laws prohibit sitting or lying down with strict liability intent in public or on a sidewalk during specified times in certain areas. Sit-lie laws are subject to constitutional challenges as cruel and unusual punishment or void for vagueness and are typically graded as an infraction.

Group conduct tends to enhance the potential for force and violence. Most jurisdictions criminalize unlawful assembly, which is purposefully assembling or meeting to cause a breach of the peace, and failure to disperse, which is the knowing refusal or failure to disperse when ordered to by law enforcement. Both unlawful assembly and failure to disperse statutes are subject to constitutional challenges under the First Amendment or as void for vagueness and overbroad, require the attendant circumstance of a group minimum of two, three, or five, and are graded as a misdemeanor. Most jurisdictions also criminalize riot, which is group commission of an unlawful act of violence or a lawful act in an unlawful manner, with the specific intent or purposely to commit or facilitate a misdemeanor or felony or prevent official action, or the general intent or knowingly that one of the group plans to use a firearm or deadly weapon. In some jurisdictions, riot is a strict liability offense. A few jurisdictions require the defendants to be the factual and legal cause of riot harm, which is public terror and alarm. Riot typically requires the attendant circumstance of a group minimum of two, five, or six and is graded as a misdemeanor or a felony if a firearm is used or if there is property damage or physical injury to someone other than the defendants.

Gang conduct is prohibited federally and in state statutes. States either criminalize gang conduct as gang participation, enhance a penalty for a crime committed by a criminal gang or gang member, or both. Gang participation is generally furthering the commission of a felony for the benefit of a criminal gang with the general intent or knowingly that other members participate in gang activity and is a felony. Gang enhancement statutes enhance the penalty for the commission of a felony or misdemeanor at the direction of or to further a criminal gang. Civil responses to gang conduct are civil gang activity statutes providing for damages and civil gang injunctions, which prohibit gang association, hand signs, wearing of gang colors, and loitering in areas known for gang activity. Statutes regulating gangs are subject to constitutional challenges under the First Amendment and as void for vagueness or overbroad.

All states and the federal government criminalize specific controlled substances offenses. Jurisdictions classify drugs in schedules, based on their harmful or addictive qualities, and punish drug offenses accordingly. Common offenses are the manufacture, cultivation, possession for personal use or sale, sale, and use of scheduled drugs, with the grading ranging from a felony to an infraction, depending on the offense and the drug. Some jurisdictions provide rehabilitation combined with probation as a penalty for nonviolent offenders through a drug court procedure. Some jurisdictions also legalize marijuana for medical use, which could violate federal supremacy because the federal government does not legalize marijuana for this purpose.

All states except Nevada criminalize prostitution. In Nevada, only prostitution that occurs in a licensed house of prostitution is noncriminal. Prostitution is offering, agreeing, or engaging in specified sexual conduct for money or anything of value, with strict liability or general intent or knowingly in most jurisdictions, and is typically graded as a misdemeanor with sentencing enhancements for habitual offenders, prostitution that occurs near a school, or patronizing a juvenile prostitute. Pimping is generally receiving something of value from a prostitute, with general intent or knowingly that it was earned by prostitution, and is graded as a misdemeanor or a felony with sentencing enhancements if the defendant uses force or the prostitute is a juvenile. Pandering is generally procuring another for an act of prostitution with specific intent or purposely and is typically graded as a felony with sentencing enhancement if the pandering takes place near a school.

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11.4.1: You Be the Legislator

You are a legislator with a perfect record for voting on statutes that are constitutional. You have been presented with four proposed statutes. Read each one, and then read the case analyzing a replica statute for constitutionality. Decide whether you should vote **for** or **against** the proposed statute if you want to keep your perfect record. Check your answers using the answer key at the end of the chapter.

1. The proposed statute is *Disorderly Conduct* and reads as follows: It is a misdemeanor to engage in indecent or disorderly conduct in the presence of another in a public place. This statute was analyzed for constitutionality by *Satterfield v. State*, 395 S.E. 2d 816 (1990). The case is available at this link: http://scholar.google.com/scholar_case?case=8539981756406627329&q= Satterfield+v.+State+395&hl=en&as_sdt=2,5. Should you vote **for** or **against** the statute?
2. The proposed statute is *Loitering for prostitution* and reads as follows: It is unlawful for any person to loiter in or near any public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting for or procuring another to commit an act of prostitution. Among the circumstances that may be considered in determining whether such purpose is manifested are that such person repeatedly beckons to, stops, or attempts to stop or engages persons passing by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture. This statute was analyzed for constitutionality by *Silvar v. Dist. Ct.*, 129 P.3d 682 (2006). The case is available at this link: http://scholar.google.com/scholar_case?case=15323479136078401167&q= Silvar+v.+Dist.+Ct.&hl=en&as_sdt=2,5. Should you vote **for** or **against** the statute?
3. The proposed statute is *Gang Violence and Juvenile Crime Prevention Act* and reads as follows: State Prosecutors are hereby authorized to bring specified crime charges against minors fourteen and older in the criminal division of adult court rather than in the juvenile division without a judicial determination that the minor is unfit for a juvenile court disposition. This statute was analyzed for constitutionality by *Manduley v. Superior Court*, 41 P.3d 3 (2002). The case is available at this link: http://scholar.google.com/ scholar_case?case=14196981766707899172&q= Manduley+v.+Superior+Court&hl=e.n&as_sdt=2,5. Should you vote **for** or **against** the statute?
4. The proposed statute is *Mere Possession* and reads as follows: It is a crime to possess an unprescribed controlled substance. This statute was analyzed for constitutionality by *State v. Bradshaw*, 98 P.3d 1190 (2004). The case is available at this link: http://scholar.google.com/ scholar_case?case=3324595675786852 9&q= State+v.+Bradshaw+98&hl=en&as_sdt=2,5. Should you vote **for** or **against** the statute?

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11.4.2: Points of Interest

Cases of Interest

- *Roulette v. City of Seattle*, 97 F.3d 300 (1996), discusses sit-lie laws: http://scholar.google.com/scholar_case?case=11766310634401293489&q= %22sit+lie+%22&hl=en&as_sdt=2,5.
- *Noy v. State*, 83 P.3d 538 (2003), discusses Alaska's possession of marijuana law: http://scholar.google.com/scholar_case?case=17763301345063946977&q= %22Noy+v.+State%22&hl=en&as_sdt=2,5.
- *Phillips v. State*, 25 So. 3d 404 (2010), discusses the right to participate in drug court: http://scholar.google.com/scholar_case?case=7066713602381344 10&q=%22drug+court%22&hl=en&as_sdt=2,5&as_ylo=2009.
- *In re BW*, 313 S.W. 3d 818 (2010), discusses juvenile prostitution: http://scholar.google.com/scholar_case?case=13593192130854531269&q=%22prostitution+statute%22&hl=en&as_sdt=2,5&as_ylo=2009.

Articles of Interest

- True threats and the First Amendment: http://works.bepress.com/cgi/viewcontent.cgi?article=1018&context=mark_strasser
- Gang injunctions: http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1736&context =ggulrev
- Substance abuse in America: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=edward_perez

Websites of Interest

- Information about the homeless: http://www.nationalhomeless.org
- Information about gangs: http://www.nationalgangcenter.gov
- Information about the legalization of prostitution: http://prostitution.procon.org

Statistics of Interest

- Homelessness: http://www.nationalhomeless.org/factsheets
- Gang violence: http://www.ncjrs.gov/app/QA/Detail.aspx?Id=11&context=9
- Drug crime: http://www.dea.gov/druginfo/factsheets.shtml

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11.4.3: Answers to Exercises

From "Quality-of-Life Crimes"

1. The ordinance can be challenged under the **First Amendment**, as **void for vagueness**, and as **overbroad**. A sign is expressive, so a First Amendment challenge is appropriate. The words "extended period" are vague, which can lead to uneven application by law enforcement and a failure to provide notice to the public of what behavior is criminal. Holding a sign such as a school crossing sign is protected activity, so an overbreadth challenge is also in order. The government has an interest in keeping the roadways *safe*, and in preventing dangerous distractions that could occur when drivers try to read signs while approaching a crosswalk.
2. The Supreme Court of Rhode Island held that the disorderly conduct statute was not vague or overbroad simply because it does not require conduct to occur in **public**, and therefore the defendant's attack of his spouse in a private residence could be prosecuted as "creating a hazardous condition."
3. The Supreme Court of New York held that "begging" is constitutionally protected expression under the First Amendment, and thereafter reversed the defendant's conviction under New York's loitering for the purpose of begging statute.

From "Crimes Targeting Group Conduct"

1. The First Amendment protects an individual's right to stand in a public place and hold a sign as long as the sign is not *obscene*, *fighting words*, or a *true threat*. Signs indicating a disbelief in the holocaust are most likely upsetting to Jewish individuals attending temple, but they must constitute fighting words or a true threat if they are to be constitutionally prohibited. If the law enforcement officer arrests the individuals for unlawful assembly pursuant to a statute that arguably prohibits such conduct, the statute is subject to constitutional attack under the **First Amendment** or for **overbreadth**.
2. The US Court of Appeals for the Second Circuit upheld the defendant's conviction. The court held that the lower court's interpretation of New York's first-degree riot statute did not violate **due process** by denying the defendant notice that his conduct was criminal, even though the interpretation extended the statute's reach by including conduct that occurred *after* the defendant left the scene of the riot.
3. The California Court of Appeal held that the defendant was not entitled to a jury trial on his gang membership for purposes of a civil gang injunction because of the **civil** nature of the action and the fact that his *physical liberty* was not directly at stake.

From "Vice Crimes"

1. Anita has committed the federal crimes of **possession** and **use** of marijuana. Although Anita's state has legalized marijuana for medical use, and Anita complied with her state's statutory requirements, the Federal Controlled Substances Act criminalizes the possession and use of marijuana, and there is no federal medical necessity exemption.
2. The Court of Criminal Appeals of Texas reversed, holding that evidence of the cocaine's presence in a hidden location accessible only to someone exercising control over the house, the defendant's ownership of the house, and evidence that the cocaine was conveniently accessible to the defendant was sufficient to convict the defendant of possession of cocaine.
3. The Court of Appeals of Ohio reversed, finding no evidence of force, duress, or coercion because the prostitute's testimony indicated that "nothing would happen" if she refused to turn money earned from prostitution over to the defendant.

Answer to Law and Ethics Question

1. Combating a syndrome like AIDS is clearly a legitimate state concern, and, generally, individual protections can be sublimated constitutionally as long as they are outweighed by the government interest at stake. In this case, the individual interest in avoiding a potentially life-saving blood test is not nearly as paramount as the government interest in preventing the spread of a communicable disease. Neither the risk of a stigma nor the ethics involved in targeting prostitutes are outweighed by the government interest. It is reasonable to infer, as the court stated, that convicted prostitutes have been or will be sexually active with multiple partners. Thus the California statutory scheme appears to be a minimally invasive and reasonable method to protect the health and well-being of California citizens, which makes it as ethical as statutes targeting the homeless, for example, **sit-lie laws**.

Answers to You Be the Legislator

1. The Supreme Court of Georgia held that the statute fails to define in any manner what is meant by indecent or disorderly conduct, so it does not provide fair warning to persons of ordinary intelligence of what is criminal, gives too much discretion to law enforcement, and is therefore void for vagueness. Thus you should vote **against** the proposed statute if you want to keep your perfect record.
2. The Nevada Supreme Court held that the statute is void for vagueness because it does not adequately specify the circumstances for which a person could be arrested, thus failing to provide fair warning to persons of ordinary intelligence of what is criminal and giving too much discretion to law enforcement. The court also held that the statute is overbroad because it criminalizes protected conduct like waving and beckoning. Thus you should vote **against** the proposed statute if you want to keep your perfect record.
3. The California Supreme Court held that the statute did not violate separation of powers and was not unconstitutionally discriminatory pursuant to the equal protection clause, even though filing charges in adult court affects a juvenile's sentencing because this is incidental to the prosecutor's traditional role in charging individuals with crimes. In addition, the court held that juveniles were subject to concurrent jurisdiction between juvenile and adult court, so the statute did not deprive them of rights guaranteed by due process of law, nor did it subject them to cruel and unusual punishment. Thus you should vote **for** the proposed statute and you will keep your perfect record.
4. The Washington Supreme Court found that the legislature had revised the statute to omit a criminal intent requirement, and this revision is constitutional even though the law disfavors strict liability criminal statutes. Thus you should vote **for** the proposed statute and you will keep your perfect record.

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12.5: Criminal Statutes Involving Crimes Against Children

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12.5.4: CA Penal Code 193.8[a] – Relinquishing a vehicle to a minor

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12.5.11: CA Penal Code 653 [b] - Loitering Near Schools - Public Places

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12.6.1: CA Penal Code 285 – Incest

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12.7: Juvenile Status Offenses (truancy, alcohol, tobacco, vape products)

12.7.1: California Welfare and Institutions Code (W&I) 601

12.7.2: California Welfare and Institutions Code 300 Child Abuse and Neglect

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15: TRAFFIC AND OTHER RELATED OFFENSES

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GLOSSARY

S

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